

HEARING RECOMMENCED

COMMISSIONER: Any change in appearances?

MR R. FLANAGAN: Yes, if it please the commission, FLANAGAN R., for the Australian Workers' Union, Tasmania Branch.

5 **MR R. HALE:** If the commission pleases, HALE R., for the Australian Services Union.

COMMISSIONER: Mr Baker?

MR BAKER: Thank you, sir. Since this matter was before you on the last occasion, I have had the opportunity of having two brief
10 conversations with Mr Edwards, one by telephone and another as late as yesterday morning concerning the introduction of supplementary payments into the award. However, at that point in time when I spoke to Mr Edwards yesterday, he was unsure of what the position of the TCCI was as he needed to discuss the matter with one of his
15 colleagues who, I understand, is currently on sick leave.

MR FITZGERALD: No longer, he's back alive and well.

MR BAKER: Well, yesterday he was on sick leave.

COMMISSIONER: Mr Fitzgerald, please.

MR FITZGERALD: I'm sorry.

20 MR BAKER: I'm only reporting to the commission what was advised to me yesterday. If that is incorrect -

COMMISSIONER: Just ignore please, just proceed with your submissions, Mr Baker.

MR BAKER: - that he would advise the position of the TCCI following
25 discussions that he undertook to have. I have yet to speak to Mr Edwards this morning, but I did receive a fax from Mr Fitzgerald indicating that in fact - well, I'm not sure what it does indicate - I'll read it:

30 *As I understand, this was one you are interested, in the intervening period, to advise how you wish to proceed. As indicated at the last hearing, our members reject the claim based simply on a flow-on but if you have further points to make I am happy to take them back to the members.*

35 Now, I'm not sure whether that is consistent with the discussion I had with Mr Edwards yesterday or not so I am in a position that I am unable to advise the commission as to exactly what the situation is, so

I await a response - a formal response from Mr Fitzgerald in regards to this matter.

COMMISSIONER: Just a minute, Mr Baker. When did you get that advice from Mr Fitzgerald?

5 MR BAKER: Well, I received it this morning but I understand it came in late yesterday afternoon.

COMMISSIONER: And when did you apply to Mr Fitzgerald to meet with him to discuss this matter?

10 MR BAKER: I spoke with Mr Edwards on Tuesday of this week following his return to work and I spoke to him again yesterday following a matter before the president.

15 If you recall, at the previous hearing there were some discussions as to whether or not the matter could proceed without a reference to Mr Edwards and I undertook and in fact I marked it in the diary to contact Mr Edwards upon his return from annual leave which he did so on Monday of this week and I rang him accordingly.

COMMISSIONER: And you weren't able to meet with him or you weren't able to get any satisfaction, is that it?

20 MR BAKER: Well, as I indicated, I did speak to him about the matter and I spoke to him again on, as I said, yesterday, where he indicated that he needed to talk to one of his colleagues concerning the matter and would advise me accordingly.

COMMISSIONER: And tell me, Mr Baker, where in the guidelines does it say that I'm able to grant this increase?

25 MR BAKER: Within the structural efficiency principle which then follows on into the minimum rates adjustment which is part 2 of the wage fixation principles.

COMMISSIONER: Yes. Show me where - lead me to it, Mr Baker.

30 MR BAKER: Well, in the principles as announced by the commission in it's July 1997 decision, the commission talks of structural efficiency and there is an intro into that paragraph which talks of:

35 *- it is intended that the parties to an award should co-operate positively in a continuing review of the award with a view to implementing measures to improve the efficiency of industry and enterprises and provide employees with access to more varied, fulfilling and better paid jobs. The measures should include but not be limited to:*

- *establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;*
- *eliminating impediments to multi-skilling -*

5 COMMISSIONER: Just a minute, Mr Baker, we don't really need to know about all that do we? What we've got here are a sequence of increases - is that correct?

MR BAKER: Yes.

COMMISSIONER: And under supplementary payments a banner?

10 MR BAKER: Yes.

COMMISSIONER: Now where is that mentioned in the guidelines?

MR BAKER: Well, that's what I'm coming to.

COMMISSIONER: Well, let's get to it.

15 MR BAKER: Okay. Well, under Structural Efficiency - point 2 - dot 1 -

COMMISSIONER: Just a minute now, wait till I find it. Yes - you're not going to read all that to me again, are you?

MR BAKER: No, no. I said -

20 COMMISSIONER: Well, let's get down to where it says supplementary payments.

MR BAKER: All right. Well, we have dot 1 -

COMMISSIONER: Yes.

MR BAKER: - skill-related career paths.

COMMISSIONER: Yes.

25 MR BAKER: Then over the page, on page 2, if we skip the multi-skilling -

COMMISSIONER: Yes.

30 MR BAKER: - and then the next dot point talks about creating appropriate relativities between the various categories of workers, and then if you come into dot point 4 it then says:

- including properly fixed minimum rates for classifications in awards, consistent with the Form of Orders Principle, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;

COMMISSIONER: Thank you.

MR BAKER: And then, sir, you then go on and look at the issue of supplementary payments itself which is contained in principle 5 which talks about how minimum rates adjustments shall be made.

COMMISSIONER: Yes.

MR BAKER: And, sir, I would contend with those two issues, that, in effect, is how supplementary payments of the commission not only are introduced but are varied from time to time consistent with these principles.

COMMISSIONER: Yes. Now perhaps, Mr Baker, if you just read through 5 for me so we all know where are.

MR BAKER: Okay.

Minimum rates adjustment for minimum rates awards in accordance with the October 1989 and August 1991 State Wage Case decisions shall continue to be allowable and shall be in accordance with the following:

5.1 the appropriate adjustments in any award will be applied in no less than four instalments which will become payable at six monthly intervals provided in appropriate cases longer or shorter phasing-in arrangements may be approved or awarded and/or parties may agree that part of the supplementary payment should be based on service;

5.2 The second and subsequent instalments of these adjustments will not be automatic and an application to vary the relevant award will be necessary and shall take into account those matters referred to in principle 7 previous state wage increases.

5.3 supplementary payments may be prescribed in the wages clauses of awards.

COMMISSIONER: Right. Now what does principle 7 tell us of relevance? Does it tell us anything of relevance?

MR BAKER: Well, 7 talks about the issue of the \$10 which was so that there wasn't a situation arising where the \$10, if you like, was awarded one week and the supplementary payment figure was adjusted the following week. And there was a prescribed period of time
5 that was required to elapse from the date of the decision in July.

COMMISSIONER: Yes, thanks, Mr Baker. Now this B.1, the draft order you produced last time we met on - well on 31 October that was produced.

MR BAKER: Yes. I think that was the original draft order that I
10 produced, sir, yes.

COMMISSIONER: What's the situation at the moment? Have you got the same one again or an amended one?

MR BAKER: Well, I have prepared an amended one which in fact simply reflects, if you like, if you look at the current B.1, what it
15 currently shows at the present in that exhibit was in fact the totality of the supplementary payment adjustment in four equal instalments with four operative dates.

COMMISSIONER: Yes.

MR BAKER: The new draft order simply reflects the rates of pay as at
20 1 November 1997. Obviously the date would change accordingly but that is in fact what the draft order reflects.

COMMISSIONER: Am I going to get one of those?

MR BAKER: I can provide you with one of those now, sir.

COMMISSIONER: Thank you, Mr Baker. We'll call that **EXHIBIT**
25 **B.2**. Yes, and am I to understand that these provisions are to be found in an equivalent federal award?

MR BAKER: They are currently found, sir, in the federal Metal and Engineering Industry Award.

COMMISSIONER: Yes. Before we go too much further, Mr Baker, I'd
30 like a copy of that. I'm not saying right now but when we get to the end of this.

MR BAKER: I've got to say to you, sir, I never leave home without one but I think I have.

COMMISSIONER: Yes, but I'd want something like this.

MR BAKER: Yes.
35

COMMISSIONER: So a copy of them - photocopy of it. But anyway we'll put that aside. Is there anything else you want to tell me?

MR BAKER: At this point in time, no, sir.

COMMISSIONER: Thanks, Mr Baker. Mr Flanagan?

MR FLANAGAN: Thank you, commissioner. Commissioner, it's clear from the report that Mr Baker has given that there have been some discussions between the AMWU and the TCCI. It's also clear that the AWU haven't been participating in that process. It appears from the report that little progress has been made and what the AWU would be seeking in this matter is that the parties be directed to confer and that they report back, the report-back date to be placed in the list. If it pleases the commission.

COMMISSIONER: Thanks, Mr Flanagan. Mr Hale - anything?

MR HALE: No comment, Mr Commissioner.

COMMISSIONER: Right. Mr Fitzgerald.

MR FITZGERALD: I do apologise. I wasn't intending to be precocious in comments initially I was making but I was just trying to correct Mr Baker's comments about Mr Watson's sick leave. In fact I can report that he is alive and well and he in fact was at work yesterday but not feeling too well, but that probably indicates the dedication of TCCI officers.

But it's somewhat confusing. I think probably Mr Flanagan's submission is probably the most sensible course but I should make a couple of comments.

As I understand on the last occasion when this matter was before the commission - and I do need - obviously Mr Baker had trouble reading my writing and I don't blame him for that at all, but the fax I sent to him - and I was seeking some response and I don't know whether really the onus should have been on me to seek that response because in my view when the matter was last before the commission, I think the onus is on the applicant quite clearly to indicate to us how he intends to respond.

Now I did indicate at the last hearing that a survey of our members of the application clearly rejected the application based simply on flow-on and it was my understanding that Mr Baker was to come back to us to indicate how he was to proceed particularly in terms of the principle, which I raised on the last occasion and I don't want to labour now, principle 13, which is an application to vary an award above or below the safety net. Now we're talking about increases ultimately in excess of \$40 a week which is quite clearly above the safety net and I would say that the principles which Mr Baker has relied on don't in any way assist him, but it is quite clear it falls within the specific principle of principle 13. We did indicate on the last occasion that it may be

necessary, or in fact it will be necessary, to make application for a special case.

5 Now the facts I sent Mr Baker yesterday - and it was really out of courtesy - and I did indicate - and I should indicate this to the commission - that it was out of courtesy that I sent him the fax and I also rang him this morning and was unable to contact him - but I said in my fax of yesterday which I think was sent around about five thirty:

10 *Phil, I understand that you have been in meetings as I have attempted to call you. I have also been at the commission [this was yesterday]. Out of courtesy, this is our position in the matters tomorrow.*

And I'll only refer to this particular matter but I do refer to the other matters which are listed here today.

15 *2. Supplementary payments. As I understand it, the onus was on you in the intervening period to advise how you wished to proceed. As indicated at the last hearing, our members rejected the claim based simply on flow-on but if you have further points to make I'm happy to take them back to members.*

20 So that is what were indicating to Mr Baker, and again I suppose I just reiterate our position. If he wishes to proceed then I think he should proceed in accordance with the principles. There's no - and they're simply not guidelines, they are mandatory principles which indicate how claims like this can proceed.

25 Now it's not just simply a matter of picking out where you - a few phrases in terms of - I mean with complete respect to Mr Baker in this respect - in respect to structural efficiency, it clearly is an increase well in excess of the safety net and the principle indicates in specific terms how it should proceed.

30 Now we're not trying to tag in or tag out in terms of TCCI officers but I'm a little surprised that Mr Baker on the last occasion realises here, well first, Mr Edwards has been away on leave up until recently as has Mr Watson who initially handled the matter and unfortunately came back and had three days' sick leave. Now I'm a little surprised that Mr Baker, in the intervening period, knowing that I handled the matter on
35 the last occasion, went to Mr Edwards to describe it, so his confusion about - I mean there's no inconsistent position at all between Mr Edwards and myself at all, but I'm surprised that he didn't come back to me and say, well this is how we intended to proceed.

40 So we are happy to take part in discussions. We believe that this is the only way Mr Baker can proceed. We're not, if you like, shutting the gate. Our fax indicates that there is an open gate there and I suppose the only way that can be pursued is the course suggested by Mr

Flanagan and we'd be happy to endorse that submission and take part in those discussions. If it pleases.

5 COMMISSIONER: Yes. Before you take a seat, Mr Fitzgerald, you're submitting, as I understand it, principle 13, and I'll just read those first lines there:

An application to make or vary a minimum or paid rates award for wages and/or conditions above or below the award safety net shall be referred to the President for consideration as a special case.

10 MR FITZGERALD: That's correct.

COMMISSIONER: You're relying on that?

MR FITZGERALD: That's right.

COMMISSIONER: What are those words, 'above or below the award safety net', what do they mean?

15 MR FITZGERALD: Well, in my submission, the safety nets which have been - you know, the series of safety net increases which have been awarded by the commission - \$8 or \$10 - it's increases in excess of those.

20 COMMISSIONER: And what about the supplementary payments arrangements? Were they not an effort to -

MR FITZGERALD: Well, that's a past exercise. No, that's what I'm suggesting. That's an exercise that's been completed in this award. If you look at the fixing of the minimum rates adjustments, that's a past exercise. We're now talking about something in excess of that and that's why I believe that principle 13 would apply.

25 COMMISSIONER: Yes. Well, I'd better hear from Mr Baker about that. I suppose he would argue that - well, let's hear what he says about it in due course.

MR FITZGERALD: Yes, well that's ultimately for your determination but, you know, I do point out that ultimately the increases are in excess of \$40 a week. Now that, in my submission, is something well in excess of the safety net adjustment - the minimum rates adjustments which have already been completed in this award. There's no question about that.

35 COMMISSIONER: Yes. If those processes had have been applied in these areas which appears they haven't been, it would have had very much the same result as what appears here in that exhibit, Mr Fitzgerald?

MR FITZGERALD: It's a bit hard for me to speculate on that.

COMMISSIONER: Perhaps we'd better hear from Mr Baker.

MR FITZGERALD: I'd need to take that on notice and look at the figures. It's really very difficult to assess that.

5 COMMISSIONER: Yes. Thanks, Mr Fitzgerald. Now you've heard that, Mr Baker, what do you say?

MR BAKER: Well, there are two things. First of all, I think a reading of the transcript will show that on the last occasion when we before you, the issue - and which was raised quite rightly by Mr Fitzgerald -
10 was that he sort of has been handed the file with little or no instruction and he did indicate at the time that it may be preferable that I have a discussion with Mr Edwards upon his return from annual leave. And as I indicated to the commission that is what I sought to do.

15 Now I really don't think that it's then up to me to hunt around various representatives of the TCCI to find out from them who is running the case. I mean I understand Mr Watson normally handles this award area but as I've also referred to the commission, he's been on leave and was on sick leave and I did attempt to speak - well, I did speak to Mr
20 Edwards who, I understand, for want of a better title is the manager of their industrial relations department. But that's simply belabouring the point.

In relation to the principles, I don't think there is an issue here. The principles are quite clear and the issue of the award safety net is not
25 appropriate in these circumstances. It has nothing to do with supplementary payments. If it did then what is the situation that applies to the commission where awards are currently being varied through a process of either halfway through the supplementary payments or three-quarters of the way through the supplementary
30 payments, or indeed, are just commencing them.

Supplementary payments go back to the structural efficiency principle; that is where the supplementary payment is clearly identified within the principles. Clearly identified. And as far as 13 is concerned, that
35 deals with the safety net. That deals with the issue that if we wanted to raise the base rate in the award by \$5 a week, for argument's sake, that is the basis of that principle. That's what that is about. It's not the issue of supplementary payments.

I simply reiterate the point that I made previously; supplementary payments are contained in the structural efficiency principle. They are
40 clearly defined. They are clearly shown including properly fixed minimum rates for classifications in the award consistent with the form of orders principle, related appropriately to one another with any

amounts in excess of these properly fixed minimum rates being expressed as supplementary payments. That's what it's all about.

5 And the other thing is as far as what Mr Fitzgerald talks about - about supplementary payments for juniors and apprentices, there are many awards of this commission where that principle currently applies. There are apprentices and junior workers employed under a multiplicity of awards of this commission that have supplementary payments attached to them.

10 Now I think the commission really has an issue at hand here. I think that the commission needs to indicate to the parties whether or not it believes that this application can go forward in accordance with the principles - well, my reading of the principles - or it should indicate to the parties if Mr Fitzgerald's position is correct because clearly if Mr Fitzgerald's application is correct, then that would then present to the
15 applicant organisation in an alternative path to remedy our application regardless of whether agreement is ultimately reached with the TCCI or not.

COMMISSIONER: Yes. Anything else, Mr Baker?

MR BAKER: Well, Mr Flanagan has made a suggestion.

20 COMMISSIONER: We haven't got to that stage yet.

MR BAKER: Well, my position is that the application has been made. There is a serious and without debating the merits of the argument, there is a serious amount of disagreement between the TCCI and ourselves as to the application of the principles. I put forward a
25 position that indicates that quite clearly, we believe, the application can be dealt with according to the principles, it can be dealt with by yourself.

Mr Fitzgerald has put forward a proposition that in fact that it would require a special case to be determined by the president in reference to
30 a full bench, et cetera, and I think that issue needs to be determined by the commission.

COMMISSIONER: Yes.

MR BAKER: And in this case obviously, sir, that is you.

35 COMMISSIONER: That's correct. Mr Baker, before we get to that, as I understand it, this process that you're seeking in this - I'm still looking at B.1 because that does give us an idea of what happens if you were successful today, shall we say - it gives me an idea of what you'd be looking for one, two, three times after.

MR BAKER: That is quite correct, sir.

COMMISSIONER: Right. Now has that process been applied to the other areas of this award?

MR BAKER: Yes, sir. All areas of the award, as all the areas which cover adult employees, have been subject to the supplementary payments process.

COMMISSIONER: Yes. So that, am I correct in saying that for whatever reason - which I don't want to hear about - for whatever reason, this area was omitted - is that correct?

MR BAKER: That is correct.

COMMISSIONER: Mr Baker, when I am finished here I am going up to look at the dictionary at the word 'obfuscation'. That's right. I think it means the truth is hidden under a whole lot of words, and what I mean by that is, that here we have a supplementary payments application made after the full process or the original process was done, it was left out by omission or mistake, needs to be corrected. Is that true?

MR BAKER: It wasn't an omission, sir. When these supplementary payments were first inserted into the federal Metal Industry Award which formed the basis of the 1989 decision which is referred to in the full bench decision, supplementary payments were not available to junior employees *per se*.

COMMISSIONER: And why was that?

MR BAKER: Because there was a view that junior employees did not share in over-award payments. And that view was maintained up until 1995 when there were discussions between the parties to try and rectify the situation.

COMMISSIONER: Right. So we come back to it. As I see it - forget about the federal area which we may take note of in due course, but as I see it, there was a group covered by the award that was left out of the supplementary payments process.

MR BAKER: That's quite correct.

COMMISSIONER: And without helping Mr Fitzgerald, what I believe him to be saying is, well, that's too bad, this is an application outside that process - a new application - therefore it's got go through that 13 principle. Is that true, Mr Fitzgerald?

MR FITZGERALD: I couldn't have put it better myself, yes.

COMMISSIONER: Right. So I understand now what's going on which I should have been told simply before - simply.

MR BAKER: Well, I apologise, sir.

COMMISSIONER: No, that's all right. I mean that's your -

MR BAKER: I was not clear.

COMMISSIONER: Perhaps I'm the one that's got an obfuscated mind. I don't know. But now having reached that stage - take a seat,
5 Mr Baker, thank you - having reached that stage I'll say this, that I, as a commissioner, sitting alone, am prepared to say that this is not to be taken under principle 13. It ought to be taken under the principles as quoted by Mr Baker because it is part of a process that should have been applied to the whole of the award at the time. Perhaps I was
10 negligent in not raising it and pursuing it at the time. I can't remember. As I think I said last time, it's so long ago I'm so confused about these wanderings in the awards that I'm not too sure what's going on.

And just as a digression, when I went to look to find it in the award
15 there's where we used to find the wages about two pages after the start. Look at this. I don't know how the employers cope with that, Mr Baker, I really don't.

Anyway, that's an aside. So that's how I feel about it and we'll go off the record in a minute and discuss that a bit further. So that having
20 established that, that I am prepared to proceed with it under the structural efficiency clause, shall we say, but we've been through all that with Mr Baker - the references, I do not believe it ought to be covered by clause 13. When I say that though, Mr Fitzgerald, those words from principle 13 that I read out - an application to vary - make
25 or vary a minimum or paid rates award for wages earned or conditions above or below the award safety net. Now I interpret that to mean in this particular award the safety net established by that process and this section that we're dealing with here I regard as an omission that should have been attended to at that time and if the manufacturing
30 union wishes to attend to it now, belatedly, I'm prepared to do that.

But I come back to the original point that I made; I would prefer to do it by agreement between the parties which then brings me to Mr Flanagan's recommendation which I'm inclined to agree to, but that
35 will be to return at a fixed date by which time I will hope that the parties have an agreed document to present to me. If not, I will rule on it which I think is most unfortunate if I have to go that far.

We'll just off the record a minute thanks.

OFF RECORD

ON RECORD

COMMISSIONER: Thank you very much for that, gentlemen. I think
40 we all know where we are with this matter. I'll adjourn it specifically so the parties can get together and hopefully reach a settlement on it.

We'll resume on Friday, 13 March at 9.30am. If the parties are not agreed that hearing may be short because I might not have time. I'll decide that when I hear from the parties. All clear, gentlemen? Anything else?

- 5 Thank you, this matter is adjourned to Friday, 13 March.

HEARING ADJOURNED