

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 2323 of 1990 and
4287 of 1993

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

re workplace representatives and
payment of wages

DEPUTY PRESIDENT ROBINSON

HOBART, 29 June 1993
continued from 3/6/93

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: Any changes in appearances?

MR G PHILP: If the commission pleases, I don't believe that I was here the last time - GREG PHILP, representing the Tasmanian Teachers Federation.

DEPUTY PRESIDENT ROBINSON: Thank you, Mr Philp.

MR R WARWICK: If the commission pleases, I believe this is the first time the Health Services Union of Australia, Tasmanian No. 1 Branch has appeared in these proceedings - RICHARD WARWICK.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Warwick. Yes, well, where are we at? I dealt with a threshold question in writing since we last met, and that obviously disposes of that particular question, unless you want to appeal something, Mr McCabe?

MR McCABE: Mr Deputy President, as far as we are concerned it doesn't really dispose of the threshold questions.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: And we would seek to -

DEPUTY PRESIDENT ROBINSON: What is the threshold question then?

MR McCABE: Well, as to how this matter, which I understand there is only one matter being dealt with today, how that matter is to be dealt with - what procedure will be used.

DEPUTY PRESIDENT ROBINSON: Well, you have been around a fair while, not as long as me, but I think the procedure was pretty well established.

The applicant in a matter is allowed to present a case and be heard, and may present relevant evidence by calling witnesses or referring to other decisions, or simply arguing the case, and then those in support of that application may also address it, and then those who might be at the other end of the table and either support or oppose will also be given the right to be heard, and may also make submissions, call evidence, conduct the case as they see fit, as long as they observe the rules of propriety and make sure everything they do is relevant, and it has to be in accordance with the Industrial Relations Act 1984 and the wage fixing principles.

That's broadly an outline of how we operate, and then I try to conciliate quite often if I can, and encourage the parties to get over any little difficulties they might have.

If I fail in that, then I think the act says somewhere that I can make an award or refuse to make an award and I must give reasons. I always do, and they are always pretty - well, modesty permits me to comment upon the quality of decisions, that's for others to judge. And we all do our best.

MR McCABE: Yes, indeed, Mr Deputy President, but what I was seeking I think more was guidance on what matters are going to be dealt with because we have a fundamental problem with at the last proceedings I think both matters were aired, both matters which are listed for today.

DEPUTY PRESIDENT ROBINSON: Right. But wouldn't you have sorted this out in the meantime with the applicants?

MR McCABE: I don't think it is a matter for the applicants. The fact is we did put certain threshold matters in regard to both matters -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - and in your interim decision of 10th June only addresses the payment of wages clause.

So we take it that you are still going to address the workplace representatives application on the threshold matters. That hasn't been addressed -

DEPUTY PRESIDENT ROBINSON: Remind me? You want it to go to a full bench or not be dealt with at all?

MR McCABE: Yes, that's right, yes.

DEPUTY PRESIDENT ROBINSON: Well, I have considered that, and I intend to hear it myself.

MR McCABE: Yes, well there are other matters which we want to put to you today for you to further consider, even though you have made that statement in respect of the payment of wages clause in your interim decision of 10th of June.

DEPUTY PRESIDENT ROBINSON: Well, don't I have a function at all to deal with the awards that I have got?

MR McCABE: Oh, certainly, Mr Deputy President, you do, but they must be done in accordance with the act. And we are saying that we don't agree with your interim ruling on your interpretation of the act, and we want to put further argument on that - plus we want to make another application.

DEPUTY PRESIDENT ROBINSON: This is only a lay jurisdiction, but we now allow lawyers in, including bush lawyers. But I am only a lay person myself, but isn't there something called 'sui generis' which means I think a matter already determined;

and there must be a cut-off point once something is determined.

MR McCABE: Well, I am afraid there is an Industrial Relations Act with certain provisions under it which give the applicants or the opponents of a matter before the commission the full right to argue their case in relation to that legislation - and that's what we intend to do, Mr Deputy President.

I'm sorry, I do take your point in regard to what you said about a lay jurisdiction and dealing with matters promptly. However, circumstances demand that we pursue that line of argument.

DEPUTY PRESIDENT ROBINSON: Well, let's ask the applicants which of the two matters listed for today that they would prefer to proceed with.

MRS STRUGNELL: If the commission pleases, as the applicants we would prefer to go ahead with the payment of wages application to vary.

DEPUTY PRESIDENT ROBINSON: Right. I see. Does that help you, Mr McCabe?

MR McCABE: Well, from the point of view of knowing what the applicant wants, I guess we are clear on which of the applications they would prefer to proceed.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: But it still leaves our arguments in relation to threshold matters as to why the matter should not proceed today on the merit -

DEPUTY PRESIDENT ROBINSON: When do you think it should proceed?

MR McCABE: When it gets to the appropriate full bench, Mr Deputy President.

MR HOLDEN: In the fullness of time.

MR McCABE: No, it is not the fullness of time. I am just insisting that the matter be dealt with in accordance with the act, and -

DEPUTY PRESIDENT ROBINSON: Well it is a wonder we don't even have an enterprise agreement on with this. I mean, I thought that was the flavour of the month.

MR McCABE: Well it certainly could be, and we are prepared to -

DEPUTY PRESIDENT ROBINSON: Enter into one?

MR McCABE: - look at that. Yes. I mean, if the -

DEPUTY PRESIDENT ROBINSON: Will I give you half an hour adjournment, or what?

MR McCABE: Well, I think there -

MR HOLDEN: The Tasmanian Technical Staff Society would prefer to decline that offer, Mr Deputy President.

MR McCABE: All sorts of options are available to the parties, Mr Deputy President, if they are prepared to enter into meaningful discussions.

And we don't think at this stage that some of those public sector unions are, so -

On that basis, we would seek to put our threshold arguments, if that's appropriate. || * ①

DEPUTY PRESIDENT ROBINSON: I really had thought that you had put it, but - || ②

MR McCABE: Oh, certainly not.

DEPUTY PRESIDENT ROBINSON: Hadn't you?

MR McCABE: I have got quite a swag of paper here to go, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: But listen, let's stop mucking around. I dealt with your threshold question on the 10th of June, didn't I? That the matter should go to a full bench.

MR McCABE: I am going to cover that in my submissions, but I thought that -

DEPUTY PRESIDENT ROBINSON: Well, you want to argue it again?

MR McCABE: I didn't put my substantive submissions on that occasion. The adjournment was granted on that occasion on the basis that you were to consult with the president on the meaning of their decision on the full bench - ←

DEPUTY PRESIDENT ROBINSON: I did, and I have addressed that.

MR McCABE: - and for the parties to confer as to whether there could be any agreement on those two clauses.

Now that was the basis of the adjournment and, quite frankly, I wasn't expecting any interim decision to be issued. But you did mention that you may bring down something.

But if there was a misunderstanding, I am sorry, but I hadn't at the last occasion put my substantive submissions on the reasons why the matter should be -

DEPUTY PRESIDENT ROBINSON: But weren't you given full and proper opportunity? ←

MR McCABE: Well I didn't think it was necessary at that stage because we hadn't -

DEPUTY PRESIDENT ROBINSON: You didn't think. You didn't think.

MR McCABE: I beg your pardon?

DEPUTY PRESIDENT ROBINSON: You didn't think.

MR McCABE: No, I am sorry, that's quite incorrect.

DEPUTY PRESIDENT ROBINSON: Well I was just quoting what you said. You didn't think, you said.

MR McCABE: Well I didn't think that at that stage it was necessary to put the full submissions as to why the matter should be referred under section 35.

DEPUTY PRESIDENT ROBINSON: But haven't I addressed the question - ←

MR McCABE: Well, you have, but I think you have pre-empted my arguments. ←

DEPUTY PRESIDENT ROBINSON: Well I have considered the question as to whether or not Application 4287 which deals with payment of wages should be referred to a full bench.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Isn't that your threshold subject? |

MR McCABE: Well, you've made that ruling before hearing my substantive submissions on it, so whether that ruling is now valid or whether you should - I mean, I think equity and justice demands that you should hear my full argument on that point.

DEPUTY PRESIDENT ROBINSON: Equity?

MR McCABE: Yes, equity, Mr Deputy President. It's called giving both parties an equal opportunity to put their full case in respect of any matter.

Now -

DEPUTY PRESIDENT ROBINSON: Well the reason I put out what's titled 'Interim Decision' is that I wished to address something which was raised by yourself, and as I understood it the subject matter was that I should not deal with it as a single commissioner but that I should refer it to a full bench.

I addressed it in order that we wouldn't be here today starting off where we left off before without the commission indicating something, as is its responsibility I think, as to how it responds to that sort of request or application.

And my purpose is to deal with matters as expeditiously as reasonably possible.

MR McCABE: Yes, I appreciate that.

DEPUTY PRESIDENT ROBINSON: And if I am wrong, tell me, but I am getting the impression that the commission is simply being frustrated in its attempt to deal with the matter.

Now I can understand that if the Crown disagrees with a ruling or a decision - just about every decision the commission gives somebody or other disagrees with it - but then there are rights under the act that people may exercise and I certainly respect those rights and would be a defender of them.

But I am, I must admit, missing your point as to what further reasons could be put forward for me not proceeding to deal with an application which is properly before me.

MR McCABE: Well I have it all here ready to go.

DEPUTY PRESIDENT ROBINSON: You have it all here. Well let's hear it then.

MR McCABE: Thank you, Mr Deputy President.

MR HOLDEN: Mr Deputy President, before you do that, I'm obliged to place on record our dissatisfaction with this process. I don't intend to mount a substantial submission requesting you change your mind because I think public sector management deserve the right to dig as deep a hole as they possibly can and bury themselves, hopefully, once and forever.

But I think your decision is particularly plain. It addresses the specific points of technical complaints raised by the minister and rejects them quite comprehensively and, of course, the TTSS submit that your decision is particularly plain. And, of course, had the minister sought to adopt the proper procedure rather than frustrate, to use your words and I must say I agree with them wholeheartedly, they would, of course, have had until I believe 1 July to appeal this

decision but instead they've waited to seek to frustrate the matter by further hearing it.

However, of course, if you do hear it and hand down a decision in a couple of days, they certainly won't be able to appeal your last decision. Though, I must admit, it's always possible for them to change the legislation.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Holden.

MRS STRUGNELL: Excuse me, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Yes, Mrs Strugnell?

MRS STRUGNELL: Also, if I may, just reading back on the transcript of the last hearing, you made it quite clear at that time that you were going to use the interval, not only to allow the parties to have discussions about the two applications, but also for you to use that interval to confer with the president in relation to the hearing of these matters.

You, at the end of that statement, made available the opportunity for either party to comment on that process. And I note from that time in the transcript on Mr McCabe made no comment in relation to wanting to put any submission that you might bear in mind in relation to those discussions with the president. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Thank you. Mr Warwick?

MR WARWICK: If I may, Mr Deputy President, I think it also relevant that I make a comment. I think that Mr McCabe has indicated that he has a significant submission to put to you and I think before entering into that process, as you've decided we should do, that we should have some ground rules. Clearly, I think it's appropriate that that which has been previously put to you should not further be debated and discussed and, clearly, I think the commission quite rightly could put down a ruling at this time that only those matters which are strictly relevant to the threshold question should be admissible, given the circumstances that have led to this point. Thank you.

DEPUTY PRESIDENT ROBINSON: Yes, I think I tend to be over generous at times. Mr McCabe, despite all that opposition and what's been said, I'd just like to know what you've got to put to us.

MR McCABE: I'll try to be as succinct and to the point as possible, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: But these are not insignificant matters, in our view, and I hope you'll bear with me. I thank Mrs Strugnell for her last comment but I don't see what the relevance of it is. The discussions with the president were, as I understand it, for you to clarify the situation in relation to matters which were being dealt with by the State Wage Case Public Sector Full Bench, not to do with section 35 of the act, which is point of contention.

DEPUTY PRESIDENT ROBINSON: Is it?

MR McCABE: Yes.

Mr Deputy President, our submissions to you today will be very much in the form of threshold submissions, as I've already indicated. Notwithstanding the fact that you addressed some of the matters of a threshold nature which we wanted you to consider, and you set those matters out in your interim decision of 10 June.

On that basis we think the threshold questions attached to those matters have not been fully explored, from our perspective. We wish to ensure that the merits of the claims are not heard further until the more important ramifications raised by the TPSA's application have been considered in full.

And to commence our submissions in this regard I wish to turn to the question of the structural efficiency principle. One of the objectives of the structural efficiency exercise in the public sector was to ensure that there was proper rationalisation of conditions of employment which, in the words of the structural efficiency principle, would ensure that working patterns and arrangements enhance flexibility and efficiency.

Now as you would be aware from your involvement with the earlier stages of the full bench dealing with the structural efficiency principle, that in the public sector one of the primary objectives, and probably the most important one for the employer, was to achieve some standardisation of conditions of employment across public sector awards and across classes of employees.

You would also be aware, sir, that the objective of the structural efficiency principle was that parties should cooperate positively in a fundamental review of the awards. Now since there was to be a fundamental review of awards in the Tasmanian public sector as a result of this principle, I have no doubt that the question of a workplace representatives clause and the question of a payment of wages clause, became part of the overall structural efficiency exercise in respect of the general Tasmanian public sector.

There is no reason that we can see why those two particular matters should be addressed in isolation from the conditions of employment package for the public sector as a whole. It follows that if either clause was included in the GCOS Award, that it would have wide application across the public sector, and that is because the great majority of public sector awards derive their conditions of employment from that General Conditions of Service Award and that's by virtue of a standard catch-all type of clause which says that any conditions not specifically addressed in the particular award will be picked up by the General Conditions of Service Award and the State Service Regulations.

DEPUTY PRESIDENT ROBINSON: Where do you get that?

MR McCABE: From the awards.

DEPUTY PRESIDENT ROBINSON: What awards?

MR McCABE: Well I'm just about to illustrate that.

DEPUTY PRESIDENT ROBINSON: Right.

MR McCABE: To illustrate what I mean about that type of clause, sir, I have an exhibit which is a list of public sector awards containing that standard catch-all clause referring to the GCOS Award. Could I hand that up as an exhibit, please? I think that would be Government.2, if I'm -

DEPUTY PRESIDENT ROBINSON: Government.2? Thanks, Mr McCabe.

MR McCABE: Now I haven't numbered those awards but there's a total of 39 awards in that list and that means that all the employees affected by the awards listed in this exhibit would be able to access the benefits conferred by the proposed new clauses in the General Conditions of Service Award.

DEPUTY PRESIDENT ROBINSON: But those awards are not before me.

MR McCABE: Ah, well, I will certainly come to that, if you could bear with me.

Now I have a second exhibit which I'd seek to tender and that is a list of public sector awards which contain a payment of wages clause of one kind or another.

DEPUTY PRESIDENT ROBINSON: Government.3.

MR McCABE: And as you can see from Government.3, Mr Deputy President, there are quite a few different clauses because there are twelve awards listed there and only one of the awards, the Welfare Workers, makes a reference to another award by reference to the Hospital Employees and Teaching

Staff Awards. So all the other awards, down to Welfare Workers, contain a separate and I think unique payment of wages clause.

And the purpose of showing you this is to illustrate that there is a diversity of payment of wages clauses at the moment and to add another clause of general application in the General Conditions of Service Award would only further add to the diversity and general confusion of payment of wages clauses applying in the State Public Sector.

So our position in relation to the payment of wages clause is that there should be no further action in relation to this clause as a result of the application currently before the commission today.

MR HUNT: Mr Deputy President, I think the advocate for the minister has strayed somewhat from a question of a threshold matter to the merits of the case. He's quite clearly, in my view, now discussing whether or not that clause should be included and has strayed somewhat from the lines that you set down, so I'd ask - through you, Mr Deputy President, that the advocate refrain from leaping ahead of what he has already indicated he doesn't want to go beyond.

DEPUTY PRESIDENT ROBINSON: Yes. You're not going to merit are you, Mr McCabe?

MR McCABE: No, I - I don't believe that I've addressed the merit of the claim at all. It's really reasons as to why the claim shouldn't be considered on merit.

DEPUTY PRESIDENT ROBINSON: If it - what are you suggesting that I not deal with it because there are already awards with divisions in them, is that right?

MR McCABE: Well what we're saying is it's contrary to the structural efficiency principle to put yet another award - another clause in another award when we - at the moment there is a move to rationalise conditions of service.

DEPUTY PRESIDENT ROBINSON: Where?

MR McCABE: The State Wage Case full bench - the public sector full bench said that the matter of conditions of service must be addressed meaningfully before any awards are going to be made.

DEPUTY PRESIDENT ROBINSON: Well, would you like to take me to where it says that there - that no matters shall be dealt with except by - across-the-board or as a package or by full benches or -

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: I mean, you've got to have regard for the fact that that public sector full bench has been dealing - wrestling, I think, with certain proposals for a fair length of time and now it has finally decided that there will be certain options, as I understand it, reading that decision, there will be options.

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: And I deliberately conferred with the president to make sure I understood what that full bench said in it's - I think its last interim decision which I referred to in my reasons for interim decision on the 10th of June- to satisfy myself what the bench meant, and whether or not there was anything to prevent a single member of the commission dealing with an ordinary application.

And as a result of that, as I have indicated, I don't think there is anything which the full bench has indicated supports your present argument; and, of course, it has got to be borne in mind that the president has the sole responsibility of allocating applications for hearing, and he deliberately allocated this matter to me.

MR McCABE: Yes. Yes. I appreciate that, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: And it raises the question of why would he do that rather than form a full bench to deal with an application to deal with payment of wages, for instance?

MR McCABE: Well, I do intend to address that -

DEPUTY PRESIDENT ROBINSON: Do you?

MR McCABE: - in the course of my submissions, as I said.

DEPUTY PRESIDENT ROBINSON: After all? It is probably a matter of both minds thinking alike, or something else.

MR McCABE: I can take you to that part now, or I can leave it until -

DEPUTY PRESIDENT ROBINSON: No, no, I didn't - if you are going to come to it -

MR McCABE: I certainly shall, yes.

DEPUTY PRESIDENT ROBINSON: - do it the way you have prepared.

MR McCABE: And, as I was saying, we were saying that there should be no further action in relation to the payment of wages clause as it is before the commission today.

And we base that claim primarily on the fact that the matter of rationalisation of conditions of employment in the public sector generally is yet to be addressed either by the parties or by the parties in conjunction with the commission.

Now we have the commission's decision of 23rd of April which effectively says that award restructuring matters can now be addressed by options other than by a single service-wide approach.

But the commission also says that whatever method the parties choose to address restructuring they must have effectively addressed the issues of employment and efficiency and productivity.

Now, as far as I am aware, that process of sorting out what the next step is in the process is to be made by the principal parties.

And, in our view, it is fruitless for the parties to try and deal with conditions of employment matters on an ad hoc or piecemeal basis.

There needs to be a much better understanding between the parties, and perhaps the commission, about the overall question of progressing award restructuring in those areas where the restructuring exercises have not been completed; and by that I mean principally the areas affected by the so-called four stream awards.

And, indeed, the scenario which arises if these piecemeal isolated applications are to be entertained by the commission is that the public sector unions may be encouraged to continue to submit applications to gain improvements in conditions, until we reach the point where there is nothing left for the parties to negotiate by way of the award restructuring agenda.

In effect, the employers' bargaining chips will be eroded if this process continues.

Now in its decision of 23rd of April the State Wage Case public sector full bench said that in any award or agreement that is proposed to be made or approved they would ensure that it has effectively addressed the issues of conditions of employment, efficiency and productivity and, where appropriate, on a service-wide basis.

Now while you have already addressed this issue in your interim decision of the 10th of June I am not sure that you have really confronted the issue as to how conditions of employment are to be dealt with in the service-wide context.

True, there is nothing in the full bench's decision that says directly that parties cannot bring applications for award amendments for arbitration, but surely if the bench says that the issues of conditions must be effectively addressed in any award proposals, then there is a prima facie responsibility on the parties to approach any award amendment proposal on a cooperative basis rather than on an arbitrated piecemeal approach.

Now the full bench says that the conditions of employment side of the equation must be effectively addressed, and I stress that word 'effectively'.

Putting forward single conditions for arbitration without any real discussion about the overall effect of conditions of employment in the public sector is not our idea of effectively addressing the question.

It is, in our view, totally contrary to the aims and requirements of the structural efficiency principle, and I think that we should perhaps revisit the substance of the structural efficiency principle because we seem to be losing sight of what was supposed to be achieved by it.

DEPUTY PRESIDENT ROBINSON: I am reluctant to interrupt you, I've been there and don't like it, but you know, hasn't that public sector full bench wrestled with this very question of trying to standardise things across the board and for reasons which it states has virtually abandoned that process. The parties just don't want to go down that track.

MR McCABE: Well, what it has abandoned is the integrated service-wide approach. I don't think it has abandoned anything else, really.

It says there are - it has made suggestions - as to how things might be progressed, and it has said that -

DEPUTY PRESIDENT ROBINSON: But, what are you suggesting, that the only way something like this subject matter can be dealt with if it is dealt with by a full bench and to cover the state service as a whole?

MR McCABE: Well, yes, that's in a nutshell, that's the basis of my submissions, yes.

DEPUTY PRESIDENT ROBINSON: Well, aren't you sort of arguing against yourself a little bit when you say that the General Conditions of Service Award, any variation to that will affect just about every other award?

MR McCABE: Yes, and that's why we are asking for it not to go ahead.

DEPUTY PRESIDENT ROBINSON: Wouldn't that standardise things a bit?

MR McCABE: No, it certainly wouldn't. It would just add to the confusion. As we say, there are already seven or eight different payment of wages clauses in various other awards, and we'd only be adding another one.

DEPUTY PRESIDENT ROBINSON: But what can a full bench do with respect to what I can't do?

MR McCABE: Well, that's yet to be seen, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Eh? What difference does it make? I mean, the powers under the act and the requirement to abide by the act and the principles is exactly the same, whether it is before a full bench or a single commissioner. The rules are the same.

MR McCABE: That's a theoretical question, if I might say.

DEPUTY PRESIDENT ROBINSON: It's not theoretical, it is the act.

MR McCABE: I don't see what relevance it has to the submissions that we're putting. I mean, the fact is that we are putting strong submissions that section 35 of the act comes into play here, and we will also be putting another application.

I don't really quibble with you about the requirements vis-a-vis a single commissioner and a full bench. We're not arguing that. We are just saying that we are insisting on the conformity with the act, and trying to prove our case -

DEPUTY PRESIDENT ROBINSON: What part of the act? You say section 35 doesn't enable me to deal with this matter.

MR McCABE: No.

DEPUTY PRESIDENT ROBINSON: It doesn't? Why doesn't it? It's something modifying, effecting five or more awards, is it?

MR McCABE: Yes, that's correct, yes.

DEPUTY PRESIDENT ROBINSON: But I am not. What awards am I going to modify?

MR McCABE: I have got it all here. It is all on the way, Mr Deputy President, and for you to mull over at your leisure.

DEPUTY PRESIDENT ROBINSON: But I have already addressed that. It is not much point labouring something that I have ruled on, is there?

MR McCABE: No, but as I said earlier, I think you may have been a little premature in ruling on it without hearing our -

DEPUTY PRESIDENT ROBINSON: Premature?

MR McCABE: - full -

DEPUTY PRESIDENT ROBINSON: I think I have had the patience of Job.

MR HOLDEN: That's an understatement.

DEPUTY PRESIDENT ROBINSON: Yes. You are taking advantage of my generosity as it is. However -

MR McCABE: I am quite happy for you to deny me the opportunity to put the submissions, Mr Deputy President, if that's your course of action.

DEPUTY PRESIDENT ROBINSON: Oh, no, I am going to give you every opportunity brother.

MR McCABE: So if I could turn to page 10 of the August 1989 National Wage Case decision, and I will hand that up as an exhibit, if I might.

DEPUTY PRESIDENT ROBINSON: Thank you. Government.4.

MR McCABE: If I could take you to the last paragraph on page 9 of that decision, and if I could just quote that. It says:

A final comment must be made on structural efficiency adjustment. Notwithstanding our affirmation in the February 1989 Review decision that there was no limitation imposed on the agenda available for structural efficiency exercises, we are concerned that conditions of employment have not been included in negotiations as a matter of course. Indeed, it was asserted by some employers that in a number of cases, restrictions had been placed on the restructuring agenda.

And if you turn to page 10 the full bench says at the first underlined passage:

The measures to be considered should include but not be limited to:

And then the fourth dot point says:

. ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry.

And they go on -

DEPUTY PRESIDENT ROBINSON: But doesn't this go to merit? I mean, any applications before me has got to address proper criteria to show me outcomes under the principles.

We are dealing with a threshold question as to whether or not, you know, the National Wage Case of August 1989 says that I can't under section 35 of our act deal with a single matter.

MR McCABE: Well, I mean it all ties in with the further argument on section 35, but -

DEPUTY PRESIDENT ROBINSON: Does it? Alright then, push on.

MR McCABE: So it is obvious, I would submit, that one of the aims of the structural efficiency principle was to provide flexibility and efficiency by being less prescriptive in awards.

And I am sorry, I didn't quote that underlined passage which said:

In relation to the last measure in particular we are of the view that many awards have scope for a less prescriptive approach and, without limiting the opportunities for innovation, the following are some of the measures which are appropriate for consideration:

If you go down to the third-last dot point one of those measures is:

. ... changes in award provisions which restrict the right of employers to manage their own business unless they are seeking from the employees something which is unjust or unreasonable.

And I end my quote there.

DEPUTY PRESIDENT ROBINSON: Does manage ones own business include deciding how one pays employees, when and how accurately, and if at all?

MR McCABE: It certainly does, Mr Deputy President.

MR HOLDEN: If at all.

DEPUTY PRESIDENT ROBINSON: Does it?

MR McCABE: It certainly does, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: And the employees have got no consideration in that matter at all? They just hope they get paid.

MR McCABE: They have the full protection of the law, Mr Deputy President. The Industrial Relations Act goes specifically to that question.

And there are also numerous acts, regulations within the government which regulate the payment of wages to state employees.

DEPUTY PRESIDENT ROBINSON: Aha.

MR McCABE: But that's perhaps for discussion on another day. I don't know.

DEPUTY PRESIDENT ROBINSON: Well, we'll wait and see what falls from your lips.

MR McCABE: Now what the National Wage Case full bench was saying was that it means they had in mind less conditions of employment where they are not really needed, and they were saying that those that are there should not mitigate against the flexible and efficient management of an industry or a government service.

So, in our view, there is no room for the inclusion of new conditions of employment in awards at the moment, unless the employer is seeking to treat the employees unjustly or unreasonably, as the full bench points out.

DEPUTY PRESIDENT ROBINSON: That's the exception, is it?

MR McCABE: Could I now turn to revisit our arguments which go to section 35(1)(e) of the Industrial Relations Act, and those relate to the fact that the TPSA's application to vary the General Conditions of Service Award - or applications - will affect not less than five awards of the commission.

Now I realise, and we have already discussed this, but you have already ruled on this matter in your interim decision of 10th of June.

DEPUTY PRESIDENT ROBINSON: Mm.

MR McCABE: And, as I have already pointed out, I wasn't counting on you doing that because I really hadn't made full submissions on that point.

MR HOLDEN: It's a good job the government doesn't play cricket for Australia, they'd never be out.

MR McCABE: And I'd like to put further argument to you on this particular point in regard to section 35 which may convince you to adopt a different view from that which you adopted in your interim decision,

My argument is based on the fact that when an amendment is made to the General Conditions of Service Award there is an automatic and unquestionable effect on the rights and entitlements of employees whose conditions of employment are set through their awards, as shown in Exhibit Government.2.

MR HOLDEN: Mr Deputy President, is Mr McCabe suggesting to you that every variation in the GCOS Award that's ever occurred before a single commissioner has been illegally done?

I realise I interrupted, but I really would like some explanation, because I am beginning to think I must lack understanding about what we are here about.

DEPUTY PRESIDENT ROBINSON: Mr McCabe?

MR McCABE: I don't know that that submission is relevant at the moment. It's an interesting question, but I don't think it is one that I am required to address.

DEPUTY PRESIDENT ROBINSON: Well I think you were saying that section 35(1)(e) in combination with the fact that a number of other awards voluntarily adopt the General Conditions of Service Award provisions means that in effect anything that happens in the General Conditions of Service Award must be dealt with only by a full bench.

MR McCABE: No.

DEPUTY PRESIDENT ROBINSON: No?

MR McCABE: No, I am not suggesting that. There are certain matters which could be dealt with under the General Conditions of Service Award where those matters are in fact in accordance with principles determined by a full bench. So there should be no problem with those.

Where the matters aren't being determined by principles determined by a full bench - for instance -

DEPUTY PRESIDENT ROBINSON: Kilometrage.

MR McCABE: Kilometrage, expense-related allowances, all being varied in accordance with full bench principles on -

DEPUTY PRESIDENT ROBINSON: And consent.

MR McCABE: And consent. Yes. A very important element, Mr Deputy President.

So I think that might answer Mr Holden's query.

MR HOLDEN: Not all of them.

MR McCABE: Now I take your point in your decision of 10th of June that the application is actually modifying only one award.

That is the new clause, or clauses, if granted will be included in only one award - the General Conditions of Service Award - but the inclusion of that provision in the General Conditions of Service Award will certainly affect the 39 or so awards that have the catch-all clause.

The conditions of employment of the employees under those awards are affected by the modification of the GCOS Award, and that is by virtue of the conditions of service clause which appears in each of those 39 awards.

And what that conditions of service clause in each of the awards does is to put in a few words by way of a general reference to the general conditions of service the entirety of the conditions contained in the General Conditions of Service Award.

So instead of having the 39 pages or so of the General Conditions of Service Award reproduced in each of the 39 awards the sensible approach has been to have the conditions of employment matters contained in a single document.

That single document, the General Conditions of Service Award, by delegation, or referral if you like, acts to flesh out the detail of the conditions of service clause of each of those 39 awards.

So, in our view, there can be no question that the variation to the General Conditions of Service Award certainly affects the conditions clause of those 39 awards, unless the award provides otherwise for those conditions, and most of them don't.

DEPUTY PRESIDENT ROBINSON: In a literal sense do you think that those awards are affected?

MR McCABE: Most certainly, yes. That's my strong submission, Mr Deputy President.

And because most of the 39 awards are three or four pages of classifications and salaries, together with a few standard clauses, but the conditions matters which are normally specified in full in a private sector award, for instance, are derived from the General Conditions of Service Award by reference.

And I think you would be well aware that just about every private sector award has conditions matters set out in full in it. I don't think there is one that has - other than minor references to other awards or parent awards.

DEPUTY PRESIDENT ROBINSON: I wonder as one of the reasons that they don't do that is that the legality of such delegation, if you like, of a function which belongs to those involved in a particular award to delegate that function to another? Do you understand what I am saying?

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: I'm just raising as a question the legality of, as an example, me making an award that says any movements in wages which occur to oil rig workers or waterside workers in the future the same percentage or flat increase shall apply to state servants covered by the Clerical Officers Award.

Have you ever thought about that that might be exceeding powers?

MR McCABE: Well, an interesting question, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Mm. One which you probably might need to seek instructions on and come back and address us on another day and another day and another day.

MR McCABE: I don't see its relevance to these particular matters.

DEPUTY PRESIDENT ROBINSON: Well I am raising it as a question as to going to the question of actual effect of the General Conditions of Service Award and the tie up with those other awards.

If those other awards are invalid to the extent that they have, if you like, delegated the responsibility of fixing certain conditions of employment to another award, give a blank cheque, as to whether or not that was in accordance with law in any case, and if it wasn't, there is not the connection properly, and the point that you make would have to be considered in the light of that. It's becoming interesting.

MR McCABE: Yes. I don't really see a problem. I think it is an admirable arrangement.

DEPUTY PRESIDENT ROBINSON: Do you?

MR McCABE: Yes.

DEPUTY PRESIDENT ROBINSON: Well I'll remember that the next time perhaps I'm dealing with some other matters and wondering whether it might be convenient to hook it up to perhaps oil rig workers or waterside worker rates.

MR McCABE: Well you would have difficulties there because ... I mean, there are certain scope clauses, parties and persons bound by various awards, the fact that this is a long-standing arrangement which works very well, I think. Instead of having 39 awards with full sets of conditions in them we have one award which forms the basis of a -

DEPUTY PRESIDENT ROBINSON: Yes, but I mean there are two ways things can work, aren't there? Either you can have a General Conditions of Service Award and other awards being individually varied or you can have a situation we have got at the moment where anyone who is a party to these other 39 or whatever it is awards would be aware of this hearing and would seek leave or appear in their own right at these proceedings and participate in them, and they would have the right to address any question at all today -

MR McCABE: Well I believe there is one organisation which isn't a party to this award, to the General Conditions of Service Award, but does have a reference in their award to the general conditions of service, but they wouldn't have been notified.

DEPUTY PRESIDENT ROBINSON: Well, why aren't they here?

MR McCABE: I have no idea, Mr Deputy President. That's the firefighters. So ...

DEPUTY PRESIDENT ROBINSON: Well they are almost federal, aren't they?

MR McCABE: Almost, yes, yes, along with a lot of other employees heading in that direction, Mr Deputy President, yes.

MR HOLDEN: I wonder why?

MR McCABE: So, in our view, the effect of the General Conditions of Service Award is that any modification of that award affects all awards that it refers to.

In further support of that view we say that if the 39 awards did not contain any conditions of service clause referring back to the General Conditions of Service Award then we would say that perhaps you and the TPSA might have an argument to say that a change to the general conditions of service does not affect not less than five awards but the mere fact that those 39 awards have a conditions of service clause which for convenience sake derives conditions from the general award

means that, in our view, that there is no doubt that they are affected by a modification to that general award.

Now my views in this regard, sir, are supported by a very reliable and authoritative source, and that is in fact yourself, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Myself, is it, well you have greater faith in that source than perhaps I do.

MR HOLDEN: One gains wisdom as one gets older.

MR McCABE: And if I can take you to your interim decision of 10th of June on this very matter, and to page 3 of the decision -

DEPUTY PRESIDENT ROBINSON: Just a sec, if you don't mind - too many files. Page 3?

MR McCABE: Yes, and the second last paragraph you say, and I quote:

Parties to those other awards have the right to either continue to allow themselves to be affected by any variations to the General Conditions of Service Award or, alternatively, to oppose them by reviewing their own award to reflect a different position.

DEPUTY PRESIDENT ROBINSON: Do you accept the whole of that or just the word affect?

MR McCABE: Well, I am drawing your attention to your use of the word 'affected' in the second line of that paragraph.

So you are using the very word that we are basing our case on, and that is that the parties to the other awards - and one assumes the awards themselves - are affected by variations to the General Conditions of Service Award.

And, according to the dictionary, 'affected' means to act upon or to influence, and we submit that that is exactly what the General Conditions of Service Award does to the 39 awards identified in Government.2.

So we leave you with those few thoughts about section 35 of the act, and we would ask you to further consider our view that in view of that provision this matter must be heard by a full bench.

If I could now move to my next argument which involves the public sector full bench decision of 23 April 1993, and I hope you have a copy of that?

DEPUTY PRESIDENT ROBINSON: Indeed I have, yes.

MR McCABE: And you will recall that I quoted from that decision from page 2, paragraph 3.

DEPUTY PRESIDENT ROBINSON: Yes. 'In addition the commission will ensure' etc., etc.

MR McCABE: Yes. And which refers to 'at the effect of addressing of the issue of conditions of employment, efficiency and productivity in the making of any award or agreement that is proposed'.

Now I was castigated I recall by the TPSA for suggesting that this paragraph only referred to where an award containing new rates of pay or classifications, for example those along the lines of the four-stream award proposals, were being mooted or heard before this commission.

Now, in my submission, that is not what the decision says. It says that:

In addition, the Commission will ensure that any award or agreement which is proposed in the public sector has effectively addressed the rationalisation of conditions of employment.

So, as far as we are concerned, the issue of conditions must be addressed in any award changes proposed for the public sector, and that includes the General Conditions of Service Award.

There is no indication anywhere that the General Conditions of Service Award is exempt from the rationalisation requirements of that full bench.

DEPUTY PRESIDENT ROBINSON: I thought it gave it away, or it said that there will be a number of alternatives.

MR McCABE: Yes, that's correct, but it didn't give away the requirement that condition matters be effectively addressed in the making of any award.

DEPUTY PRESIDENT ROBINSON: But you were talking in the terms that there must be a whole package - you can't deal with a single item. Weren't you?

MR McCABE: I'm not saying that it ought to be approached as a entire package. Obviously the full bench has said that is not going to work, we have tried that.

DEPUTY PRESIDENT ROBINSON: I thought you used that word, actually, on the last day.

MR McCABE: On the last hearing?

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: Well, perhaps I've thought a little bit further about it in view that I read that full bench decision more carefully, and I would say quite clearly they have given away the idea of addressing matters as a single entire package.

But they haven't given away the requirement.

DEPUTY PRESIDENT ROBINSON: But aren't you talking about what should happen either before a full bench or either before a single commissioner, and does this really go to your threshold question as to whether I should deal with it or it should be referred to a full bench?

MR McCABE: Well it does go to threshold matters which are associated with the question.

DEPUTY PRESIDENT ROBINSON: Well I am missing the point here. Are you saying that I shouldn't be dealing with either of these two matters listed here today, but that they should only be considered in conjunction with a whole list of other conditions - shouldn't be dealt with in isolation?

MR McCABE: Yes, I guess I am really addressing the matters that you addressed in your interim decision - the fact that in your view the full bench said that there is nothing to restrict you from proceeding to hear these matters.

And that is one of the issues I wanted to cover, but I will be getting on to full bench matters again in a little while, if that's okay.

I mean, I can certainly skip this part of it if you don't think it's -

DEPUTY PRESIDENT ROBINSON: I am not requiring you to skip anything. I'm giving you a full and adequate opportunity to put the whole lot of your argument.

MR McCABE: So you're willing for me to address that point which you raised in your interim decision? You know, we want to try and change your mind on that particular aspect as well.

DEPUTY PRESIDENT ROBINSON: Yes, but I am still not quite sure of the point you are making in relation to the third paragraph on page 2 of the full bench decision of 23rd of April.

MR McCABE: Well, that's what I am addressing at the moment.

DEPUTY PRESIDENT ROBINSON: In relation to your threshold question.

MR McCABE: I guess I am addressing it from the point of view that it was raised in your interim decision. If you want me to leave that and pass on to the next leg of my submission?

DEPUTY PRESIDENT ROBINSON: No, I told you, I don't want you to leave anything. I just want to understand what point you are making, and I understand you were addressing a threshold question as to why the matters before me today should not be heard by me but should go to a full bench.

MR McCABE: Well, I will leave the rest of that if it's -

DEPUTY PRESIDENT ROBINSON: Well, that's your choice. That is your choice.

MR McCABE: Yes. The final facet of my submission today, Mr Deputy President, is an application under section 24(4) of the Industrial Relations Act. That the matter of the payment of wages clause and workplace representatives be referred back to the president in order that he may determine whether or not it should be referred to a full bench.

The grounds for this application are that, (a) we have made extensive submissions to you on the basis that the applications affect more than one other award.

We say that they affect 39 other awards and, therefore, must be dealt with by a full bench.

So section 24(4)(a) clearly is invoked, in our view, and we would say also that subsection (b) of that section should also be heeded in that the general application nature of the clauses sought is of such importance, together with the question of rationalisation of conditions in the public sector generally, that the matters should be referred to a full bench in the public interest.

On that basis, we say that these matters should not be dealt with on the merits or proceeded with further until the threshold question as to the effects of section 35(1)(e) of the act are reconsidered, and my application for referral to a full bench under section 24(4) is brought to the president's attention.

If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Have you concluded your submissions?

MR McCABE: I have, on those threshold matters.

DEPUTY PRESIDENT ROBINSON: Is there anything you can think of that you would like to add?

MR McCABE: Well, apart from the bit I skipped on my submissions, no, Mr Deputy President. But, as you say, that's my choice, and I rest my case on those threshold issues. Thank you.

DEPUTY PRESIDENT ROBINSON: Thank you. I think we'll just take about 10 minutes of adjournment for those who wish to smoke, or something like that, then they may if they choose, but I don't require them to.

SHORT ADJOURNMENT

DEPUTY PRESIDENT ROBINSON: Round two.

MR HUNT: Mr Deputy President, I have drawn the straw to respond to the threshold arguments that have been put this morning, and if I could make just a general characterisation of them initially, Mr Deputy President.

I think the basic message from the minister's advocate was that you can't do anything unless we agree with it and ask for it, and I am going to address the points that Mr McCabe has made step by step.

Mr McCabe quoted the structural efficiency principle as a reason why we can't proceed.

I find it ironic that the government after thwarting and obstructing the implementation of the structural efficiency principle in the state service in general should turn around and try and rely on the structural efficiency principle as a reason why we can't proceed here today.

But, that aside, it is my view that there is no basis of the argument that the structural efficiency principle restricts us from proceeding on this matter.

A comprehensive rationalisation of conditions does not imply that you can't deal with conditions step by step, or that you can't deal with conditions one by one.

Indeed, when you actually sit down and think about the practicalities of dealing with a rationalisation of conditions, of course you have to deal with them step by step. You can't deal with each and every condition at the same time.

Mr McCabe said that rationalisation had yet to be addressed by the parties. Well, I draw your attention, Mr Deputy President, to the decision of November 29th, 1991 in Matter T.2399, etc., where the commission makes statements on conditions of service.

Basically they indicated that in the process of implementing the structural efficiency principle in the state service conditions would need to be considered, and there was consideration given to conditions.

There was a set of conditions provided by the government by the colleagues of Mr McCabe to the full bench to discuss and to progress conditions matters.

There were meetings of conditions of service committees.

There were further discussions; there were further proposals on how those conditions matters could be progressed.

There were discussions on individual conditions items.

So the statement that those matters had yet to be addressed by the parties is simply wrong.

The minister's advocate also made the statement that in the 23 April decision on the same matters, T.2399, that's 23 April 1993, T.2399 et cetera, that the term 'award' in that decision could be taken to mean, in my judgment of what Mr McCabe was saying, anything to do with awards.

So a simple award variation, according to Mr McCabe's interpretation, was caught by the use of the term 'award'. I most strongly disagree. I think Mr McCabe has, in fact, taken those remarks - or taken those words, that phrase, out of context and tried to put a broad construction on what was quite a specific statement for the purposes of continuing the government's agenda of obstruction.

'Award' in the 23 April decision refers to awards that encompass a comprehensive and progressive implementation of the four streams that were determined by the full bench on 29 November 1991. I am still reeling, although I may not physically look to be reeling, from the statement made in relation to page 10 of the August '89 National Wage Case. Mr McCabe has argued two things, that the page 9 and page 10 sections of that National Wage Case gave us the guidance that awards should be less prescriptive and that employers should be able to manage their own business. And in response to a question from yourself, Mr Deputy President, Mr McCabe indicated, as I interpreted it, his response that basically that includes deciding how to pay employees and when they should be paid.

He also argued, I believe, that there's no room for the inclusion of conditions unless the employer is seeking to

treat employees unjustly. That, once again, is a broad construction on something which does not imply what Mr McCabe has asked it to imply and made the representation that, in fact, it does apply.

We can still bring conditions matters to the commission and we'll continue to do so. We have done so in the intervening period since the August '89 National Wage Case. We've not been prevented from doing so and, as I said, we'll continue to do so.

Section 35(1)(e), Mr McCabe quoted and said that he wasn't counting on the bench ruling on this matter and hadn't made full submissions. I understand that in the hearing of the dispute the T. number, being a number that I haven't got with me right at the moment, which led to this application, I understand that during that dispute Mr McCabe foreshadowed that it was his view that this matter could not be determined by a single commissioner sitting alone. And it's my understanding as well, Mr Commissioner, that you indicated to the government's advocate that you would consider that question, so this question was already on notice and it's my understanding that all you've done in making your decision is take up that question on notice and answer it, and very well, if I might say.

Now Mr McCabe has argued that, amongst other things, the General Conditions of Service Award is just a fleshing out of the conditions of service clause in other awards. He's also made the statement that no private sector awards have such a reference clause. Well it seems to me, Mr Commissioner - Mr Deputy President, that what Mr McCabe is arguing is that the General Conditions of Service Award is not an award that stands alone. Well I wonder exactly what it is. Is it just a clause. I think you'll find that under the act, Mr Deputy President, the General Conditions of Service Award is an award; it is not just a fleshing out; it is not just an expansion; it is an award that stands alone.

The fact that other awards refer to it doesn't alter that situation. It doesn't mean that if - and it also doesn't mean that if you modify the General Conditions of Service Award you are modifying other awards or affecting other awards. You might affect conditions which apply to an employee but those conditions are taken from the General Conditions of Service Award. They are not taken from any other award.

In your decision of 10 June, Mr Deputy President - this is a point which Mr McCabe referred to, the second-last paragraph, and I'll quote it:

Parties to those other awards have the right to either continue to allow themselves to be affected

by any variations to the General Conditions of Service Award or, alternatively, to oppose them by reviewing their own award to reflect a different position.

And Mr McCabe has claimed that the word 'affected' implies that awards are affected. It's my submission, Mr Deputy President, that there is a distinction to be made there and that, in fact, the wording of your paragraph actually means that the parties may be affected by variations to Conditions of Service Award, not that the other awards would be affected. There is a distinction and it's a very, very important distinction that cannot be blurred. We must keep a sharp focus on that distinction and ensure that the government's agenda of obstruction is not met or not satisfied by blurring an interpretation of something which is, in fact, quite clear.

I've already made the point that Mr McCabe returned to the 23 April decision which said that any awards or agreements will address conditions. That is completely out of context. Mr McCabe also - I thought I noted a note of triumph in his manner at this stage - made an application under section 24(4) for the matters to be referred back to the full bench - sorry, to the president, who can consider whether or not they should be referred to a full bench and asked that that matter be brought to the president's attention.

Now under section 24(4), Mr Deputy President, you only need to stop the proceedings here if you consider that (a) or (b) apply, that is that the application directly affects another award - well it doesn't - and that the application or part of it is of such importance that in the public interest it should be dealt with by a full bench, well in my view it isn't. And the other alternative is on his own motion or at the request of a party to the hearing, refer the application to the president in order that he may determine whether or not it should be referred to a full bench.

Well my argument, Mr Commissioner - Mr Deputy President, is that you should disregard the arguments that are being put here today. It's a simply case of obstructionism and I submit to you that you should proceed to hear the arguments on merit in relation to this application. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Hunt. Anyone else? Mr Warwick?

MR WARWICK: Thank you, Mr President. I've been graciously afforded the opportunity by Mr Holden to make a few comments, a few brief comments prior to him doing so on the basis that I do have an appointment at 12.30. So I'll be self-regulating to that extent, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Well I won't restrain you from making any relevant submission you wish to make, you know that.

MR WARWICK: It's simply my own agenda, Mr Deputy President, which requires me to make those brief comments.

Mr McCabe's arguments appear to me to be in two parts. The first goes to the operation of the structural efficiency principle. And he used on a number of occasions the word 'standardisation' in respect to conditions of employment in the public service. Mr Deputy President, there is nowhere in the wage fixing principles which have applied at a federal level or at this level since August '89 onwards and, indeed, even before that time where there has been a requirement to standardise conditions of employment and not only in the Tasmanian Public Service but anywhere else.

There has been a requirement to have a fundamental review of the award. That review clearly can have been or can be piecemeal or package in its content and it can be arrived at by arbitration or by agreement. There is no limitation anywhere in the wage fixing principles to that extent.

The other things I'd like to make a comment on is the astonishing remarks really, all things considered, made by Mr McCabe in relation to exhibit GOVT.4 in relation to his perception of what a less prescriptive approach means. And it would seem to me that Mr McCabe wants you to find, Mr Deputy President, that that set of words means that, in effect, an award should have either less in it or nothing in it. A most astonishing proposition.

Clearly what the full bench intended was that there needed to be a more flexible approach in respect of the contents of an award, certainly more options available in terms of working hours, the treatment of payment for overtime and - there's a list of things that would need to be clearly less prescriptive. There's no requirement anywhere in the wage fixing principles to have less in an award or nothing, which seems to me to be what Mr McCabe was actually putting forward to you. I consider that to be a most astonishing proposition.

If I could turn to the second part of his argument, which really goes to the question of the operation of section 35 of the act, I'd simply put to you, Mr Deputy President, there was nothing put forward by Mr McCabe of consequence which could reasonably lead you to review your interim decision, which is ... issued. There were no new argument, no logically coherent argument that was put forward or added to that which has been addressed in your decision. And certainly you should dismiss in full Mr McCabe's arguments in respect of that section of the act.

Perhaps the most astounding thing that I found in his submission was that he referred to the public interest. And it seems to me that Mr McCabe seems to be putting to you and asking you to find that it is in the public interest for there to be further disputes and arguments and barneys about payment of wages because of the absence of an award prescription going to the question of the payment of wages. An absolutely astonishing proposition, I would have thought, Mr Commissioner - Mr Deputy President, I'm sorry.

We would argue that it's very much in the public interest that there be a clear set of rules understood by all contained not only in this award but in all awards in respect to the question of payment of wages. It is not in the interests of the people of Tasmania for there to be disputes about people not being paid or being paid late.

Those are the comments I'd seek to make in respect to the threshold question, Mr Deputy President. With your indulgence I would like to briefly make some comments which anticipate - and I put it no higher than that - that you may find that the threshold submissions put by Mr McCabe should be dismissed and therefore those comments would go to subsequent hearings this afternoon, and I would simply like to put a very basic proposition to you in that regard.

We support the application, Mr Commissioner, and I'm sorry I won't be here this afternoon to put those submissions to you. We support the application and we would ask that the proposed clause in relation to payment of wages be included in the award. I would however say that we are in the process of preparing, from our point of view, a new award to apply in respect to the - certainly the health agency. It may be the case that it will also apply to the whole of the new Health and Community Service Agency. In that regard it is not necessarily our view that the clause contained in the application would be the same clause that we might want to include in that award when it's made. So we would certainly want to keep our options open in that regard.

DEPUTY PRESIDENT ROBINSON: Would there be a case for excluding the health industry award, however titled?

MR WARWICK: Well the current award already has a clause, Mr Commissioner.

DEPUTY PRESIDENT ROBINSON: Yes.

MR WARWICK: And I think that that would clearly override any operation that may be considered to exist in respect of general conditions of service.

DEPUTY PRESIDENT ROBINSON: Well again, it's a rather academic sort of argument as to whether any provision in the GCOS Award has effect or is deemed to have effect elsewhere.

MR WARWICK: That's right. That's a question we've been grappling with in a dispute over payment of meal allowance before Commissioner Watling. It's a fairly significant question but certainly we would say that the current clause in the Public Hospitals Award applies to people bound by that award and no other clause applies, and we would see that that would continue to be the case. And I'd simply make the point that we may or may not wish to have a clause similar to the one which is being proposed in that award, at the time when it's made. I'd simply like to state that on the record so that it's understood by

And I support the comments made by Mr Hunt previously, and no doubt I'll support those of Mr Holden and and I thank -

DEPUTY PRESIDENT ROBINSON: You might even support Mr McCabe.

MR WARWICK: Oh, no, I don't think I'll be doing that, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: No.

MR WILLINGHAM: And I thank you for the opportunity for putting those submissions this morning. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Thank you, Mr Warwick. Mr Holden?

MR HOLDEN: Thank you, Mr Deputy President. Mr McCabe's submission was, as you've already been told, based on the traditional - what has become traditional government line of obstructionism, but today added merit to a threshold submission. Maybe that's an extension of obstructionism.

The reference to rationalisation of awards rather than standardisation certainly is a fact of life. And it's interesting that in the federal commission, which operates under the same principles as the Tasmanian commission in respect of structural efficiency, Senior Deputy President Riordan handed down a decision on 8 June. I'm unable to give you a print number because it wasn't my intention to quote from it. But in that decision the senior deputy president rejected out of hand the Tasmanian Government submissions that there be a standard clause in respect of TUTA leave applicable to all Tasmanian public servants.

He stated that in that case the health services industry is an industry in its own right and the conditions which apply to that industry should be specific to that industry. He

directed the parties to draft an order based on the health services industry.

So therefore any suggestion, as Mr McCabe appeared to suggest, that award variations are, in effect, outlawed until a total collective agreement on conditions of employment is reached, is quite seriously preposterous and, of course, the whole concept of that was based on a reduction in the Public Sector Award from over 70 awards to four awards. And, of course, it had some commonsense in that context. But the dismissal of the application for those four awards in the public sector by the full bench and subsequent decisions of the full bench, have made it very clear that matters now do or can - I won't say necessarily automatically do - can devolve to the agency level and the parties are expected to progress the matter.

And it certainly shouldn't be taken as carte blanche by the minister that he or she is able to simply thwart the proper aspirations of employees to have their award amended. The suggestion that the matter should go to a full bench, of course, has already been dealt with in your interim decision and is but another example of the instructions Mr McCabe seems to get in a number of matters that notwithstanding - oh, and his colleagues, should I say - that notwithstanding the decision being against you, seek to argue it again. I think the teaching service case is a perfect example.

In terms of the GCOS it is interesting that it is now at this stage and never in the past that the government raised the question of application of that award, that in effect it no longer is a single award in its own right. And, of course, parties to that award can always seek to move away from it in terms of particular conditions, if conditions are varied.

The clause that is sought by the TPSA is in general line with payment of wages clauses which have been granted by this commission in the past and, as such, therefore it certainly doesn't create something that one can say is new. And on that basis and on the submissions made by Mr Hunt and Mr Warwick, the Tasmanian TAFE Staff Society supports their arguments that Mr McCabe's submission on the threshold issue be rejected and that the matter proceed to conclusion on the basis of a proper hearing on merit, as was suggested - sorry, as was stated in your interim decision on 10 June should occur.

I, like Mr Warwick, probably won't be here this afternoon as I have other commitments, however based on everything that has been said today the commission can rest assured the Tasmanian TAFE Staff Society supports the TPSA application one hundred per cent. We have read it in detail and I am able to put on record our absolute support for it. Thank you.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Holden. The small gentleman at the back.

MR PHILP: Yes, thank you, Mr Deputy President. I won't take up too much of the commission's time because I'll also support my colleagues, Mr Hunt, Mr Warwick and Mr Holden, both in regard to their views on Mr McCabe's objections and also in relation to the merit of the particular case. I don't think I could add anything usefully that you are not already aware of, sir. Thank you.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Philp. I suppose, Mr McCabe, on the threshold question which you raised, you've probably got a right of reply if you seek to exercise it.

MR McCABE: Yes, thanks, Mr Deputy President. I don't think there's a lot to answer there. I don't think there is any argument that the structural efficiency principle requires a rationalisation of conditions of employment. What I put to you earlier this morning and Mr Hunt has argued against, is the adding in another condition of employment in relation to payment of wages which will further add to the existing variety and number of payment of wages clauses, as contained in GOVT.3, is in line with the structural efficiency principle. We say quite clearly it isn't.

But quotes from the various full bench matters decisions and the National Wage Case decision of August 1989, clearly indicate that working patterns and arrangements should enhance flexibility and efficiency. Now adding another clause to an already existing diversity of clauses is not a way of enhancing flexibility and efficiency, we would suggest.

DEPUTY PRESIDENT ROBINSON: Well I assure you it's the object of this commission to make sure that payment of wages is conducted in a way which is conducive to flexibility and efficiency.

MR McCABE: Yes -

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: - I certainly hope so. Yes.

DEPUTY PRESIDENT ROBINSON: But at the moment there might be a case, and I haven't heard it yet - but there might be a case for saying that the award should deal with such a question based upon past experience.

MR McCABE: Yes, that may very well be put to you. I'm sure it will be, yes, if we get to that stage. But, of course, on our submission you wouldn't be hearing the matter as the other parties seem to suggest this afternoon, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Mm.

MR McCABE: Now Mr Hunt raised the question of referral to a full bench and made the astounding suggesting that you should have used the argument that was put to you in a dispute matter under section 29 as a substantive argument in this particular application. Now I think anyone that's aware of the procedures of this commission, that each matter stands alone, and when the matters are being argued along those lines, that unless the advocate chooses to refer to a previous matter, then they're quite entitled to argue totally differently or completely differently in a different matter. So the fact that it was brought up -

DEPUTY PRESIDENT ROBINSON: They can be inconsistent if they want to.

MR McCABE: They can be inconsistent if they want to, yes.

DEPUTY PRESIDENT ROBINSON: Right.

MRS STRUGNELL: Mr Deputy President, if I might remind you in relation to the section 29 and the DEA pay dispute, at the same time the TPSA had also lodged an application to vary the GCOS to insert a payment of wages clause and it was on that matter that you were commenting in order to go and seek advice and not as part of the section 29.

MR McCABE: Well, I am sorry. My notes say that Mr Hunt made a submission to you about the section 29 dispute matter.

DEPUTY PRESIDENT ROBINSON: Well, what about Mrs Strugnell's point, though?

MR McCABE: Well I am just replying to Mr Hunt's submissions - whether there is a difference between the two advocates from the TPSA, I am not sure.

MRS STRUGNELL: There's certainly no difference between the two advocates from the TPSA. When my colleague Mr Hunt responded to Mr McCabe's submission he made reference to the previous dispute, but in fact did not mention at that time that it was raised during a section 29, but at the time we were also hearing the dispute.

DEPUTY PRESIDENT ROBINSON: Those two matters were listed together.

MRS STRUGNELL: Those two matters were together - were both lodged at the same time.

DEPUTY PRESIDENT ROBINSON: Listed for the same day.

MRS STRUGNELL: Yes, sir.

DEPUTY PRESIDENT ROBINSON: Yes, I think that's right, actually, to the best of my memory.

MR McCABE: Well, I suppose the transcript will reveal what the real situation is. I don't think a great deal turns on it, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: No.

MR McCABE: Well, if that's what Mr Hunt is suggesting, that you should take into account what I put on the section 29 matter in regard to the application to vary an award, then I don't think that that is a legitimate argument. If not, I stand corrected.

DEPUTY PRESIDENT ROBINSON: Mm.

MR McCABE: I don't think any of the replies that Mr Hunt put on my arguments in regard to the effect of the General Conditions of Service Award on the 39 other awards did anything to damage what I put to you. We still stand by our argument that there is a direct and real affect on those awards by delegation of the clause in each of those 39 awards to the general conditions of service.

Of course we said, and we acknowledged that any modification - any change to the General Conditions of Service Award - does not modify the other 39 awards. We quite acknowledge that. But we say most definitely that it does affect those awards by that inference.

Mr Warwick's submission made some point of the fact that I referred to standardisation of conditions. I may have. If that word came out it's certainly not something that we back away from.

I think standardisation is one of the objections in the rationalisation process, but I'm sure that 'rationalisation' was the term that I used - rationalisation of conditions, rather than standardisation.

But if rationalisation means in some instances standardising some conditions to effect efficiency and flexibility, then we say standardisation. There is nothing wrong with standardisation.

I don't agree with Mr Warwick's submissions that refer of awards can be done on a piecemeal basis.

As I said in my earlier submissions if you do that, if you deal with each and erode away the conditions matters by stealth and by eating into each matter without any proper consideration of the package as a whole, then you defeat the

purpose of the exercise. It is not a structural efficiency exercise.

DEPUTY PRESIDENT ROBINSON: I'm not quite sure what the package is. I'm not sure that there is a package being put forward. Is there?

MR McCABE: No, there isn't - not in these applications before you now - and that's the point.

DEPUTY PRESIDENT ROBINSON: Is there a package before the commission anywhere? I don't know.

MR McCABE: Well, not at the moment and, as I said earlier in my submissions, that perhaps there needs to be a better understanding between the parties in the public sector and perhaps the commission as to how conditions are going to be rationalised; because the commission has said, quite clearly, that in any award - and the TPSA says, yes, it only applies to the four stream type awards - we differ on that - but it says in any award consideration the matter of rationalisation of conditions is going to be a major factor.

That in those awards any award restructuring will be dependent upon matters of conditions of service being rationalised. It is a condition precedent of that process going ahead.

DEPUTY PRESIDENT ROBINSON: I think it was Mr Hunt who argued that all those sorts of desirable outcomes didn't mean that you had to deal with every possible award variation as a package. That there was nothing to prevent matters being dealt with one by one, as it were, and that's what you are disagreeing with?

MR McCABE: Yes. I don't think you can do that by this piecemeal approach. It is not conducive to a rationalisation.

DEPUTY PRESIDENT ROBINSON: And, how many further claims would need to come in before we could consider that we had a package to deal with?

MR McCABE: Well, I mean in a perfect world, I suppose, there would be discussions between the parties in the public sector as to conditions of service overall; there would be some agreement as to how they might be rationalised; and one hopes that they might be put forward as a generally agreed package.

DEPUTY PRESIDENT ROBINSON: Are you inviting further claims to come forward?

MR McCABE: Well, it is inevitable, I think, that there is going to be some solution to the whole question of award restructuring somewhere down the line.

But, as I was saying earlier, I think there needs to be some better understanding between the parties and perhaps the commission as to how that's going to be achieved effectively.

We don't say this is an effective way of dealing with conditions of employment by doing it on a piecemeal arbitrated basis.

DEPUTY PRESIDENT ROBINSON: Do you think it would be more effective if it were referred to a full bench and that it be fixed - all the matters would be addressed smartly and dealt with and disposed of and the awards appropriately ratified - than me hearing it?

MR McCABE: Well -

DEPUTY PRESIDENT ROBINSON: It would be more effective, do you reckon?

MR McCABE: I don't know whether the outcome would be more effective. That's what were -

DEPUTY PRESIDENT ROBINSON: Well, let's base it upon history, then.

MR McCABE: I'm sorry, I missed that last comment.

DEPUTY PRESIDENT ROBINSON: Let's base it upon whatever lessons we can learn from history. What does that teach us about matters being dealt with effectively?

MR HOLDEN: That it failed.

MR McCABE: Well, I mean, that full bench has said that matters will have to be dealt with effectively before any award restructuring - restructured awards are to be considered.

I guess what I am saying is that whether the matters are addressed under some other principle or some other matter, I don't know.

And I can only refer you again to that third paragraph on page 2 of the full bench's decision of 23rd of April.

DEPUTY PRESIDENT ROBINSON: Yes, I drew that to the attention of the president specifically, because it was my duty and obligation I think to quote you exactly.

MR McCABE: Yes. I don't agree with Mr Hunt's submission that that paragraph only refers to a matter which seeks to put a restructured award in place along the lines of the four-stream proposal.

It discusses those various options, and talks about classification standards, and then it says:

In addition the Commission will ensure that any award or agreement has effectively addressed issues of conditions of employment, efficiency and productivity, either on an Agency or an enterprise basis or, where appropriate, on a service-wide basis.

That's what we're talking about.

I don't agree with Mr Warwick's submission that in the public interest we were saying that, you know, further disputes on payment of wages was the way to go. I mean, clearly that is not our submission.

Mr Warwick says that, you know, we are opposing a payment of wages clause. We are not doing anything of the sort.

We say that that matter is a legitimate matter to be dealt with by a full bench, and this is the way that the public sector -

DEPUTY PRESIDENT ROBINSON: You are not opposing -

MR McCABE: Well, No.

DEPUTY PRESIDENT ROBINSON: - the insertion in the General Conditions of Service Award of a payment of wages clause?

MR McCABE: No. We say -

DEPUTY PRESIDENT ROBINSON: You support it?

MR McCABE: - that there is room there for such a clause.

DEPUTY PRESIDENT ROBINSON: You support an application in principle?

MR McCABE: Well, I am not going to go that far at this stage.

DEPUTY PRESIDENT ROBINSON: But you are not opposed to it - you are not opposed to it?

MR McCABE: No. In the general philosophy behind a payment of wages clause it is not abhorrent to the employer, Mr Deputy President.

We think there is room for something there to deal with payment of wages. We don't see it perhaps in the way that the application has been drafted. We would prefer something else, something simpler, and as we put in the last hearing before you we prefer it to be done by agreement.

But the TPSA are more than anxious to press on to have the matter arbitrated, and if that's how they are going to approach it, then we are entitled to take our own - make our own submissions - and take our own stance on that.

DEPUTY PRESIDENT ROBINSON: But on the fundamental question as to whether or not there should be a payment of wages provision in the General Conditions of Service Award you are not opposed to that in principle?

MR McCABE: We are not philosophically opposed to the idea of such a clause. But the way it is done is another question.

DEPUTY PRESIDENT ROBINSON: Yes.

MR McCABE: We think it is a bit presumptuous for Mr Warwick and for Mr Holden and for other advocates to assume that the application itself might be heard this afternoon or some other time before yourself, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Well I think that they were just saying in the event that I did hear it.

MR McCABE: Right.

Other than that, Mr Deputy President, I've nothing further to add, thank you.

DEPUTY PRESIDENT ROBINSON: Could I just be clear, Mr McCabe, absolutely clear as to whether or not your argument, your threshold argument put here today, relates to both applications - 4287 of 1993 going to payment of wages, and 2323 of 1990 going to workplace representatives?

MR McCABE: Yes, the argument in relation to reference to a full bench, section 35, because both of those clauses will go into the General Conditions of Service Award, if granted, and would have general application, then both are similarly affected, yes.

DEPUTY PRESIDENT ROBINSON: Right. So you wouldn't be seeking leave if I proceed with one application and then when the next one comes on reserving your right to argue again the same threshold argument?

MR McCABE: No.

DEPUTY PRESIDENT ROBINSON: No.

MR McCABE: No. But, as I pointed out earlier, you've only addressed in your decision of the 10th of June you've only addressed one application, that being the payment of wages application T4287.

DEPUTY PRESIDENT ROBINSON: Yes, that's why I asked the question. That's why I asked the question, you see?

MR McCABE: Yes. Yes. No, I think the same arguments apply equally to workplace representatives as they do to the payment of wages clause, Mr Deputy President. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Thank you. I am grateful for the submissions that have been made by all parties here today, and I shall carefully consider all of the arguments for and against proceedings, or the alternatives which have been suggested, and I shall undertake to reconsider again such a threshold question in the light of these further submissions and the assistance of exhibits and so forth which have been put forward.

And, to that extent, I shall reserve my decision on the threshold question - questions - as they relate to both files, and hand down those decisions at an early date. We are now adjourned. Thank you.

HEARING ADJOURNED