

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 2323 of 1990 and
T. No. 4287 of 1993

IN THE MATTER OF applications by
the Tasmanian Public Service
Association to vary the General
Conditions of Service Award

re workplace representatives and
payment of wages

DEPUTY PRESIDENT

HOBART, 10 August 1993
continued from 29/7/93

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: An apology has been received from Mr Greg Philp who apparently is on the mainland today. Any other preliminary matters going to appearances or whatever?

MRS S. STRUGNELL: If the commission pleases, MRS SUE STRUGNELL appearing for the Tasmanian Public Service Association.

DEPUTY PRESIDENT ROBINSON: Yes.

MR D. HOLDEN: I appear on behalf of the Tasmanian TAFE Staff Society, HOLDEN, D.

DEPUTY PRESIDENT ROBINSON: Thank you.

MR J. McCABE: No change from this end of the table.

DEPUTY PRESIDENT ROBINSON: No change. Right. Well, whilst there are two matters listed for today, we've been giving priority to T.4287 which is the payment of wages application and I would assume that we should dispose of that matter before we think about the other application.

Mr McCabe, you had put part of your submission last time and as I understand it there are other submissions you wish to make today. Just before you start, you had raised the question of whether or not this particular application, 4287, could be accommodated within the wage fixing principles and you gave, as a hypothetical case, some possible cost implications which may occur. Whilst that is hypothetical, I wonder would it be possible for some research to be done to find out what, if any, costs have been incurred in those public sector awards which already contain payment of wages provisions, and if there have been any instances where a penalty has had to be paid, some sort of a breakdown - department to department or number of employees affected and the actual cost, as a further indication on that argument that you raised before. And I wouldn't expect you to get that immediately, but if you could make some enquiries -

MR McCABE: Yes, certainly, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: - it would be helpful to know I think.

MR McCABE: Yes. Probably be an interesting exercise, if it can be done -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - within a reasonable time.

DEPUTY PRESIDENT ROBINSON: Yes. All right.

MR McCABE: There certainly was one instance that comes to mind in the health area where there was a payment made. I can't think of others at the moment, but we'll certainly have a look at that.

DEPUTY PRESIDENT ROBINSON: Yes, I'd appreciate that. That's all I have. Now we're in your hands.

MR McCABE: Yes. Thank you, Mr Deputy President. We did put submissions at the last hearing on the principles -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - chiefly, the conditions of employment principle and raised that very question about the - how this might be processed - how this claim might be processed under that principle.

DEPUTY PRESIDENT ROBINSON: Sure.

MR McCABE: And to follow on from that we would want to put our substantive - or complete reply at this stage as to the claims and to put alternative positions -

DEPUTY PRESIDENT ROBINSON: Sure.

MR McCABE: - and I hope you'll bear with me. This is quite a complex area with many factors -

DEPUTY PRESIDENT ROBINSON: I'm used to having complex matters, if one can ever get used to it.

MR McCABE: There are many factors impinging on the payment of wages in the public sector and I'll do my best to explain it as clearly and - as I can.

DEPUTY PRESIDENT ROBINSON: Well go slowly for me, won't you?

MR McCABE: So our response to the TPSA's claim relies on putting to you an alternative proposal which has been developed in response to: (a) the need to put in place certain checks and balances and safeguards to ensure that various pay systems which exist to pay state employees work efficiently; and (b) to put in place mechanisms which are designed to work with pay systems which pay employees in the vast majority of cases by direct deposit of their pay into nominated accounts by electronic funds transfer.

Our response to the TPSA's claim is that while it may have some valid points, a major feature of their claim is the penalty payment which is applied if the employee is not paid by being kept waiting for more than half an hour - sorry, quarter an hour after the normal time for ceasing work on pay day.

Now our response to that is that the claim was developed for and relates to the outmoded method of paying employees when it was usual for employees to be paid cash at some time during pay day. The employee would be given a pay packet containing cash, would check the contents of the pay packet and then sign the pay abstract to the effect that they had received their pay.

Now that method of paying employees largely disappeared in 1988 when the public sector unions agreed to payment by electronic funds transfer and that was part of the various 4 per cent second tier agreements. Now if there is any doubt about the continued observance of those efficiency offsets, it may pay any doubters to read the proviso which is contained at the beginning of the salaries clause of nearly all public sector awards.

So what the unions are attempting to do now is to ameliorate the possibility of any disadvantage to their members in the electronic funds transfer process so that the employer is responsible for ensuring that the employees' pay is in their bank or financial institution account on the dot on pay day. So what we want the commission to consider is that any award regulation which attempts to ensure the correct and timely payment of employees is cast so as to take account of the electronic fund transfer environment in which we now operate.

So as to ensure that the commission is aware of how public sector pay is organised, it would be - it is necessary to take you, sir, to - to some of the legislation and regulations by which the pay systems must operate. And the primary regulatory legislation in payment of wages is the Financial Management and Audit Act 1990, and under section 23 of that act, the treasurer can issue Treasurer's Instructions with which heads of agencies and appropriate officers must comply.

Now the treasurer has issued such instructions in regard to many aspects of financial management and it's quite a voluminous document but I would seek to table as an exhibit Part VIII of those instructions which regulate salaries and wages arrangements.

I'll refer to these instructions quite a bit throughout my submissions but I'll take you through them now, if I can.

DEPUTY PRESIDENT ROBINSON: Yes, I think it will be Government.5, Mr McCabe.

MR McCABE: Yes, thank you, Mr Deputy President. Perhaps I - at this stage I could just make mention of the exhibits. In fact going through my papers I did find a Government.4 which had been - which I'd handed in earlier in proceedings -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and at the last hearing we continued on -

DEPUTY PRESIDENT ROBINSON: Yes, you're quite right.

MR McCABE: - as if there wasn't a Government.4.

DEPUTY PRESIDENT ROBINSON: Yes, my error.

MR McCABE: So if we could make - make the exhibit that I handed out on the last occasion Government.4A -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and that was the - that was the example - the costing example on the implementation of -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - of a - of a penalty clause.

DEPUTY PRESIDENT ROBINSON: We shall make that exhibit of 28th July, I think, 4A.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: And -

MR McCABE: That - that will solve that - yes, thank you.

DEPUTY PRESIDENT ROBINSON: Yes, thank you.

MR McCABE: Now if I could take you through Government.5, and as you see this is Part VIII - in roman numerals - of the Treasurer's Instructions and this - this part covers salaries and wages. As I say, there are many instructions covering many parts of the aspect of financial management in the public sector -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - but we're just looking, for our purposes, at this - this section. Paragraph 801 is the Definition which defines an employee in simple terms and an overpayment.

Paragraph 802 deals with a certified pay sheet, and it says, I quote:

Each Agency shall prepare and lodge with DOTAF -
- which is the Department of Treasury and Finance -

- no later than two working days before each pay-day or by such other days as the Secretary directs

-

- and that's secretary - secretary of DOTAF -

DEPUTY PRESIDENT ROBINSON: Mm.

MR McCABE: - in that instance -

- a certified paysheet which shall comprise the undermentioned forms as set forth in the schedule:

(a) Pay-roll Voucher in accordance with Instruction 506(4); -

- which we don't have - that's another part of the instructions, but I don't think for our purposes we need that.

(b) Pay-roll Tax form (see Appendix) where applicable;

(c) A Salary Abstract which shall indicate with respect to each employee named:

(i) the salary or wage;

(ii) the gross amount payable;

(iii) separate particulars of income tax and Retirement Benefit Fund deductions, and other mandatory and voluntary deductions in accordance with Instructions 806 and 807 -

- which we'll come to in a moment -

- and;

(iv) the net amount payable.

It says:

The Salary Abstract shall incorporate a summary on the final sheet detailing the total amount payable to employees, total agency deductions and the sum of these totals. The "Amount Payable" shown on the Pay-roll Voucher must reconcile with the Salary Abstract summary. The Salary abstract shall be certified as to the correctness of the rates, additions and calculations used in its preparation.

(d) A summary of Retirement Benefits Fund Contributions;

(e) Tax Instalments form (see Appendix); and

(f) With the exception of non-PAYSTAT Agencies -

- various forms which are covered in the Appendix.

We then go on to 803 which is Clearing the Payroll Suspense Account - I don't think that has any - doesn't impinge on our matters before the commission.

804 is the Method of Payment, and if I could quote that - it says:

(1) The net salary or wages of an employee may be paid:

(a) to the credit of an account nominated by the employee at such bank, building society, credit union or other organisation approved by the Treasurer in accordance with Regulation 10(3) of the State Service Regulations 1985. Every such nomination shall be on a Tasmanian Government Direct Deposit Authority form (see Appendix); or

(b) by cheque; or

(c) only where the relevant Award so provides, by cash, in which case a signed acquittance is to be obtained from the employee.

(2) Where the -

- and then we go to paragraph (2) which says:

(2) Where the net salary or wage of an employee is paid by cheque the cheque shall be drawn in the employee's name, payable "to order" and shall be crossed "not negotiable".

So that paragraph covers the alternative methods of payment although the government's preferred option of course is the direct deposit into the employee's account. There are instances where it is still necessary to pay by cheque and if an award requires then cash may be paid as well. But that would be fairly rare in these days.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: Paragraph 805 goes to the Payment of Salaries or Wages in Advance, and I don't think that is germane to the proceedings.

Paragraph 806 goes to Mandatory Deductions as I mentioned a little earlier, and that says:

(1) All deductions for contributions payable by employees to the Retirement Benefits Fund shall be made in such amounts as are provided for under the Retirement Benefits Act establishing the Fund, and in such manner as is prescribed by regulation under the Act.

A deduction -

Oh, sorry, paragraph -

(2) A deduction shall be made for the salary -

- sorry -

- from the salary or wages of an employee in accordance with any court order or statute.

And -

(3) Where a Court Order is not specific as to the rate of deduction, the amount to be deducted from each salary payment should be determined with reference to the Tasmanian Government Officers' Salaries Attachment Act 1927.

And I'm not sure what that says but I don't think it is really relevant.

Voluntary Deductions - are then covered in paragraph 807. It says:

(1) A voluntary deduction from the salary or wage of an employee for any purpose approved by the Treasurer pursuant to Regulation 10(3) of the Tasmanian State Service Regulations 1985 shall be made only on the written and signed authority of that employee.

DEPUTY PRESIDENT ROBINSON: Does that apply to teachers and those sorts of people?

MR McCABE: It certainly does.

MR HOLDEN: Sometimes.

MR McCABE: It certainly does, Mr Deputy President and certain steps made to ensure that that - people are totally aware of that and that -

Paragraph (2) says:

Where an employee authorises a deduction which is a contribution or subscription to a private health organisation or an industrially registered employee union or association any official change to the contribution or subscription as advised by the organisation, union or association shall be deemed to be the new authorised deduction unless such authority for the increased deduction is revoked in writing by the employee.

And -

DEPUTY PRESIDENT ROBINSON: Does that occur now?

MR McCABE: It does.

DEPUTY PRESIDENT ROBINSON: Payment into trade unions?

MR McCABE: Yes, it does at the moment, yes. And I think the government performs a very useful task for those organisations by collecting the pay and -

DEPUTY PRESIDENT ROBINSON: And get a commission -

MR McCABE: - increasing it when the union -

DEPUTY PRESIDENT ROBINSON: - for it - and get a commission for it?

MR McCABE: Well I - probably. I think there might be something along those lines.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: I'm not sure whether commission applies in respect of union deductions - other deductions it may apply. In fact it does apply.

MR HOLDEN: 2.1/2%.

MR McCABE: For unions?

MR HOLDEN:

DEPUTY PRESIDENT ROBINSON: Sorry, Mr McCabe, but I thought it just might be of interest.

MR McCABE: Mm. Paragraph (3) says:

Agencies shall retain all current voluntary deduction authorities during the period of employment of the employee.

Now paragraph 808 deals with the disbursement of those deductions and I don't think that is really important other than the fact that at (2) it says:

Commission shall be levied at a rate of 2.5 per cent on all deductions payable to private health organisations and private insurance or assurance organisations.

So they are specifically covered. Unions and other organisations are not covered by that regulation, so they may - may very well get away with it.

Paragraph 809 is - deals with limit to deductions, and that covers the scenario where an unfortunate employee may have so many deductions that his pay doesn't - his or her pay doesn't cover it.

DEPUTY PRESIDENT ROBINSON: I know the feeling.

MR HOLDEN: Pay them more.

MR McCABE: Paragraph 810 covers Unclaimed Salaries and Wages, which I don't think is germane to these proceedings.

811 goes on to deal with the Recovery of Overpayments of Salary and/or Allowances of Employees. Now that is - there are quite detailed instructions there as to what happens in the case of an overpayment. But since overpayments don't form part of the claim before the commission I don't think there is any need to deal with that, but it does make interesting reading.

DEPUTY PRESIDENT ROBINSON: This Treasurer's instruction - does that - does that have the authority of an act?

MR McCABE: I'm about to come to that.

DEPUTY PRESIDENT ROBINSON: Yes, right, right.

MR McCABE: I'll - yes, give you the appropriate section from the act and the regulations -

DEPUTY PRESIDENT ROBINSON: Sure.

MR McCABE: - which - which explain how the instructions work.

DEPUTY PRESIDENT ROBINSON: I was just wondering whether it's advisory or -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - or - or a management arrangement or - or what.

MR McCABE: So the next paragraph is 812 which is Procedures on Death of Employee, and makes provisions there for payment to the - to the next of kin or to the estate, but that's not really a question that's - arises in these proceedings.

So in essence they are the Treasurer's Instructions to all departments as to how salaries and wages shall be dealt with.

Now to answer your last question, Mr Deputy President, if I could now hand up this exhibit - the various parts from the legislation and regulations.

DEPUTY PRESIDENT ROBINSON: Thank you - be Government.6.

MR McCABE: Yes - the first page of Government.6 is an extract from the Financial Management and Audit Act of 1990 - so this is the - the legislation.

DEPUTY PRESIDENT ROBINSON: Good.

MR McCABE: And the Treasurer's instructions are covered by section 23 and it says - 23(1) says:

The Treasurer's -

- sorry -

The Treasurer shall issue instructions with respect to the principles, practices and procedures to be observed in the financial management of all Agencies, and those instructions shall have effect unless they are inconsistent with this Act or any other written law.

(2) Treasurer's Instructions, so far as they relate to the duties of a Head of Agency under section 27, shall be prepared after consultation with the Minister responsible for the administration of the Tasmanian State Service Act 1984.

And that is, one assumes, to make sure it is consistent with practices, procedures, throughout the public sector.

Paragraph (3) says:

Treasurer's Instructions may be issued -

(a) so as to apply -

(i) at all times or at a time specified in the Treasurer's Instructions; or

(ii) to all Agencies or Agencies specified in the Treasurer's Instructions; and

(b) so as to confer a discretionary authority on a person or body or a class of persons or bodies specified in the Treasurer's Instructions.

And section (4) says:

It is the duty of each Head of Agency and officer to comply with any requirement of the Treasurer's Instructions that is applicable to that Head or officer.

And section (5) says:

Treasurer's Instructions are not statutory rules within the meaning of the Rules Publication Act 1953.

So while they don't have the force of a statutory rule, the - the act still requires that they must be obeyed by the Head of Agency and any officer, presumably people in the pay offices and the accounting functions of the agency unless they're inconsistent with any act or other written law.

So that is the force given to the Treasurer's Instructions by the act.

DEPUTY PRESIDENT ROBINSON: Mm. I'm not quite sure why you're telling me all this.

MR McCABE: Oh we'll - we'll get around to that.

DEPUTY PRESIDENT ROBINSON: Yes, right.

MR McCABE: The - if I could turn then to page 2 of Government.6, these are - this is an extract from the actual Financial Management and Audit Regulations made in 1990 and these - these - these are the regulations which go to the salaries and allowances of employees paid fortnightly, and if I could take you to 6, that defines the various words for the purposes of the regulations.

Now if we go to 6(2) - if I could quote that, it says:

Except as provided in this regulation, the salaries and allowances of employees are payable fortnightly on Wednesday of each alternative week (in this regulation referred to as "pay-day") in respect of the pay period ending on that day.

So pay-day for the public sector, for all intents and purposes, is Wednesday fortnightly.

DEPUTY PRESIDENT ROBINSON: Every second thereof - Mm.

MR McCABE: Yes - except as provided, which I'll come to later.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: Subsection (3) deals with situation where the pay-day falls on a state service holiday and in the vast majority of cases it would be - the pay-day would then occur on the nearest preceding day that is not a state service holiday or a Sunday.

And the next paragraph (4) deals with where pay-day falls over Christmas.

Paragraph (5) then goes on to say:

The Treasurer may from time to time make such requirements in respect of the payment of salaries and allowances as the Treasurer considers desirable.

So that would give some scope to varying the pay-day from Wednesday if the Treasurer for some reason or other thought that Wednesday was not an appropriate day to have pay-day could be changed.

DEPUTY PRESIDENT ROBINSON: But what if the award says it should be Wednesday?

MR McCABE: An interesting question.

DEPUTY PRESIDENT ROBINSON: Well, it's important. I mean it really comes down to whether or not I've got jurisdiction to deal with this application or not, doesn't it?

MR McCABE: Yes, yes.

DEPUTY PRESIDENT ROBINSON: And if I haven't I won't.

MR McCABE: Yes. Yes. In fact the Industrial Relations Act section 42, which is one of the new sections of the act says that:

An award has effect subject to the provisions of any Act dealing with the same subject-matter.

So -

DEPUTY PRESIDENT ROBINSON: So I don't have jurisdiction?

MR McCABE: I think this purpose of me pointing this out to you - and - so you have everything before you which is - we see as being regulated by legislation and subordinate legislation -

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: - and I guess the question is for you then to decide as to whether it's appropriate for award regulation or not.]

DEPUTY PRESIDENT ROBINSON: But aren't you going to tell me?

MR McCABE: Oh, yes.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: And if I could take you then to the - to subparagraph (6), which is the last one on that section, it says that:

The first payment of salaries and allowances under this regulation shall be 2 weeks after the last such payment under regulation 28 of Schedule II to the Audit Act 1918.

And in fact the first pay-day - the first Wednesday pay-day was set by that act of 1918 and as far as I know has been every second Wednesday after that particular day in 1918.

DEPUTY PRESIDENT ROBINSON: Can you vouch for it personally?

MR McCABE: I can't personally, but I have no reason to doubt it, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: The regulation 7 then goes on to again define an employee, it defines a holiday and a relevant award. And at (2) it says:

Except in the case of an employee to who subregulation (3) applies -

(a) an employee's fortnightly pay is 1/26th of the employee's annual rate of pay, subject to all deductions that may be properly made; and

(b) an employee's daily rate of pay is 1/10th of the employee's fortnightly pay calculated in accordance with paragraph (a).

So that sets out the method of calculation for the majority state employees' fortnightly pay.

And paragraph (3) then goes on to deal with employees who are rostered for duty on regular afternoon or night shift or other shift - shift work.

And paragraph (4) says:

An amount calculated for the purpose of subregulation (2) or (3) shall be calculated to the nearest cent.

It might be a bit out of date, as Mr Holden suggests perhaps it should be the nearest five cents. However, they are the regulations made under the Financial Management and Audit Act and which currently apply to the payment of wages in the public sector.

DEPUTY PRESIDENT ROBINSON: Yes. On Government.6, Mr McCabe, if I could take you back to the beginning - right at the beginning - 23(1); it says:

The Treasurer shall issue instructions with respect to the principles, practices and procedures to be observed in the financial management of all agencies and those instructions shall have effect unless they are inconsistent with this Act or any other written law.

How does that stand in relation to section 42 of the Industrial Relations Act - I wonder which prevails?

MR McCABE: Yes, paragraph (1) relates to the Treasurer's Instructions as they're drafted in the form of Government.5 -

DEPUTY PRESIDENT ROBINSON: Mm.

MR McCABE: - whereas the regulations are made pursuant to the act and have the - take the form subordinate - subordinate legislation. So it's really - it's - the Treasurer's Instructions which shall have effect unless they are inconsistent with this act or any other written law - not the regulations which pages 2 and 3 of Government.6.

DEPUTY PRESIDENT ROBINSON: But Government.6 is the Financial Management and Audit Act isn't it?

MR McCABE: That's correct, yes. And - and Government.5 are the instructions issued by the Treasurer -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - in accordance with 23(1).

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: And 23(1) refers to those instructions. The regulations are a separate matter again - they are subordinate - subordinate legislation issued in accordance with - yes - we don't have the actual part of the Financial Management and Audit Act which authorises the issuing of regulations. I haven't given you that, but the regulations are just normally a section contained somewhere the end of the act saying that regulations may be made under this act going to such and such.

DEPUTY PRESIDENT ROBINSON: Sure.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: But - but as I understand Government.6 it's the act itself.

MR McCABE: That is the act, yes.

DEPUTY PRESIDENT ROBINSON: Yes, that says that instruction shall not be inconsistent with - with its own act of course.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Or any other written law - and I just wonder how - whether that is like the 3(6) of the State Service Act - only be a lay person I'll take advice.

MR McCABE: Yes, well I guess it's a question of which - which act - the -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - IR Act or the Financial Management - or the Treasurer's Instructions part of the Financial Management and Audit Act which takes - takes precedence. That's the question really.

DEPUTY PRESIDENT ROBINSON: Yes. It's not direct; it's rather curious that you, as I understand it, are saying to me that, okay, an award is subject to other legislation dealing with the same subject matter and prima facie, let's say, the Financial Management and Audit Act deals with payment of wages but itself proscribes the giving of instructions which are - are contained in other written law - whatever that means.

MR McCABE: Yes, it's -

DEPUTY PRESIDENT ROBINSON: Curious.

MR McCABE: - it's a - and is something I really can't answer.

DEPUTY PRESIDENT ROBINSON: You said at the beginning it was going to be long and complex.

MR McCABE: Yes, yes - yes, I'm afraid so.

DEPUTY PRESIDENT ROBINSON: Why does it always happen to me - that's what I'm complaining about.

MR McCABE: Now having shown you those two instruments - or instructions - Mr Deputy President, I think it would be proper now to take you through the PAYSTAT pay system -

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: Which covers many members of the - TPSA members. Now the pay details for the PAYSTAT system are prepared by the various departments and are sent to Treasury and - where was it - yes - Treasurer's - Treasurer's Instruction 802 says that the agency shall lodge with DOTAF no later than two working days before each pay-day.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: The details of that pay roll. Now from that Treasury prepares consolidated data relating to all employees in agencies on the PAYSTAT system. This is then passed on to the Reserve Bank in Hobart with whom we have a contract to handle the distribution of the net pay due to each employee to the employee's nominated account or accounts in banks or financial institutions. And I understand that information is supplied to the Reserve Bank by Treasury on the Tuesday before the - before pay-day on the Wednesday and the information is then disseminated electronically by the Reserve Bank to the various banks and credit unions, but it's again not a simple process, and if I could hand up to you a schematic diagram which hopefully sets out with some clarity how the process works.

DEPUTY PRESIDENT ROBINSON: Thank you. Government.7.

MR McCABE: Right. The diagram on the first page is shows that the departments on the left-hand side provide information to the Treasury; Treasury then collates and assembles all that information, it goes to the Reserve Bank in Hobart electronically. The Reserve Bank in Hobart then sends those same details to the Reserve Bank head office in Sydney.

From Reserve Bank Head Office in Sydney the information goes to the Australian Head Office of each bank and from each of those head offices, it then goes to the individual bank branches in various areas of the state and the individual bank branches then pay into an employee's account.

If you go to the bottom of the diagram, you can see the Reserve Bank Head Office in Sydney also send information to the Island State Credit Union in Tasmania in Hobart which has the responsibility to send the various payments to individual credit unions, so there is a split in the system at the Reserve Bank Head Office Sydney where the banks are given the information and the credit unions receive their payments via the Island State. Page 2 of that exhibit I'll come to a little later because that deals with various deductions, et cetera.

So in the PAYSTAT system the various recipients, that being the various banking institutions are given a certain time to acknowledge the receipt of the information from the Reserve Bank and having done so, the payments into employees accounts becomes the responsibility of the banks once they've acknowledged the receipt of the information from the Reserve Bank.

DEPUTY PRESIDENT ROBINSON: Yes. Is there a definite cut-off time, do you know, when Treasury - well presumably departments must have information to Treasury and Treasury must have it to Reserve Bank?

MR McCABE: I understand that the Treasury information is passed to the Reserve Bank at 4.00 pm on a Monday.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: Now, it's our view that once the information passes from Treasury to the Reserve Bank, then the employer has no further control over the payment process.

DEPUTY PRESIDENT ROBINSON: But isn't there an instruction that says, 'We definitely require you, as part of our contractual arrangements, to make sure that you credit employees and credit unions with the sums by a certain time -

MR McCABE: I'm -

DEPUTY PRESIDENT ROBINSON: - and if you don't you're in breach of our contract'.

MR McCABE: Yes, I'm sure that's part of the contract and I don't have details of the contract -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - which we're able to give you.

DEPUTY PRESIDENT ROBINSON: But it's question of where the responsibility is -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - for the payment of wages, whether it rests with Treasury or other agencies who are given the -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - given the responsibility and the responsibility is passed from one to the other wholly and solely.

MR McCABE: Yes, well we certainly acknowledge that Treasury has a responsibility -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and we acknowledge that there is a contract and there are contract arrangements for the pays to be passed down the line and to eventually get into the employee's bank account.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: That's certainly part of the process.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: But the last statement I made was that - was really to emphasise that when the Treasury has passed the information to the Reserve Bank, the employer then has no actual control - apart from the contractual arrangements - over what happens to the money once it's in the hands of the Reserve Bank. I mean, there are safeguards and there are things that the employer can do, perhaps, if something goes amiss, but the actual control is then passed from - there's nothing that the employer can do - however, can I just go on?

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: So what happens to the money once it passed onto the financial institutions then becomes a matter between the employee and the financial institution which he or she has authorised to handle his or her money. Now that's - we don't say that we would wash our hands of any problem that occurs with pays being lost in the financial system, and we certainly wouldn't, but there must be a point where the employer can no longer be in control of the processes which determine when an

employee's pay will be in an employee's nominated account and available for use. So there is a certain -

DEPUTY PRESIDENT ROBINSON: Mr Holden's shaking his head.

MR HOLDEN: In amazement, sir, in amazement.

DEPUTY PRESIDENT ROBINSON: He's obviously going to disagree with you - that, and presumably he's going to argue that the employer has a responsibility to pay the employees the wages that they've earned.

MR McCABE: Oh, certainly, yes, but just how much control the employer has over the process, once it passes from the government hands into a - into the hands of another organisation over which the government has no control is the question which -

DEPUTY PRESIDENT ROBINSON: But doesn't it have a contract - as I say, doesn't it have a contract for the provision of a certain service -

MR McCABE: Yes, it does.

DEPUTY PRESIDENT ROBINSON: - and that the - that service which presumably is paid for ought to have its own built in protections for the one who is paying the service, ie. the government as employer or Treasury.

MR McCABE: Yes. Yes, I appreciate what you're saying and I'm sure there are safeguards there -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - but just what the government can do - I mean, to ensure that the -

DEPUTY PRESIDENT ROBINSON: Let the contract out to somebody else.

MR McCABE: I think you - if you see what I mean, that the actual - the government has no control, even though there may be a default in the contract -

DEPUTY PRESIDENT ROBINSON: Well if it's lost control -

MR McCABE: - and the government may be able to make a claim and to claim damages perhaps under that contract, but that doesn't help the employee who hasn't got their money in their account because of a failure somewhere in the banking system.

DEPUTY PRESIDENT ROBINSON: Yes. But I think there is a difference between having control and having responsibility.

MR McCABE: Oh, yes, we don't resolve from the responsibility, but I think the control is the important -

DEPUTY PRESIDENT ROBINSON: Yes. What I'm driving at, and I think I raised this earlier, is that may be there should be some financial responsibility for the Reserve Bank or the credit union to pick up the tab if there is, for instance, something in an award that says if somebody's not paid and it's within the employer's control - there - that something - that there is some fine, if you like, that the final handler of the cash could have to cough up.

MR McCABE: Yes, it's - certainly in the last instance where there was a failure in the system - in the banking system somewhere some weeks ago - the Treasury was certainly active in ensuring that employees were given access to money at that time and I think that sort of responsibility is taken by the government -

DEPUTY PRESIDENT ROBINSON: Yes, sure. But I'm just wondering, you know, on the - getting back to the financial implications of having some provision in an award that whether or not it would fall upon the government itself -

MR McCABE: It could very well and - I mean, the - if there was, for instance, a late payment and the employee was successful in prosecuting for a late payment penalty, then the - it was proven that it was the fault of the financial institution not the government, then I would imagine there would be some -

DEPUTY PRESIDENT ROBINSON: Fair case for -

MR McCABE: - fair case for the government to claim the - from the financial institution.

DEPUTY PRESIDENT ROBINSON: Yes. And the end result would be that it hasn't - that the penalty that you're so worried about, and the restrictions imposed by the wage fixing principles, in the end, given a favourable result for the government, wouldn't occur.

MR McCABE: That's an interesting - yes, that - we have thought about that, and -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and the wage fixing principles themselves don't say - well, the expense must occur to the person in question. I mean, it talks about expenses - if there's going to be a penalty, it's going to fall with someone somewhere along the line.

DEPUTY PRESIDENT ROBINSON: But it's the cost implications to the employer, isn't it?

MR McCABE: Well, it doesn't say that. Now, there is - now there could be a case for saying, well, there is a cost implication; someone in the community is going to have to meet that cost.

DEPUTY PRESIDENT ROBINSON: Well in the alternative there could be a cost implication for an employee who has a reasonable expectancy of being paid on payday and if they are unable to meet their financial obligations on time, then obviously they could suffer financially as a result.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Now, - I mean, the wage fixing principles, if you turn them around, are not - are not putting a double negative, as it were, to say that you shall not impose a condition of employment that will have - well will save, I suppose, employees from a cost implication. I mean, it gets a bit complicated

MR McCABE: It does. Perhaps if I could - and this may go part way to answering the questions we've just been talking about - I have an exhibit here which is an extract from a publication put out by the Westpac Bank.

DEPUTY PRESIDENT ROBINSON: Thank you. This will be Govt.8.

MR McCABE: Now it's a publication called 'You and your Bank', and it's 'Your Westpac guide to everyday banking law and practice' is the title of the publication.

DEPUTY PRESIDENT ROBINSON: Does that override us too, does it, that law?

MR McCABE: I don't know. I mean, there is always that possibility.

DEPUTY PRESIDENT ROBINSON: Just about everything does, doesn't it, these days?

MR HOLDEN: If it doesn't it may in the near future.

MR McCABE: I suppose it's not beyond the realms of possibility.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: And I've just extracted one page from that publication, page 31, and this deals with direct debits and credits and the heading says:

One of the benefits of modern banking is the option of having your salary paid directly into your accounts by your employer and the option of having payments made directly from your account.

Direct Credit

It is now common place for a salary to be credited directly to a bank account. This is known as Direct Pay. It means you can draw against your salary immediately (you don't have to wait for a cheque to clear). You don't have to carry round a large amount of cash. You don't even have to visit the bank. After the deposit has been received by your branch, you can:

draw a cheque on your account

withdraw or transfer money between accounts through Handybank

buy goods or services wherever you see a Handyway or EFTPOS sign

transfer money -

And then the last paragraph is the one that really want to draw your attention to and that says:

Any dispute about the amount of your salary paid to your account is between you and your employer unless we have made an error in crediting your account. Direct Pay is a facility for you convenience and security as well as your employer's.

So the Westpac Bank does acknowledge that if they are at fault in crediting your money to the account then it's - certainly implied there that they will take responsibility for it.

DEPUTY PRESIDENT ROBINSON: Yes. They're having a bit of a two bob each way, aren't they? I mean, -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - they're saying both that it's really between you and your employer, except that it might be our responsibility -

MR McCABE: It might, and that is the question which is sort of facing us at the moment -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - where does the responsibility begin and end if

-

DEPUTY PRESIDENT ROBINSON: There was a heck of a row, wasn't there, earlier in the year when there was a dispute over the payment of wages and whether or not those payments were unauthorised or were held without authority and if so, whose responsibility it was, and I don't remember who accepted responsibility publicly. I don't think anyone did on that occasion.

MR McCABE: Now to the best of my knowledge, this question hasn't been tested and I'm not aware of where there has been an argument over who was responsible for the nonarrival of case in an employee's account, but obviously Westpac there is acknowledging that if they've made a mistake in crediting the account then they will take the responsibility. If the employer has made an error in calculating the pay -

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: - in supplying the incorrect amount of money to them, then it's going to be the employer's fault.

DEPUTY PRESIDENT ROBINSON: But doesn't it go against your own argument that - about cost implications and money moving out of your control and it could be someone else's mistake for which you would have to pay the cost.

MR McCABE: Yes. Yes.

As I say, I don't where that part of it has been tested, where the money has passed - correctly passed from Treasury into the financial banking institution process.

DEPUTY PRESIDENT ROBINSON: Yes. Right.

MR McCABE: I think the important thing about our cost argument was predicated purely on a failure in a pay system before it was transmitted to the Reserve Bank which is -

DEPUTY PRESIDENT ROBINSON: Was it?

MR McCABE: Yes, certainly, yes.

DEPUTY PRESIDENT ROBINSON: But for which you wouldn't accept responsibility.

MR McCABE: Oh, we would, yes, yes, and that was the point of the exhibit to show that if there was a failure, for instance,

in the PAYSTAT computer system and for some reason or other the pays weren't able to be calculated and consequently the information couldn't be supplied to the Reserve Bank then we would accept the full responsibility for that -

DEPUTY PRESIDENT ROBINSON: And the -

MR McCABE: - and it is possible that that could -

DEPUTY PRESIDENT ROBINSON: And the penalty -

MR McCABE: And the penalty.

DEPUTY PRESIDENT ROBINSON: - but you wouldn't -

MR McCABE: Well it's arguable that a penalty - yes - and that is the cost implication which we drew out in Government.4(a).

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: So, just to dwell on that line of argument a little further, there - the processes of payment into an employee's account by electronic funds transfer is one of the calculated risks that employees have to accept in agreeing to the electronic fund transfer process. That is, the government having provided the pay information and funds to the Reserve Bank cannot guarantee that the money will be in a particular account when the employee ceases work on pay day. On most pay days the money will be there and is usually accessible sometime during pay day well before 5 pm. Occasionally it may be there before pay day.

So what we have developed in response to the TPSA's claim is a process which addresses payments by electronic funds transfer in that it does not talk about an employee being kept waiting for more than a quarter of an hour after knock off time on pay day and I will explain the details of that a little bit later, but we say that the notion of waiting time has no place in an electronic fund transfer environment where the physical act of paying an employee in cash on pay day has been superseded by the direct deposit of net pay into an employee's account or accounts.

Now the reason why we say that this late payment requirement, as sought at clause (e)(i) of TPSA.6, is irrelevant. It can be explained something like this: if an EFT - oh, sorry - in an EFT pay environment, the employee expects to have their net pay transferred to their nominated account or accounts on the nominated pay day. That's a reasonable expectation with which we agree. There is, however, no requirement for the employer to ensure that the pay will be in the employee's account at any specified time on pay day. Indeed, for practical purposes, it is impossible for the employer to guarantee that

the employee's pay is credited to their account on pay day because of those reasons we have said, that once the pay is out of the Treasurer's hands, it's - the process is then up to the banks.

So, any failure of the process to provide pay to an employee's account would need to occur as a result of a failure of the government to provide the pay information and funds to the Reserve Bank and that was, as I said, pointed out in the scenario I gave in relation to Government 4(a) where the PAYSTAT system itself might fail and not be able to produce the pay information. So, to be able to invoke the penalty clause sought at (e)(i) of TPSA.6, there would need to be a failure on the part of the employer and not some failure which is beyond the employer's control.

Now, what happens as a result of clause (e)(i) of TPSA.6 - yes, what happens if an employee goes to their account at, say, twenty one minutes past five on pay day and that being fifteen minutes after the normal finishing time for any employees, and their pay is not in their account? Well the employee is told by the bank that there is no money in their account as a result of a failure somewhere in the pay system. However, the bank cannot tell the employee where the problem has occurred or when the money might be available.

If we assume, for this instance, however, that the failure can be traced back to the employer, then it is a question of how the employee can advise the pay office - which is most likely closed for the day - that they haven't received their pay into their account, and on the - similarly on the others, the pay office is unable to advise the employee who has left work that no payment will be made on that day. So you have the ridiculous scenario that arises that because no information can pass between the pay office and the employee until the pay office opens for business the next day, which could lead to a penalty being imposed on the employer to the tune of time and a half from 5.21 pm on the pay day to midnight on pay day which is the balance of the day and that is something like 6.6 hours at time and a half which equates to 9.9 hours and if you use the figure of \$14.65 which was the figure we used in Government 4(a) it would give a total penalty for the elapsed time on pay day of \$145.04, now that's quite unrealistic in our view because the penalty provision, as sought, was designed to cope with a pay system which paid employees on cash on pay day. The employees in that system would be physically present to collect their pay and if there was a foul up somewhere in the - along the line in the pay preparation, the employees could be told on the spot that the pay would not be ready on that day.

Now, under the provisions of the old pay system, it would be possible for the employer to advise employees that before the normal ceasing time on pay day, that the pay would not be

available on that day. The pay office could then correct the foul-up and prepare the pays overnight and have the pay ready for collection by employees as they arrive for work the next morning. So it is possible in that scenario that there would be no penalty payable by the employer because employees have not been kept waiting at all - although they haven't been paid, they haven't been kept waiting.

In that situation, there may be an argument for a minimal - minimum penalty payment of a quarter of an hour pay which, using our standard example, would amount to about \$5.49. Now, \$5.49 is a bit different to a penalty of a \$145.04 which the unions might say the employer has no opportunity to avoid simply because in an EFT system there can be no contact between the employee and their pay office until the following morning. Now, to take that further, the government under the proposed penalty clause, could be in double jeopardy because the employee would inform the employer on the next morning after pay day that no pay had been paid into their accounts.

If the employer was unaware of the circumstances of the nonpayment, it would require the pay office to trace the fault and to effect payment which may take perhaps a further hour and a half, for example, so the employer could then be pinged for a further penalty of an hour and a half at time and a half at \$14.65 an hour which, on my calculations, comes out to \$33.00, so all in all, the employer could be liable for \$178.04 in penalty payments as a result of the inappropriate penalty clause sought by the TPSA in TPSA.6.

So, instead of the \$5.49 penalty which might be incurred by the employer in the payment in cash on pay day situation which the clause was designed to accommodate, we have the government - as the employer - possibly having to pay a penalty of perhaps \$180.00 for the average employee who is paid within one and a half hours of the day after pay day. So in most cases, the employer does not have an opportunity under the direct deposit system to be advised of an error or to advise the employees of a failure of the pay system, generally, until the employee reports for work on the next day.

Now, it is arguable that the penalty under the clause sought by the TPSA would not apply because the employer is not able to advise the employee after normal working hours that no pay will be available on that day. However, that is an argument for another day, if and when it becomes necessary. But whatever the answer to that is, we maintain that the examples I have given illustrate just how inappropriate this clause is in a pay system which is geared to providing funds to an employees nominated account by direct deposit. And it's important, we say, not to forget that all the public sector unions agreed to the concept of direct deposit of wages as part of the 4 per cent second tier arrangements.

So, in our view, the unions cannot now expect to have the best of both worlds. They cannot expect to agree to the direct deposit of wages and still maintain the protection and penalty clauses which were intended to work only with a system of cash payment to employees in person on pay day.

So what we have done is to examine what happens in the current pay system processes and the direct deposit of wages into employees accounts and to develop instructions and directions to the departments to departments which will supplement the existing requirements. They will alleviate, as far as possible, the problems which can occur in the pay processes and at the same time, they will provide safeguards to employees.

Now, we have taken you through the various legislation which applies to public sector pays and the Treasurer's instructions made as a consequence of that legislation. As you would appreciate, however, the Treasurer's instructions contained in - whatever it was - Exhibit Government.5, are comprehensive but do not way what happens when an employee's pay is late or short or not received at all, so what we have done is to augment the Treasurer's instructions with an administrative instruction issued by the minister under section 26 of the State Service Act. This instruction sets the rules and requirements to departments as to what happens when no pay is received or pay is deficient. The other aspect it addresses is to provide employees with a pay slip giving a dissection of the pay which is another aspect which is not covered by the Treasurer's instructions.

If I could now table a copy of the administrative instructions and take you through that.

DEPUTY PRESIDENT ROBINSON: Government.9, I think.

MR McCABE: Yes. Thank you, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Just a couple of questions while - just before you get onto that, Mr McCabe. Is there a precise time of the day that payment of wages is due or not?

MR McCABE: No, I don't believe so. It's due on pay day which is nominated in the regulations but there is no time -

DEPUTY PRESIDENT ROBINSON: So it could be one minute to midnight on pay day is payment on pay day.

MR McCABE: Well, I suppose that's a distinct possibility if it occurs on that nominated Wednesday.

MR HOLDEN: Not according to The usual time of knocking off work.

DEPUTY PRESIDENT ROBINSON: As has already been shown by a government exhibit, there are a number of awards applying in the State Service already that have payment wages provisions. As I understand it, there was even government consent to the insertion of one in the health area - an award covering the health area?

MR McCABE: It's possible. I'm not aware of that one, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: No. I just wonder -

MR HOLDEN: Maybe I could help, Mr Deputy President, as the person representing the Hospital Employees Federation, No.2 branch, at that time, and the author of that claim, I can assure you it was inserted in the Public Hospitals Award by consent and in fact was subsequently included in the Private Hospitals Award, though I seem to recall that was by arbitration through Commissioner King, as he then was.

DEPUTY PRESIDENT ROBINSON: Yes. If that were so, it begs the question as to why would one make ^{F.A.S.H.} of one and foul of another area of state service in relation to an award provision.

MR McCABE: Well if it was ex Commissioner King, then it must have been prior to -

DEPUTY PRESIDENT ROBINSON: No, no, that was the private sector one.

MR HOLDEN: No, no, Commissioner King - sorry, it was dealt with by consent but it was certainly at the time that Commissioner King was a member of the commission which was the point I think that Mr McCabe's making.

MR McCABE: Yes. I assume it was then before 1988 which was prior to the agreement by the unions to a second tier offset of direct deposit of pay which -

DEPUTY PRESIDENT ROBINSON: Yes. I -

MR McCABE: - entirely altered the -

DEPUTY PRESIDENT ROBINSON: Yes. I thought there was something in the last 12 months.

MR HOLDEN: teachers - in the teachers

DEPUTY PRESIDENT ROBINSON: That was arbitrated.

MR HOLDEN:

MR McCABE: Yes, that was mainly opposed by the government, yes.

DEPUTY PRESIDENT ROBINSON: Yes. However -

MR McCABE: I'm unaware of any other and I can't imagine us agreeing to that particular provision -

MR HOLDEN:

MR McCABE: - in the last few years, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Well I can always ask the question.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr McCabe.

MR McCABE: If I could take you through the administrative instruction in the form of Government.9. Now, this is Administrative Instruction No.30 issued on the 29th of July and as it says: '(Issued by authority of the Minister administering the Tasmanian State Service Act 1984)' under section 26 of the State Service Act and if I could just quote it. It says:

In addition to statutory and other arrangements which exist the following payroll procedures are to be adhered to at all times.

And a note to say that:

- paragraphs one to three are existing legal requirements.

Then you will see, in the box at the top of the administrative instruction that there references to the various acts which apply so that the people in the departments know which acts to refer to. Paragraph 1 says:

1. On or prior to pay day each employee shall be provided with written advice setting out full details of wages to which that employee is entitled.
2. The written advice shall at least include the following information:
 - (a) for an employee holding a position classified

under an award (federal) of the Australian Industrial Relations Commission, the requirements prescribed in the Regulations made under the provisions of the Industrial Relations Act 1988; or

(b) for employee hold a position classified under an award (state) of the Tasmanian Industrial Commission, the relevant details in the certified Salary Abstract required by the Treasurer's Instruction No.802; or

(c) for an employee engaged under any other arrangement, the requirements set out in (b).

DEPUTY PRESIDENT ROBINSON: That means that if you - if you want to go under a federal award, you're going to have less state control.

MR McCABE: I'm sorry?

DEPUTY PRESIDENT ROBINSON: If you're covered by a federal award, you're not going to be subject to the same state control.

MR McCABE: Well, clearly the administrative instruction cannot override the requirements of the Federal Industrial Relations Act, so that's the point of the - yes. There are regulations made under the Federal Act in relation to pay slips.

DEPUTY PRESIDENT ROBINSON: But you could have employees working in the same establishment - two or more groups - some under federal award and some under state award and they'd have different requirements and rights in relation to payment of wages.

MR McCABE: Yes. That would be - there are different requirements, yes, but we're saying that they're substantially - in effect, that those requirements are going to be so - there's - be so little difference between them that I'm sure the employees themselves are not going to be complaining too much.

DEPUTY PRESIDENT ROBINSON: Well some might get a penalty and others not in relation to the same set of circumstances.

MR McCABE: I think, as we go on through our submissions and we show you what employees are actually provided with by way of information, shall allay any fears you might have in that -

DEPUTY PRESIDENT ROBINSON: Well I'm not -

MR McCABE: But I do take your point that -

DEPUTY PRESIDENT ROBINSON: - expressing fears. I don't have any fears, I don't think, excepting that this case might never finish.

MR HOLDEN: couldn't be that successful, John.

MR McCABE: The paragraph 3 says that:

The written advice is to be distributed in such manner that the employee will have access to that information at, or before the usual time the employee ceases work on pay day.

And we think that that is a very fair and equitable requirement. Paragraph 4 says that:

Except in circumstances beyond the control of departmental management, in any case where no pay is available for an employee on pay day departmental management must make such special arrangements, with the employee's consent as to the nature of those arrangements, so that where possible payment is made on that pay day, but not later than the close of business on the next working day following that pay day.

And then there's a proviso going to say that:

Provided that existing custom and practice covering intermittent or relief work, provided it is made known to and is agreed with the employee prior to commencement, is exempt from those requirements.

Paragraph 5 says that:

In any case where an employee is underpaid on pay day the procedure in 4 is to be adopted except where the underpayment is less than 5% of the gross pay due to the employee on that pay day. Any underpayment of less than 5% is to be rectified as soon as possible.

And an other proviso saying that:

Provided that existing procedures or custom and practice covering adjustments to penalty rates, overtime, allowances and similar payments, provided they are made known to the employee prior to commencement, are exempt from these requirements.

Paragraph 6 says:

In any case where an employee is overpaid on pay day departmental management is to -

- (a) notify the employee; and
- (b) proceed in accordance with the relevant Treasurer's Instructions issued under the provisions of the Financial Management and Audit Act 1990.

We've already covered those particular instructions with regard to overpayment - or you have a copy of them. We haven't covered them, but - paragraph 7 says:

An employee is required to promptly notify departmental management if no pay has been received, or there is an error in his or her pay.

Paragraph 8:

Where an employee has notified departmental management at any time after the pay day that no pay has been received, or that there is an error in his or her pay, the relevant requirements of 4 or 5 above are to be undertaken, or the requirements in 6 above are to be commenced, before the close of business on the next working day following receipt of the notification.

Now, we say that the administrative instruction comprehensively addresses the concerns of the unions and the TPSA's claim in relation to: (a) the issuing of pay slips; and (b) ensuring that there are comprehensive requirements on agencies to ensure that there is immediate action taken to rectify any deficiencies in paying an employee. This instruction, by nature of its general application to state employees under state awards, federal awards and award-free employees ensures that all employees of the government are afforded this protection and all employees are given fair and equitable treatment, thus we have addressed a much wider range of employees than the TPSA's application seeks to cover. *

To recap on the contents of the instruction, we say that paragraphs 1, 2 and 3, require the agency to provide all employees with pay slips setting out a dissection of their pay - and we address that aspect a little later in more detail. Paragraphs 4 to 8 address the situation where there is: (a) no payment to employee; (b) an error in the payment to the employee; or (c) the overpayment of an employee.

Now, we say that the paragraphs 4 to 8 are developed to address pay discrepancies which may occur in the electronic fund transfer pay process. Unlike the TPSA's penalty clause, the processes we have put in place ensure there is a logical and realistic plan of action for any pay deficiencies and it ensures that: (a) the employee has a pay slip on or prior to pay day setting out comprehensively the various elements of the pay to be transferred to the nominated account or accounts. If there is a discrepancy in the amount shown on the slip then the employee can seek to have the error corrected immediately; and (b) where there is a situation which results in no pay being available, the employer must make special arrangements with the employee's consent to ensure that payment is made on pay day or at the latest, on the day after pay day. The exception being where the employer has acted in good faith to ensure pays are properly distributed and there has been a failure beyond the control of the employer.

Paragraph 5 says that as long as an employee has received 95 per cent of their gross pay, then they are not being seriously disadvantaged and the discrepancy will be rectified as soon as possible so the onus on the department is not quite as demanding in this instance. On the other hand, it is not unreasonable.

Now, in support of this substantial payment of wages situation, I would like to tender an exhibit which is an extract from a reference book titled 'Federal Industrial Laws', by 'Mills and Sorrell' being the fourth edition of that book.

DEPUTY PRESIDENT ROBINSON: With all of these internal arrangements, as outlined by Government.9 and other exhibits, you would wonder why we've had disputes in the recent past in relation to the payment of wages.

MR McCABE: Well, I guess Government.9 was developed in response to the recent events in an endeavour to ensure that they don't happen again, and if they do happen that there appropriate processes there to make sure that things are done in agencies.

DEPUTY PRESIDENT ROBINSON: Government.10.

MR McCABE: Now, the particular section I wish to refer you to is paragraph 239 which starts about a third of the way down the page and commences with the heading 'Payment of Wages'. It's rather small, but -

DEPUTY PRESIDENT ROBINSON: Yes, I've picked it up, thank you.

MR McCABE: And if I could read this. It says:

This clause generally provides that (a) payment shall be made on a specified day; (b) an employer shall not keep more than a specified amount, e.g. two days' pay in hand; (c) upon determination of his employment, an employee shall be paid moneys due to him on the day of such determination or forwarded to him by post the following day; (d) "all wages shall be paid during working hours"; or "an employee kept waiting for his wages on pay day for more than a specified time, e.g. five minutes or fifteen minutes, shall be paid at overtime rates after such specified period".

And then the:

An award provided: "If an employee who is not absent from work is not paid on the regular pay day, he shall be paid waiting time at the ordinary rate of pay from the close of business on pay day until time of actual payment provided that not more than 8 hours' pay shall accrue in respect of each 24 hours of waiting. Provided always that if the delay is caused by circumstances outside the control of the employer, this sub-clause shall not apply."

End of quote of the award provision. It goes on to say:

Upon an application to the Commonwealth Industrial Court for interpretation of the this provision, Joske and Eggleston, JJ., said: "The obligation of the employer is that an employee is paid each pay day. There must be a physical act of payment and there must be payment in a real sense. A colourable payment is not a real payment. The obligation of the employer ... is not satisfied by the making of a token payment, nor does the employer satisfy it by making an evasive payment. A payment is a real payment when the employer has bona fide endeavoured to pay the full amount which is believed to be due to the employee at the time of the payment. It may be that the amount paid is not the full amount because of an error by someone in the pay office, or because the circumstances

under which a special rate or some other benefit was earned have not come to the knowledge of the employer or that the employer is not reasonably satisfied, without investigation, which he has not had sufficient opportunity to make, that it was earned, or that the employer bona fide disputes a particular item claimed. If under such or similar circumstances the employer pays the employee the full amount which is believed to be payable, although it may turn out to be less than the full amount due, there has been a real payment and the employee has been 'paid' within the meaning of ... the award".

And that was: Re Commonwealth Works and Service (Northern Territory) Award, and I'm not sure of the date of that. I think it might be 1960.

Now, there's another decision attached to Government.10 which I shall refer to later, Mr Deputy President, but in relation to the one I've just quoted, we say that even though the ruling was made some years ago, a search of later authorities does not reveal anything which overrides that interpretation and what it says it quite apparent, in our view. It's saying that if the employer acts in good faith and provides a payment on pay day which, to the best of the employer's knowledge, is the full amount due, then that constitutes a real payment and the employee has been paid and no penalty applies.

Of course, any discrepancy would need to be adjusted and we allowed for that at paragraph 5 of the administrative instruction which says: any underpayment of less than 5 per cent will be rectified as soon as possible. So that is, in accordance with the industrial precedent available to us, in our view.

To return to Government.9 and paragraph 6 of that - that deals with what happens if there is an overpayment to an employee and that calls up the Treasurer's Instructions. Overpayment not being an issue with the TPSA's claim, we don't want to go into the detail of that, but it's something we've included for our purposes.

DEPUTY PRESIDENT ROBINSON: Except where it perhaps is a large overpayment which has accumulated over a period of time and if the employer stops payments for a while until the overpayment is recouped, they might make a complaint.

MR McCABE: They may do, yes, yes. Paragraph 7 places a requirement on the employee to let the department know if there is an error in payment or no payment is received. This is only fair in that there is an onus placed on the employer in most of the other paragraphs to advise and consult with the employee where problems occur, so we say that the employee

should expect to bear some responsibilities in the consultative process if a problem occurs.

Paragraph 8 deals with a situation which may arise here the employer is unaware of any error in the payments made to an employee, but the employee advises the pay office the next day of errors in his or her pay or it's nonpayment. Once notified, the agency must then act according to the relevant paragraphs 4, 5, or 6, so while there is some leeway given to the employer to commence action here, it is expected that most errors would be corrected on the day of notification.

So that, in essence, is a summary of the purpose and effect of the administrative instruction. We say that the safeguards which are being sought by the TPSA in its application are addressed by the provisions contained in this administrative instruction.

If we could not move onto the next part of the submission, and we have said that we do not oppose the inclusion of a payment of wages clauses in the General Conditions of Service Award. Given the existence of a number of instruments which deal with the subject matter of payment of wages in the form of the Financial Management Act and regulations and the administrative instruction, we say that there is not much else which needs to be included by way of an award provision. However, we think that there is merit in including some basic payment of wages information by way of an award provision and we have put together a number of provisions which we consider are appropriate to supplement the other instruments which control payment of wages and which we say could be included in the General Conditions of Service Award within the constraints the current wage fixing principles on conditions of employment place on the applicants.

If I could tender a copy of that clause which we would intend to be our answer to and substitute for the clause sought by the TPSA in Exhibit TPSA.6.

DEPUTY PRESIDENT ROBINSON: Whilst that's being handed up, the emphasis that you place upon arrangements which are already in place through instructions in particular as to how employees are to be treated in relation to payment of wages, could we draw some sort of analogy with other circumstances where a person contracts with a builder - in contrast to a contractor master/servant - for a building of a house according to specifications which are laid down, for instance, the house is to be made up of certain materials of a certain size and so on and so on. Then the owner finds the house has been built which don't conform to the contract and the builder says in reply: -

But I have given instructions to all my employees and all my subcontractors that they are to stick strictly to what I have

told them that they must do. But the householder says: Well there's the house, it's supposed to be 20 squares; it's only 18. It's supposed to be constructed of brick; it's weatherboard. It's supposed to be insulated; it's not. It's supposed to have a fireplace; it hasn't. And so on.

Can the principal contractor wipe his hands of it on the basis: But I've got instructions which I've given which should have been followed. See the point I'm making?

MR McCABE: Yes. You're thinking of this in reference to the administrative instruction mainly, and the other -

DEPUTY PRESIDENT ROBINSON: Well I'm just trying to draw out, I suppose, an argument as to whether or not the giving of all sorts of instructions necessarily absolves a party to a contract of any further responsibility in the event of a failure.

MR McCABE: I don't know. I guess not. I mean, the builder of the house, the owner of the house would have recourse to perhaps seek to prosecute the builder and to recover damages or costs or whatever.

DEPUTY PRESIDENT ROBINSON: You don't think it would be a defence to say: But I told everybody what they should have done, and then left them to it.

MR McCABE: I think the point is that with the instructions and the various regulations that apply in the government, that the employer would expect his employees to carry out those actions in accordance with those instructions. If they don't -

MR : sack them.

MR McCABE: Yes. If those employees don't carry out those instructions - I guess I'm not carrying out mine at the moment in not repeating what was just said.

DEPUTY PRESIDENT ROBINSON: Yes, anyway I just thought it would bring back a little bit of, sort of, balance to the argument.

MR McCABE: The instructions given to me was that we would sack them, but whether it would get to that stage is - depends on the severity of the -

DEPUTY PRESIDENT ROBINSON: I just hope they're not covered by awards within my assignment.

MR McCABE: Whether it would depend on the severity of the - what was done or not done by the employee in question.

DEPUTY PRESIDENT ROBINSON: You don't have to comment any farther, I don't think.

MR HOLDEN: employees, not contractors.

DEPUTY PRESIDENT ROBINSON: Probably your legal adviser would advise you not to say any more.

MR McCABE: I mean, I guess it's like building specifications, in your analogy, that, you know, we're doing our best to ensure that everything goes to plan and that there are remedial provisions there is something does go wrong.

DEPUTY PRESIDENT ROBINSON: Where?

MR McCABE: In the administrative instructions to ensure that the employees are -

DEPUTY PRESIDENT ROBINSON: Well perhaps we're going around in a circle and getting back to the remedy, if the instructions are not followed -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - and I don't know whether the sacking of a builder's subcontractors or direct employees would assist the owner. And this is the point I'm making - the owner of the building.

MR McCABE: Yes, well I guess there's an onus on the owner to ensure that the builder is building the house to his requirements.

DEPUTY PRESIDENT ROBINSON: So not only should he -

MR McCABE: If he doesn't, I mean, there is a basic problem there.

DEPUTY PRESIDENT ROBINSON: Well that's right. Right.

MR McCABE: You can't wash your hands of it and say: Look, I'll come back in 6 months when the house is built and it had better be right otherwise - I mean, you know, so there some onus on the employee to ensure that their pay is right, to let the employer know. If the pay isn't right, then the instructions are there to address that situation.

DEPUTY PRESIDENT ROBINSON: Yes. GOVT.11.

MR McCABE: Right, GOVT.11 is - if I could go through the clauses and at the same time compare and contrast the clauses contained in GOVT.11 with the clauses contained in TPSA.6.

Now the first clause (a)(i) is straightforward. It states what is already agreed - sorry, what is already an agreed arrangement between the government and the public sector unions, and that is that salaries and wages shall be paid by cheque, direct deposit or electronic funds transfer. It was also part of the second-tier agreement that, and I quote from that agreement: In return for a 4 per cent salary increase it is agreed that specific adjustments to conditions of employment and their application will be made in accordance with this agreement. Such adjustments where relevant will be subject to award or regulation variation at the appropriate time. End of quote.

And since we are now 5 years down the track from the second-tier agreement, and we happen to be dealing with the subject matter, we say that it is time to finalise this offset as an award item.

DEPUTY PRESIDENT ROBINSON: Is that an agreement actually?

MR McCABE: Yes -

DEPUTY PRESIDENT ROBINSON: Who is it between?

MR McCABE: - yes, it's a registered agreement.

DEPUTY PRESIDENT ROBINSON: Registered is it?

MR McCABE: Yes, yes, it is.

DEPUTY PRESIDENT ROBINSON: Could you give me a reference number or something to -

MR McCABE: It's the one thing I didn't bring with me, I'm afraid.

DEPUTY PRESIDENT ROBINSON: No.

MR HOLDEN: Mr Deputy President, I think it's registered in respect of the GCOS. It's certainly not registered in respect of all awards. All 4 per cent second-tier awards weren't registered, even though they -

DEPUTY PRESIDENT ROBINSON: Was it registered under section 55 of the act, that's what I'm asking?

MR HOLDEN: No, I think it was special - a requirement of the full bench in the case that laid down some rule that - or laid down some suggestion, at least, that they should be registered. I know it wasn't registered in the case of the TAFE Staff Award, and I think it was an oversight on behalf of your current superior, sir.

DEPUTY PRESIDENT ROBINSON: Well I'm just questioning the status of this 4 per cent agreement.

MR McCABE: I imagine that we will be going after lunch, and if I could give you that reference after lunch.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: It certainly was - the one we're talking about with the TPSA certainly was a registered industrial agreement under section 55.

DEPUTY PRESIDENT ROBINSON: Was it? Mm.

MR McCABE: So what our award clause does is to formalise this item as an award clause with emphasis being given to direct deposit in an employees' nominated financial institution.

Now this is not much different to the TPSA's clause (b) other than removal of the references to 'cheque' and 'electronic funds transfer'. The option of payment by cheque is retained by our clause (a)(ii), in that by mutual consent payment by cheque would be permitted.

We've also omitted the reference to electronic funds transfer. I think you will find that the term 'electronic funds transfer' is the process which is used to effect a direct deposit. In other words, the direct deposit of funds into an employees' account is achieved by an electronic transfer of funds from Treasury, vis-a-vis the various stages to an employees' account. We therefore consider reference to 'EFT' in this instance as being superfluous.

You will notice, sir, that the paragraph at (a)(ii) in our suggested clause is word for word with the TPSA's clause found at the second paragraph of TPSA.6. So in that instance there is complete agreement between the parties as to the wording of the clause.

Our clause (b)(i) is the replacement clause for clause (a) of TPSA.6. The two clauses are very similar, the main difference is that our clause does not specify that pay day shall be no later than Wednesday. And that is because provision is made in regulation 6 of the Financial Management and Audit Act Regulations, which you have as an exhibit, GOVT.6, for pay day to be on another day within the fortnight if the treasurer considers Wednesday is an inappropriate day.

And you will find that at subparagraph (4)(b) of regulation 6. I think we pointed that out at the time we were looking through there. And, in fact, there are employees in the state service who are regularly paid on a Thursday and have been for many years. So the provision in our clause is cast in such a

way as to blend with the Financial Management and Audit Regulations and custom and practice in the public sector. There would be no point putting a clause in an award which does not mesh comfortably with subordinate legislation dealing with the same subject matter.

Now the second sentence of our clause (b)(i) addresses the situation where pay days fall on a public holiday. Our clause says the same as the TPSA's, in effect, with the exception normal pay day if it is a holiday, rather than on the day prior to the holiday. This variation is to accommodate at least one agency which, by custom and practice, has paid the day after a public holiday.

So since we wish to have a consistent payment of wages clause for the public sector as a whole, we would request that this variation be included in any clause you may consider for the General Conditions of Service Award.

The next part is clause (b)(ii), which is the section dealing with the provision of pay slips to employees. Now this award clause is simpler than the TPSA's suggested clause at their paragraph (c). That is because we have written the clause to mesh with the administrative instruction which goes into more detail as to what is to be provided to the employee by way of details on a pay slip. And, in fact, you'll find that the opening sentence of the TPSA's clause (c) is exactly the same as the words set out in clause (1) of the administrative instruction. So that aspect is mutually agreed.

The next section is where we part company somewhat in that we find that some of the items in the list of details set out in (i) to (xi) in TPSA.6 - clause (c) of TPSA.6, are somewhat difficult for the government to comply with at the current time. And they're the details which the TPSA say must be included on the pay slip.

Now having said that I should explain that we can comply with all the items in some of the larger individual payrolls, notably those in the health area and the education area. However there is one pay system which can accommodate nearly all the items requested by the TPSA on its pay slips, but not everyone of those items, and that is the PAYSTAT system which covers employees across a range of departments and agencies and is used to pay about 14,000 state employees.

Now we say, to the best of our knowledge, there have been very few complaints, if any, from employees about any lack of detail which they receive on the pay slips which are issued under the PAYSTAT pay system. The PAYSTAT system was introduced in 1985 and being 18 years old - I'm sorry, that should be 1975 - and being 18 years old is somewhat antiquated by modern computing standards.

However there is no doubt that the system still works well at the moment and continues to meet the government's needs while the question of how pay systems will be organised and managed in the future, is considered by the government. What we say about PAYSTAT is that it is an adequate system with which employees appear to be entirely satisfied.

However that part of the PAYSTAT system which produces the pay slips cannot, without difficulty and some expense, be extended or modified to produce pay slips with any more additional information on it. So to be able to provide pay slips with all the information on it, as sought by the TPSA, would require the government to modify, replace or abandon the PAYSTAT system and substitute a more modern system to produce a pay slip with only slightly more information contained in it.

If that was forced on the employer, even with a 12 months' grace suggested in TPSA.6, in the proviso clause in (c), it could represent a substantial cost impost on the employer in return for very little extra information to the employee. And as we have said, we have no complaints about the PAYSTAT pay slips and we doubt that there is a real demand for the extra information being sought by the TPSA.

And to give you an idea what information we can currently provide on a PAYSTAT pay slip I'd seek to tender as an exhibit a blank PAYSTAT pay slip.

DEPUTY PRESIDENT ROBINSON: GOVT.12.

MR McCABE: You will notice these blank forms have had cancelled typed across them, Mr Deputy President, just in case anyone was tempted to type their own out. I'm sure none of my colleagues here -

DEPUTY PRESIDENT ROBINSON: Well mine is, I don't know whether all the others are.

MR HOLDEN: Only underpaid public servants would do that, John, not highly paid ones like you and your colleagues.

MR McCABE: I wish it was true.

Now the various boxes do cover various items sought to be covered by the TPSA, and if we go through the two we can show you what is covered and what is not. Now TPSA item (i) seeks the date of payment. Now that is not shown on the PAYSTAT form as such. However the next item sought in (ii) is shown, and that is the period ending for a particular pay. Now since the pay day for all public sector employees is fixed by law, and has been since the Audit Act of 1918, which set the first pay day for the public service in that year, we say that there is little to differentiate between the date of payment and the

period ending for that pay, because for all intents and purposes it's the same day.

Now that may vary slightly if the pay is a termination pay or pay in advance of holidays or if a public holiday intervenes. However we say that providing a date on which the pay is made - sorry, I'll put that again. We say that providing a date on which the pay is made is not the important issue as far as the employee is concerned. We say that the period covered by the pay is the important fact to allow the employee to check what should be included in their pay for that period. Now while more modern pay advices will contain a date of payment, we cannot at the moment accommodate that item on the PAYSTAT form.

If we can move to TPSA item (ii), now that item - which is the period covered by the payment. Obviously that item is covered by the box titled 'period ending' on the PAYSTAT form. The next TPSA item at (iii), gross wages, and that is covered by the PAYSTAT form on the right-hand column, second from the top, and titled 'gross pay'. (iv) is more than covered in the PAYSTAT form, under the item on the left-hand side headed 'analysis of overtime and/or penalty rates'.

Now this box on the PAYSTAT form gives a total analysis of penalty rates at the various factors of half ordinary time, time and a half, double time and any other rates. Now this degree of analysis of penalty rates does not appear to be called for in TPSA.6. We would consider that this dissection of penalty and ordinary rates would be of much more interest to employees than telling them the date of their payment and classification, which we will come to in a moment. So we say that (iv) in the TPSA's claim is more than adequately covered by the PAYSTAT system.

The next item in TPSA.6 is (v), allowances. This is fully covered in the PAYSTAT form in the section headed 'remuneration', in conjunction with the area at the bottom of the slip which is titled 'analysis of adjustment' column. So any standard allowances are shown in a separate box, in addition to which any adjustments in the form of, say, leave loading allowance, higher duty allowance or, say, retrospective pay for an increment, is shown in the 'adjustments this pay' box at the bottom of the pay slip.

The total in the 'adjustments' box is then analysed in the section at the bottom of the slip giving full details of how the amount is calculated. So that that area is more than fully covered.

(vi) in TPSA.6 is a bit of a mystery but it is assumed that this would cover any payment which is not by way of salary or allowance or penalty payments. I'm not sure what those payments might be but it is assumed that they would be

accommodated in the 'adjustments this pay' box already contained on the PAYSTAT slip.

The next item roman (vii), and that is an employee - the employees classification. Now this is the only other area sought by the claim which the PAYSTAT form cannot accommodate.

However, one of the items which the PAYSTAT form does cover and is - and which is not sought by the TPSA is that the award salary for each employee is shown as an item on the top line of the PAYSTAT form.

Now we say that given that - that the employee is given a letter of appointment and a position number when he or she takes up a job with the government, that employee in the vast majority of cases would be aware of what the job that they've got is classified as. If they had any doubt they can check their award salary as shown on the pay slip against the appropriate - appropriate award to verify that classification. If they are still in doubt they can ask their pay officer or personnel officer to verify the award classification.

So while the pay slip does not spell out in detail the actual classification it does provide the salary for the corresponding award classification.

Now we say that we substantially comply with what the TPSA are seeking and we hold that it is not necessary to specify that item in an award provision.

The next four items roman (viii) to roman (xi) are all accommodated by the PAYSTAT form and we comply with the claim in all those respects as you can see.

In respect to superannuation, both the compulsory superannuation payments or SAF as it is known in the public sector and any other super contributions are shown as separate items. Tax is detailed as well as the net pay.

Other deductions are shown in the various boxes under the heading 'Deductions' and more than adequately cover the usual range of deductions requested by employees.

So in effect we say that the only two items which may not be perfectly clear are the requests for the date of payment and the employees award classification, but both of those are shown in effect, if not in fact.

Now we have used the PAYSTAT system as an example of one - of one system in the state government which would not fully meet the information requirements of the award clause sought by the TPSA.

There are several other small pay systems in some of the smaller divisions and government agencies which could well be affected by the additional award requirements if they were granted and which would also incur expense to upgrade them to provide the full information sought.

Now I can't give you full details of those separate systems but there are several of them which provide varying degrees of information on pay slips.

Now we make the point that if the TPSA wish to press for these items to be shown then it cannot easily be done on the present PAYSTAT system or some of the other systems. To be able to show these details would mean going to a new or different system which will occur in the foreseeable future but which the government needs some time to evaluate the most efficient and effective way to approach this.

As I've said, the PAYSTAT system is some 18 years old and will need to be replaced but just how that's going to be done and what the overall arrangements in the government for pays will be is something that the government's pondering at the moment.

And having said that, we point out that the immediate introduction of a system to comply with the award provision sought would involve the government in direct cost implications which are not negligible and if such provisions were to be sought would need to be processed under the special case principle as we pointed out on the last day of hearing.

So to enable this matter to be decided by these - by proceedings in the form of these before you, Mr Deputy President, which are not special case proceedings, we have therefore cast our preferred award clause in a much simpler form than the subclause (c) of TPSA.6. Our preferred clause is set out in item (b)(ii) in exhibit Government.11, and that simply says:

An employee shall be given details of gross and net pay due, together with details of hours, allowances, overtime and any deductions made by the employer.

Now this clause must be read in conjunction with the administrative instruction on payroll procedures which requires that written advice on the pay slips for all employees must contain at least certain information. So if you look at item 2(b) of the administrative instruction which is exhibit Government.9 it says that those details must be relevant details in the certified Salary Abstract required by the Treasurer's Instruction No.802.

And if you turn to Treasurer's Instruction 802 which is part of Government.5 we see that each department must prepare a

certified pay sheet two working days before pay day, part of which is a Salary Abstract.

Paragraph (c) details what the Abstract shall contain.

So - and we've already - I've already read that into transcript - so we say that between our award clause (b)(ii) and the administrative instruction, we are providing adequate information to employees to know what comprises the major elements going into and out of their pay packets.

DEPUTY PRESIDENT ROBINSON: The fact that agencies must provide Treasury with pay advice 2 days in advance, does that mean that 2 days are held in hand?

MR McCABE: Yes, I understand that nothing is held in hand and anything which can be anticipated is included in the pay.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: Obviously there will be some payments which may not be covered -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - but if they're not brought to the Treasury's attention -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and they're not included, but those that can be anticipated are included.

DEPUTY PRESIDENT ROBINSON: That - the union won't like this but it's not - not uncommon under private sector awards for - for there be some buffer between actual pay day and the close of the pay period -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: - and it's - it's a - it makes it difficult for the employer to make sure that pay is absolutely accurate if they have to pay them up to the - to the minute.

MR McCABE: Yes. I guess most people are on a fixed salary -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - which can be easily anticipated. It's only in those instances where there may be some overtime worked.

DEPUTY PRESIDENT ROBINSON: Yes, there would be large sectors of shift workers.

MR McCABE: Yes, I understand the shift work is anticipated and adjusted before the - before the next pay day, yes.

DEPUTY PRESIDENT ROBINSON: I wouldn't like to have to work in a pay office.

MR McCABE: Now having covered that we say there is an important factor to be considered in these deliberations and that's the fact that under the Industrial Relations Act and regulations, there is no requirement on any employer to provide an employee with details of the dissection of their wages. The act simply states at section 49 that employees are entitled to be paid by the employer for the work performed.

However, section 75 of the act requires an employer to keep a prescribed record of employment for each employee. The Industrial Relations Regulations at regulation 23 then go on to itemise the details which must be kept in those records. Those details include of course details of wages and various rates and deductions, so that the legal requirement on the employer is to keep details of the employee's earnings and the deductions made from them. An employer must pay the employee in accordance with those records kept, but there is no legal requirement to give the precise details as to the breakdown of that payment.

Now the recourse available to the employee, if they believe they have not been properly paid is to question the payment with the employer. If they are still not satisfied they can then ask either their union or an authorised inspector to inspect the employer's records to find out whether they - whether their pay has been correctly calculated, so that, in effect - sorry - so that, in effect, is the employer's legal duty in respect of the pay records, and that is, to see the specified records which may be subject to inspection.

In our view, there is no more obligation on the employer than that imposed by the Industrial Relations Act and regulations, and we say that the government - state government complies fully with those requirements and goes beyond that to the extent of providing detailed pay slips which cover most of the important information which an employee would require.

Now we don't resile from the fact that you could impose further requirements on us by way of an award provision which requires the information on a pay slip which we say is not possible to supply at the moment. But we have shown you that we comply with the minimum legal requirements in this regard and we say that any further requirement which would incur the government in considerable expense in meeting those requirements cannot be justified in terms of either a), the minimal - the minimum legal requirements, or b), the conditions of employment principle due to the cost factors.

So our preferred paragraph at (b)(ii) in relation to pay advice has been framed to accommodate the information which we can already provide and which is required in law to be available.

If I could, just as a final comment on that aspect, if I could refer you again to exhibit Government.10 which has a comment on this subject at the third-last paragraph on the front page and that paragraph refers to an interpretation of the federal Metal Trades Award by Justice O'Mara in 1942, and a full copy of that decision is appended to Government.10.

Now the relevant part of the decision occurs at the last paragraph of the second page of the decision, and if I could read that paragraph in full, it says, quote:

In the third matter which relates to payment of wages it is alleged that Cockatoo Dock and Engineering Co. Pty. Ltd. are not complying with the provisions of clause 17 (e) which provides that on or prior to pay day the employer shall state to each employee in writing the amount of wages to which he is entitled, the amount of deductions made therefrom and the net amount being paid to him. From the pay envelope submitted to the Court it appears that this Company endorses on each envelope the net amount of wages paid and the amount of the deductions and this I regard as a sufficient compliance with the clause. I understand that the employees contend that they should be supplied with information as to the make-up of their wage, the total amount being dissected to show ordinary wages, overtime, shift allowance and special rates. The award however does not provide to that effect and with the demands which are now being made upon the clerical staffs of these large establishments I do not feel that it would be proper to impose this additional burden upon them. If an employee is correctly informed of the amounts of his gross -

- wages - sorry, of his gross -

- and net wages and given details of the amount of deductions, I consider that he should easily be able to calculate his earnings under the various clauses of the award.

Now, end of quote there.

Now we say that this is a fairly venerable decision made during war years which the - which is noted there -

MR HOLDEN: Makes you laugh at least.

DEPUTY PRESIDENT ROBINSON: Which war was that?

MR McCABE: Yes.

MR: The Boer War.

MR McCABE: However, the principles contained in it are worthy of note and the judge says, in effect that one doesn't have to comply to the last letter of the award in supplying pay information. If there is adequate basic information there then it should be regarded as sufficient compliance with the award.

The judge also says in effect, that employees should not expect to be spoon fed when it comes to pay information. If they given adequate basic information then they should be expected to be able to work out for themselves some of the information they may require.

Now we say that that principle should be applied when it comes to consideration of all that range of information which is being sought by the TPSA in clause 6, and it certainly is light years away - the information that's being supplied at the moment from what was considered adequate in 1942, and that's -

MRS STRUGNELL: It was cash in hand.

DEPUTY PRESIDENT ROBINSON: You've been on your feet a fair while, Mr McCabe, whenever you're -

MR McCABE: Yes -

DEPUTY PRESIDENT ROBINSON: - wanting an adjournment we'll grant it.

MR McCABE: Probably another three quarters of an hour to go, and -

DEPUTY PRESIDENT ROBINSON: Well I think we'll adjourn till a quarter past 2.00?

MR McCABE: Yes, okay, thank you.

LUNCHEON ADJOURNMENT

DEPUTY PRESIDENT ROBINSON: Mr McCabe?

MR McCABE: Yes. Thank you, Mr Deputy President. A couple of matters raised before the luncheon adjournment, one being the question as to whether the 4 per cent second tier agreement was a registered agreement under the Industrial Relations Act. Now, I do have a 'T' number for it. This is for the TPSA's 4 per cent second tier agreement and that is T.1216 of 1988 and I believe - although I only have part of the decision of the full bench which refers to that 4 per cent second tier agreement - I believe they did ratify that agreement under that number.

DEPUTY PRESIDENT ROBINSON: I've been doing a bit of research myself during the break and dug out some of those agreements in relation to the 4 per cent deal and each of them has to have an overriding effect on certain awards - nominated awards and I was wondering whether T.1216 deals with the question of payment of wages and whether or not it overrides the General Conditions of Service Award.

MR McCABE: Now would you be referring to the list -

DEPUTY PRESIDENT ROBINSON: I haven't got that one with me, I must be frank with you.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: I've got T.1233 which is structural efficiency agreement between the Minister, the Public Service Association and others. It does deal with noncash payment of wages in clause 4 of the agreement and in the list of awards, to quote the preamble - or the preceding words, it says:

This agreement shall apply to the Minister for Public Administration and to those employee organisations signatory to this agreement and their members employed pursuant to the following awards and agreements of the Tasmanian Industrial Commission.

- and there's dozens of awards.

MR McCABE: Yes, yes, I think I have that very page - second page of the agreement itself.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: That list refers to the awards to be varied for the 4 per cent.

DEPUTY PRESIDENT ROBINSON: Right. It mentions -

MR McCABE: Not the awards to be varied for the various offsets contained in the agreement.

DEPUTY PRESIDENT ROBINSON: But it nominates awards, doesn't it, for some purposes, that they are the awards to be overridden, if you like, by the agreement?

MR McCABE: I think they're the awards to be varied by the 4 per cent increase. I think that's what the reference is to, but all the -

DEPUTY PRESIDENT ROBINSON: Well the General Conditions of Service Award is not on the list.

MR McCABE: No, it isn't because -

DEPUTY PRESIDENT ROBINSON: It's got General Officers which is the closest -

MR McCABE: Yes. But the General Conditions of Service wouldn't be varied for 4 per cent because a lot of those - well the expenses in - they're expense related allowance, skill related allowances, overtime provisions which wouldn't be varied generally by 4 per cent as a result of the second tier -

DEPUTY PRESIDENT ROBINSON: Yes, but if you take the words of the agreement I just read out:

This agreement shall apply to the Minister for Public Administration and to those employee organisations signatory to this agreement and their members employed pursuant to the following awards -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Well, -

MR McCABE: Well as I understand it they are the awards to be varied by 4 per cent in the salaries scales in recognition of the offsets in the second tier agreement.

DEPUTY PRESIDENT ROBINSON: Yes, but the agreement doesn't apply to people covered by those awards on the face of it. How else could the words be interpreted? I'll read it again, for the benefit of those who haven't got it in front of them:

This agreement shall apply to the Minister for Public Administration and to those employee organisations signatory to this agreement and their members employed pursuant to the following awards and agreements of the Tasmanian Industrial Commission.

And it lists the awards, and I think if we go to - no - but I guess the purpose of it is to make it clear as to what the scope of the agreement is.

MR McCABE: Yes. Well I've always taken that to mean that those - the employees subject to those - to that list of awards will receive a 4 per cent salary increase which is the first paragraph on the next page of the agreement -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - in return for 4 per cent salary increase -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - in return for the offsets which are set out in the other parts of the agreement. And if you go to the decision - the full bench's decision in full, there is a list - it doesn't seem to have a page number on it for some reason or other - but it is a list of awards to be varied under application T.1216 which is the TPSA application -

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: - and I think would correspond to the list we've just been referring to in the agreement.

DEPUTY PRESIDENT ROBINSON: But you know an agreement overrides an award, even a decision of a full bench dealing with an award matter.

MR McCABE: Well perhaps we'd better take the 4 per cent back then, Mr Deputy President.

MR HOLDEN: I think you have done many times.

DEPUTY PRESIDENT ROBINSON: any way.

MR McCABE: I can add nothing more to that -

DEPUTY PRESIDENT ROBINSON: No, no, -

MR McCABE: - other than my understanding of how it's to be applied and that was - certainly, the payment of wages was covered by the TPSA agreement and there was that agreement that at the appropriate time the matter should become award variations and we say that now is the appropriate time to acknowledge the nonpayment of cash wages.

DEPUTY PRESIDENT ROBINSON: Very interesting.

MR McCABE: One of the other matters you raised was in relation to previous payments which may have arisen as a

result of penalty clauses under the payment of wages clauses and I was able to - in the short time available - have a look at a few matters which have come before the commission under section 29 by way of actual claims or disputed claims for payment and all of them that I was able to find were heard before the commission under section 29, but none of them were actually decided by the commission. They were all seem to be subject to out of court settlement, if you like, -

DEPUTY PRESIDENT ROBINSON: Highly commendable too I can say.

MR McCABE: One of the more notable ones involved an employee at the North West Regional Hospital and that was a section 29 dispute under matter T.3489 of 1991 in which an employee was claiming 4 weeks penalty payment for a payment of \$29.00 I understand which led to a claim from the HSUA of a penalty payment of \$18,803 which I can assure you was not paid -

DEPUTY PRESIDENT ROBINSON: Not paid?

MR McCABE: - but there was an amount of money paid in the out of court settlement, but nowhere near the \$18,800 but I think -

DEPUTY PRESIDENT ROBINSON: Half, a quarter?

MR McCABE: I wasn't able to ascertain the actual settlement of that one, -

DEPUTY PRESIDENT ROBINSON: No. Right.

MR McCABE: - but it does point up, I think the ridiculous lengths to which these penalty payments can go if things aren't handled properly on both sides.

DEPUTY PRESIDENT ROBINSON: Well obviously they were handled properly and it didn't cost any where near what was claimed. Right. Thank you for that. No others?

MR McCABE: It would be extremely difficult to find out whether - what other costs there have been incurred by the government. I don't think we could do that in the time available to us before these proceedings are finished - assuming they finish today - but I'm not sure how the penalty clause is applied in a departmental sense. I mean, they may apply.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: If a claim is made, it may be paid and we'd have no knowledge of that. It would be a matter of trying to find out.

DEPUTY PRESIDENT ROBINSON: Well it would probably be in your own best interests, I mean, to illustrate a point that you are making in relation to the cost implications and as I say, rather than giving a hypothetical example which might occur, I asked if there was any more concrete way of demonstrating the point by past experience.

MR McCABE: Yes. As I say, it would take some time to do that.

DEPUTY PRESIDENT ROBINSON: Well it might be impossible if, in some instances -

MR McCABE: Well it could very well be.

DEPUTY PRESIDENT ROBINSON: - if there's sort of an embargo on the terms of the settlements.

MR McCABE: Well - yes, quite so. But we do - and I don't have it with me - but there is a claim in with the government at the moment from the Secondary Colleges Staff Association for a variety of penalty payments for a variety of employees -

DEPUTY PRESIDENT ROBINSON: Oh, right.

MR McCABE: - and I can't give you those details because my papers have gone somewhere amiss, but -

DEPUTY PRESIDENT ROBINSON: Well I hope I don't have to have cause to go deeper into the particular -

MR McCABE: Yes. Well, I - it depends -

DEPUTY PRESIDENT ROBINSON: - problem.

MR McCABE: I guess it depends how the matter is handled between now and - well, the next step of the process, but -

DEPUTY PRESIDENT ROBINSON: Well we'll put our faith in those who are involved in being able to resolve it amicably and for the least possible cost - consistent with what's fair and just.

MR McCABE: Indeed. If I could take you, Mr Deputy President, to the second page of Exhibit Government.7. Government.7 was the schematic diagram showing the processes involved in the PAYSTAT pay system.

DEPUTY PRESIDENT ROBINSON: Oh, yes.

MR McCABE: There is an attachment to that. And this illustrates to what extent and to what trouble the government goes to to accommodate employees in making their - or actually processing their voluntary deductions and as we saw earlier in the PAYSTAT pay slip:

There are seven (7) broad categories of voluntary deductions which are shown on the pay advice -

- and they're detailed there. Some of the superannuation funds are voluntary and so there's a choice there that employees may be in more than one superannuation fund and the superannuation accumulation fund information is shown separately on the pay advice because it's not a deduction. It's a payment which must be made by the employers.

DEPUTY PRESIDENT ROBINSON: It's a notional payment.

MR McCABE: Yes. And:

In each of the above seven broad categories there is capacity to include up to 100 individual organisations. It's not possible to list the name of every individual organisation on the pay advice -

- so there may be up to a hundred assurance companies which employees could have deductions made to. One employee may have 10, 12, 20 different policies with different companies to whom deductions and premiums are paid and that can be accommodated by the PAYSTAT system.

DEPUTY PRESIDENT ROBINSON: There'd be a lot of commissions coming out of a lot funds too, wouldn't there?

MR McCABE: Well, that's right, yes. And 3 says:

Where an employee has authorised two or more voluntary deductions which fall into one of the above broad categories only the aggregate amount is shown on the pay advice for that category.

That's, I don't think, unreasonable. The employee should be aware of what sort of payments they're making to - in respect of assurance or medical funds. One assumes and hopes that an employee is only in one medical fund. Unions is another matter. We do have some people who feel they need to belong to more than one union, but not many.

DEPUTY PRESIDENT ROBINSON: Or none at all.

MR McCABE: Or none at all, indeed. And at 4 we say:

The following table shows the number of individual organisations included in the voluntary deductions component of the PAYSTAT payroll system at mid-July 1993.

So you can see the categories there that we have listed. The capacity is there are a 100 different organisations could be catered for, and they are the actual number of organisations for whom payments are made on a regular basis by the government on behalf of the employee. So there is quite a variety there, with the assurance being the highest with 62.

So the government does go to not a, you know, an inconsiderable amount of trouble to accommodate employees in paying their deductions.

And (5) says:

Under the above arrangements there is no current restriction on adding a new organisation for deduction purposes approved by the Treasurer pursuant to the Regulations until the number exceeds 100 in a particular broad category.

Now I doubt that that is going to occur, so -

I think the point is that if we want everything shown on the paystat slip it's going to be very awkward to do it, the detail of every deduction and with some employees you would probably need two or three foolscap sheets to show every deduction. We don't think it is necessary.

It could be done but the results may not be - may be less efficacious to the employees than they are at the moment - if I could put it that way.

To move on then we say that the TPSA and the other unions have not satisfactorily explained to you how the clause they are proposing at clause (c) can be justified in terms of cost, nor have they satisfactorily explained by way of evidence or submission that there is a need for the range of information sought in clause (c).

They have produced no witness evidence or other evidence to substantiate the need for this additional information.

No-one has proven to the commission that any employee has ever complained about, let alone been disadvantaged by, the non-provision of additional information sought.

So we say that in the absence of supporting evidence and submissions by the TPSA the reasons we have put forward on the

basis of meeting minimum legal requirements and the additional cost factors must weigh heavily against the TPSA claim.

If we could then move to the next part of the TPSA's claim, that being clause (d) of TPSA.6, which addresses the matter of deductions from wages due.

We say that there is no need to address this as an award clause since it is already covered by Treasurer's Instruction 807 and the State Service Regulation No. 10.

So the matter of voluntary deductions is satisfactorily taken care of, in our view, in other instruments.

Moving to clause (e) of TPSA.6, which is the penalty clause for waiting time, we say that we have already dealt with the merits of this clause in some detail, and we say that the clause cannot be granted on the grounds of either practicality or costs.

It is not a provision which can work in an electronic fund pay environment. The costs associated with it are prima facie not negligible, so it cannot be considered other than in accordance with the special case principle.

The last clause of TPSA.6 is clause (f) Parts I and II which is the other clause with which we have no quarrel and, in fact, the clause we are suggesting at our clause (d) of Government.11 is for practical purposes the same as the TPSA's clause (f).

There is a minor difference between the second subclause in both those examples in that we have said that on termination the employer will forward, and I quote, 'as soon as possible', any payments to the employee's home address.

The TPSA's clause says that the pay due should be forward, quote, 'on the next working day of the pay office'.

Our view is that it may not be practical to calculate all of an employee's termination entitlements and to have a payment ready to be posted on the next day after termination - and that would be especially so in the case of an instant dismissal for misconduct - which is of course not able to be anticipated by the employer.

Another scenario is that there could be a number of employees being terminated at the same time which could mean that the personnel and pay systems are unable to have every termination payment ready to be posted out after the terminations take place.

So the wording in our clause does give the employer some degree of latitude to prepare and forward termination payments

to an employee as soon as practical, and we would anticipate that in most cases this would be the next working day, but for the reasons state may not be able to be achieved quite that soon.

So we say that our clause is preferred, in that it takes a more realistic view of the situation whilst still ensuring that an ex-employee gets his or her money as soon as possible.

So that, in effect, is our submission in relation to TPSA.6 and Government.11.

Now we say that Government.11 represents a practical and workable payment of wages clause. It has been developed to work in conjunction with the existing State Service Regulations, Financial Management and Audit Act and Regulations and the Administrative Instruction No. 30.

The clause sought by the TPSA in TPSA.6 cannot work effectively in the EFT environment and does not sit comfortably with the other instruments.

The penalty clause of TPSA.6 cannot be justified either in practical terms, and it cannot be justified in the terms of condition of employment principle because of its direct cost implications.

In regard to the wage fixing principles established by this commission in February 1992 we say that we have addressed the relevant principles throughout our submissions and the only relevant principle as far as we are concerned that would apply in these proceedings is the conditions of employment principle.

As we have said, the TPSA would need to seek a special case hearing if they wish to continue to pursue their claim with the cost implications which it contains, as outlined in Exhibit Government.4 and detailed in submissions today.

And we have also put the argument that the wage fixing principles do not specify who the costs might be borne by if the cost is passed on to somebody else in the community and somebody else is going to have to pay the penalty, then that is an additional cost.

One assumes it is directed at the employer, but that's not what the principle says. If there is going to be an additional cost for someone, then that has to be kept in mind when considering the merits of including a new condition of employment.

In regard to section 36 of the Industrial Relations Act, the public interest, we say that the notion of the payment of

wages clause to be contained in an award is in itself not repugnant to the public interest.

However, given the impracticalities in the cost implications of the clause sought in TPSA.6 we say that it is not in the interests of the public to approve such a clause.

On the other hand we say that the clause we have developed sits comfortably with existing legal and administrative requirements and does not contain any cost implications.

For those reasons, we say that our award proposal also sits very comfortably with the public interest requirements of the Act and could be adopted by the commission in these proceedings.

On the question of operative date of any award amendment which the commission may contemplate we say that no case has been put for any retrospective operation under section 37 of the Act of the TPSA's clause as sought.

We would say that retrospective operation of any clause in these proceedings is undesirable and unsupported, and we say that the operation of an award clause, if granted, should be on or after the date of your decision.

That concludes my prepared submission, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr McCabe.

MR McCABE: The question was raised this morning, and I haven't had time to really ponder it in any depth, but the differences between section 42 of the Industrial Relations Act and the wording of the Financial Management and Audit Act, and you did raise the question as to how these two bits of legislation which both qualify interact, and we say that the Financial Management and Audit Act says that the instructions shall have effect unless they are inconsistent with this Act or any other written law.

Now if there isn't any inconsistency, then we say that they must prevail over anything contained in an award, because an award must be read subject to any Act dealing with the same subject matter.

So, if the Treasury Instructions themselves are clear and inconsistent - sorry, consistent - with any other Act or law. I take it that 'written law' means any other statute. Then the award must be read subject to the Financial Management and Audit Act. I think that is a fairly logical explanation of how it may work.

DEPUTY PRESIDENT ROBINSON: The Financial Management and Audit Act doesn't deal with the question of, if you like, a penalty

payment for late payment of wages. So if an award contains such a provision, prima facie there wouldn't be any inconsistency.

MR McCABE: No, there wouldn't, no, prima facie.

DEPUTY PRESIDENT ROBINSON: That's a nice little expression, isn't it, to get over with. I'm not sure.

So, what you are really saying to me, from your examination of those two pieces of legislative enactment is that it is not that there could be no award provision, because in fact you have put forward one which you think would be appropriate and suitable to go into the award. But if any other proposal which is put up which is inconsistent with the Financial Management and Audit Act then it doesn't have any legs?

MR McCABE: That's certainly what the legislation suggests, yes. If an award is read subject to any other Act dealing with the same subject matter, then the matter in those other Acts would prevail.

DEPUTY PRESIDENT ROBINSON: I guess it is a question of whether the subject matter is payment of wages or the subject matter is penalty for late payment. The lawyers could have a feast probably.

Thanks very much, Mr McCabe.

MR McCABE: If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Are the two union organisations in a position to exercise a right of reply at this time or would you like the opportunity of an adjournment?

MRS STRUGNELL: Mr Deputy President, if the commission pleases, in view of the importance as we see it of this particular case and in view of the vast amount of submission put by the government today, we would if it be possible request an adjournment until transcript is available.

If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Mr Holden, are you going to have a contrary view?

MR HOLDEN: I intend to have two bob each way, Mr Deputy President. The TTSS fully support the TPSA request for an adjournment. We are actually following in steps trodden by others on many occasions, aren't we?

DEPUTY PRESIDENT ROBINSON: Don't ask me.

MR HOLDEN: Usually the opposition to our submissions.

Certainly I think there is a need for transcript to be available because of the breadth of areas covered by Mr McCabe. However, from the Staff Society's position, as I think you may be aware, I intend to take some holidays at the end of the month and I certainly wouldn't want this case to be held up because of my absence, because I certainly don't see the society as the major player in this application.

Therefore, with the commission's permission, I would be prepared to respond on behalf of the society this afternoon rather than have the matter delayed until such time as I return from leave.

DEPUTY PRESIDENT ROBINSON: I'm happy for you to proceed if you're able to, and I will grant an adjournment insofar as the TPSA is concerned.

MR HOLDEN: Thank you very much for your indulgence, Mr Deputy President.

Because of the fact that I am responding off-the-cuff to what is a mass of material, I'm sure if I miss anything my colleague Mrs Strugnell will certainly bring it to your attention when she has had time to peruse the transcript and prepare a response.

The basis of Mr McCabe's submission seems to lie in a number of points. No. 1, where does the responsibility lay; secondly, the context of penalties; and third, the arbitrary right of the government to simply determine the conditions which will apply in respect to payment of wages.

Well, clearly the responsibility lies with the government. The government has received its benefits from the contract of employment, it has its work done, and a major part of its responsibility is to ensure the employee is paid.

Now the arrangements the government makes with other parties is the government's responsibility. It in no way reduces it's responsibility to ensure its employees are paid, and I will deal in somewhat more detail with that at a later stage.

In terms of the penalty, without a proper and adequate penalty there is no real incentive on the government to ensure that the employee is paid as quickly as possible, and in terms of the fact that something already exists by past practice, or that it is contained in the regulations is, in the view of the unions, inadequate because in this day and age, as we see so often, governments with the stroke of a ministerial pen exercise their right to change conditions, and that has happened on a number of occasions in the past.

It's interesting if one looks at the exhibits tendered by Mr McCabe and in particular commencing with Exhibit Government.5 of today no where in there does it say that the employee is entitled to receive the information.

It's not until we come to Government Exhibit 9 when we read under heading 1 on page 1:

On or prior to pay day each employee shall be provided with written advice setting out full details of the wages to which that employee is entitled.

My examination of all the previous documents indicates to me that there is no such requirement prior to that administrative instruction, and I draw to the commission's attention the date on that administrative instruction - 29.7.93.

It is there interesting as to what did occur before. It would appear that the government may well have been providing the information, but they were not forced to do so, and if they had wished to they could have ceased to do so.

From the employees' point of view we believe that they have an automatic right to as much detail as it is possible to provide, and I think the lack of requirement in the regulations simply shows the general approach of the employer in this instance to the lack of employee rights.

It was only when they were under constant pressure - well, it became constant in June and July of '93 - it certainly hadn't been constant from 1990 when the application was made, that they saw fit to include in an instruction that the employee should receive written advice.

It is interesting of course that Mr McCabe raises the question of where does jurisdiction lie in this matter, and the TTSS has a different interpretation to that put forward by Mr McCabe because Exhibit Government.6 which is the exhibit that deals with the Financial Management and Audit Act, Treasurer's Instruction 23, which reads:

The Treasurer shall issue instructions with respect to the principles, practices and procedures to be observed in the financial management of all Agencies, and those instructions shall have effect unless they are inconsistent with this Act or any other written law.

Well it has long been taken as read that awards have the force of written law.

And therefore if it is inconsistent with them - with that award - it of course must be written down and be subservient to that award.

It is, of course, interesting when one looks at these regulations that, like many other things, I think they're as out of date as the government and it should also be realised of course that the current Industrial Relations Act was brought in by a government of the current political collar. In fact most of the members of the current government were probably members of the government that introduced this act.

COLOUR

Maybe they're having second thoughts of the efficacy of their act at that time.

The Treasurer's Instructions certainly do not prevent the commission from including in the award a clause dealing with the question of payment of wages. There may well at some stage be an argument of as to which is predominant - whether it's the Treasurer's Instructions or the award - but whilst the question of the conditions that surround payment of wages is arbitrarily determined by the Treasurer or his advisors, I have to put it to this commission that that has to represent prima facie a denial of natural justice to the employee.

The employee has delivered his side of the contract; the employer has an obligation to deliver their side of the contract. As far as I'm concerned - and I put this in the strongest possible terms - any contract that the government has with the Reserve Bank is secondary to the contract it has with its employees.

If the government did not have a contract of employment with its employees there would be no need for a second contract with the Reserve Bank or any of the other banks. That contract exists because of the existence of the first contract of employment between the employer and the employees. And it doesn't matter what contracts the employer makes with anyone else, they cannot be seen to write down in any shape or form the first contract it has. And the responsibility clearly lies with the government as the employer to ensure that the employee is paid and paid properly and paid at the correct time.

The TTS believe it is fundamental to employment that the employer is obliged to pay and under the conditions which are generally laid down as their normal entitlement.

It seemed from listening to the government's submission that the acceptance of direct pay systems in 1988 that the employee then becomes responsible for any shortcoming of the system. Now that's absolute nonsense. The employees and their representatives fail to see any of the problems that it would raise - certainly that's a problem of theirs, but if the

government failed to see problems that would arise, that's a problem that the government have to face up to and they cannot use that as an excuse to simply say, we do not have to pay penalties for late payment - that's an absolute nonsense.

Had the government have thought that way and thought that through to its conclusion they would clearly have included at that time in awards proper provisions - or would have sought to include in the award at that time - provisions which would have achieved the aim which they're achieving - seeking to achieve now. They certainly didn't do it in the public health sector, and these provisions were already in that award at that time and by agreement. X

As I said before, being the person who authored the claim in the first place and who negotiated it with the departmental representatives, I do claim some background knowledge of that matter. And certainly of course this commission has since then arbitrated similar clauses in other public sector awards.

Now certainly the tenor of the submission from the government today is that the commission clearly got it wrong at that time because EFT payment of wages was certainly in effect at the time that the commission arbitrated in the manner it did.

In terms of exhibit Government.8 where it - which is the Westpac document - where it refers to who is responsible if there is an error, I don't see that it is a two bob each way document. Westpac say that they have made the error in crediting your account - they're at fault - otherwise they are not at fault. And I must admit I tend to agree with them. The responsibility lies with the employer. They are the one with the contract with the employee and as was raised of any costs that are affected elsewhere other than on the employer, I would submit to this commission that the Australian Industrial Relations Commission and the Tasmanian Industrial Relations Commission do not have a right to determine wage fixing principles that go to those areas - they are not industrial matters.

If the Reserve Bank make a mess of things and do not pay and the fault is on the Reserve Bank, that is a matter that would be dealt with a common law and certainly not in an industrial tribunal.

So I do not see that the bank having any responsibility unless they make the error - and they concede that in exhibit Government.8 - or, if there is a breakdown in their system - and of course employees would then have the right to challenge the bank on that in the appropriate areas - but if the fault is in any way the responsibility of the government, and not outside forces, the government should be responsible for the penalty.

To say that a penalty shouldn't apply because it's electronic funds transfer as compared when an employee receive cash payment is certainly something that I don't take on board or accept.

If an employee was not to be paid on pay day and was kept waiting till the next day, the employee didn't sit at the factory gate and freeze to death overnight and get paid for that. The employee was paid the penalty for not having the use of his own money and being kept waiting for a payment that should have been made at a specific time.

If the employer is at fault in this case, that's exactly the same - they're keeping the employee waiting for their money - the employee does not have the use of the money.

And in the same manner of course, if the employee goes to the bank and the money is not available the employee has been put to considerable inconvenience. It seems to me that from listening to the government's submission, that if the employee is inconvenienced so be it - tough luck. But, the employer mustn't be inconvenienced and the employer mustn't pay a penalty for not getting things right. Now that's contrary to everything that's happened in industrial relations practice in the past and I'll discount the exhibit that - Government.10 - it is over 50 years old in respect of the case it quotes.

It quotes from a metal trades case of Judge O'Mara in 1942. Thank heavens that Australia has gone ahead in some way since 1942 and more information is now required than was required then.

Judge O'Mara in that instance was ruling on what an award said, and no doubt in his wisdom his ruling was probably right based on what the award said at that time. But since then as the Public Hospitals Award shows there have been some significant changes to where employees under industrial democracy, et cetera, are entitled to rather more information than they were before. And certainly I believe the commission should take little if any regard of exhibit Government.10.

The TPSA clause is one that already applies to a large number of public servants - probably in excess of five - probably a lot more than 5,000 in the health system, and of course there is federal award applying to a large number of health system employees. It applies to -

DEPUTY PRESIDENT ROBINSON: Which are they?

MR HOLDEN: The ones who are under federal award - I think they might be nurses.

DEPUTY PRESIDENT ROBINSON: Oh.

MR HOLDEN: Of course there are a lot of other public health employees who are covered under the same award, still, and of course in the health area there are a large number of employees - sorry - in the education area who I've covered under state awards who do receive the benefits of an award clause that is couched in similar terms to that being sought by the TPSA.

I am interested in your observation, sir, about how the 4% second tier impacts in respect to this matter. You may recall that prior to lunch I said I thought that there was unusual arrangements about that and I am aware that that had - that the 4% second-tier agreements were required to be registered with the commission. And the reason I'm so familiar with that is, that I'm aware T.108 - 1098 of '88 - which applied to the TAFE Staff Award - was for some reason not registered. I don't know why it wasn't but the parties dealing with the matter did not register it at that time. I understand the others were but the fact that the GCOS Award is not - probably not included in those issues raises the interesting question, and I think that's one for the commission to ponder rather than for me to make any detailed submissions as to the matter.

The fact that the TPSA or other organisations did not call witnesses in my submission does - should not be taken as having great weight. As I've said, the entitlement to the information being sought in this matter is really a matter of natural justice which the employees should be - have available to them as a matter of course. And unless there are penalties, as I've already said, there is no encouragement on the government to ensure that the employee is paid as a matter of - as a matter of urgency.

In terms of the operative date, the TTSS does not oppose what was put to you by the government.

And that concludes my response at this point and for the future because I won't be saying anything further, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Holden, and I hope you have pleasant holiday.

MR HOLDEN: Oh, I'm sure I will alongside my colleague Mr McCabe, who is, I believe, going before I am - but not to the same place I might add.

MR McCABE: Thank goodness. You had me worried for a minute.

DEPUTY PRESIDENT ROBINSON: Very well. We will now adjourn and we'll fix a resumption date after transcript is produced and advise.

MR McCABE: I just wonder if - just one question before we -

DEPUTY PRESIDENT ROBINSON: Yes, Mr McCabe.

MR McCABE: Two matters have been listed for several hearing days, including the workplace representatives matter; is it the intention for the applicants to proceed if I could ask the applicants through you and does the -

DEPUTY PRESIDENT ROBINSON: Do you want us to -

MR McCABE: - does the commission propose -

DEPUTY PRESIDENT ROBINSON: - put that on while you're away?

MR McCABE: Well I certainly wouldn't -

DEPUTY PRESIDENT ROBINSON: Well you can ask them direct through me - direct through me - that's -

MR McCABE: Because I got the impression at earlier hearings that they didn't want to proceed with that. If they could indicate when we could - we are in the position of having to reply and they've put their substantive submissions and we're now in the position of having to reply to them - if they could give some indication we'd be grateful for that.

DEPUTY PRESIDENT ROBINSON: Yes, well I did indicate that I thought we ought to concentrate on one matter at a time.

Mrs Strugnell, what do you say to that?

MRS STRUGNELL: That's certainly my understanding, sir. There was no indication, I don't believe, from our part that we didn't want to proceed with the workplace representatives clause, but just that we were asked to indicate which one we would like to get first off the rank with and that was the penalty clause.

DEPUTY PRESIDENT ROBINSON: Yes. So it's - it's slightly on the backburner at the moment, Mr McCabe, but it's got to be completed one way or another and obviously we'll liaise with the - with the parties concerned before we spring it back on.

MR McCABE: Yes, thank you, Mr -

DEPUTY PRESIDENT ROBINSON: Fine. Thank you.

HEARING ADJOURNED SINE DIE