TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 4593, 4596, 4597 and 4598 of 1993

IN THE MATTER OF applications by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Tasmanian Branch for interpretation of the Cleaning and Property Services Award

re Clause 9 - Annual Leave; Clause 10 - Call Back; Clause 21(b) - Ordinary Hours of Employment; Clause 21(d) - Minimum Start

PRESIDENT

HOBART, 4 November 1993
continued from 13/10/93

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Mr O'Brien?

MR O'BRIEN: Thank you, Mr President. And thank you for allowing us a few minutes extra this morning -

PRESIDENT: It was my pleasure.

MR O'BRIEN: - to thrash some matters out. They were mainly necessary because of my absence from the state and difficulties if discussion has taken place between us since the last hearing, after Mr Sertori's membership meeting.

In relation to the first numbered application -

PRESIDENT: Yes.

MR O'BRIEN: - we would seek to deal with that last because that's the matter on which there is no agreement.

PRESIDENT: I see, right, thank you.

MR O'BRIEN: In relation to matter 4596, my understanding is that the employers concur with our view of the meaning of the award as expressed in the application.

PRESIDENT: I see.

MR O'BRIEN: In relation to application 4598, the employers also concur with our view on the interpretation of the award as expressed in the application.

PRESIDENT: Very good.

MR O'BRIEN: In relation to application 4597, the agreement is that, in lieu of what we amended our to say, that the provision referred to means that - and these are the agreed words - on engagement an employee's constant number of hours - sorry, I think I've missed something here. Sorry, I'll start again.

That an employer, on engaging a part-time employee by this provision of the award, is required to specify the constant number of hours on any nominated day and per week that pertain to the employee's contract of service. I think I've got that right, because we talked about two concepts when we were discussing that.

PRESIDENT: Well -

MR O'BRIEN: The intent being that in the absence of such specification at the time of engagement, the employee could not be held to be a part-time employee, whatever else the employee might be, that the intention of the award and the words as currently expressed mean that the employee on

engagement would have their hours on particular days of the week and therefore the total per week is specified. And that would form the contract of service. There would be the ability to vary that pursuant to other provisions in that clause.

PRESIDENT: Yes.

MR O'BRIEN: But in the absence of such specification, the employer would not be a part-time employee, and that is, as I understand it, the way the matter is agreed. Whatever else the employee might be, they would not be part-time. And so the critical test would be that on engagement these hours on particular days and total number per week would be specified. And then would be able to be changed only in accordance with the provisions in 22(b) .... my file notes.

PRESIDENT: Yes, 22(b) - Part-time and casuals.

MR O'BRIEN: Yes, and in the absence of such change that additional hours would be paid as overtime and no less than those hours could be paid. And that is, of course, subject to the observance of the minimum .... provision in 22(b).

PRESIDENT: Yes.

MR O'BRIEN: Now I can undertake to have that expressed in written form and run it past Mr Sertori, just so that I haven't misrepresented the position or that the words don't quite clearly express what we think they express, and apologise that we aren't in a position to do that this morning, but that our current agreement is only one which we reached prior to the hearing this morning -

PRESIDENT: Yes.

MR O'BRIEN: - in terms of trying to get a form of words.

PRESIDENT: Yes, that was in relation to paragraph (a) -

MR O'BRIEN: Yes.

PRESIDENT: - which was contained in your -

MR O'BRIEN: Yes.

PRESIDENT: - letter to us of 13 October.

MR O'BRIEN: That's correct, Mr President. And (b) would not be required.

PRESIDENT: And (b) is not required?

MR O'BRIEN: Not required.

PRESIDENT: I see.

MR O'BRIEN: On the basis that if they don't comply with the part-time definition they're not part-time. There are no constant hours and they are whatever else they might be.

PRESIDENT: Right, yes.

MR O'BRIEN: So perhaps if we can deal with those and then I'll go back to the one on which we are not agreed, and perhaps Mr Sertori wants to -

PRESIDENT: All right, well I'll hear from Mr Sertori.

MR SERTORI: If the commission pleases, I confirm the position as reported by Mr O'Brien, that there is consent to the three matters. And in matter T.4597, the words presented were of some slight variation from those that we spoke of pre hearing, but I don't think anything of substance was missed and Mr O'Brien undertook to provide those words. I can confirm my agreement to those more precisely, but the concepts he put forward, my understand of what he said concurs with our pre hearing discussions.

The reason for substantive agreement on this matter is that the main thrust of these three matters arise out of variations that occurred for the structural efficiency review, when there were substantial changes made, particularly to part-time arrangements. And it was a concern of our organisation and membership that the intent behind the changes in that structural efficiency review may not be observed in practice. And it was important that we restore the intent in the spirit of those negotiations. And that is why consent has emerged and it's just unfortunate that some advantage has been taken of wording in practice.

It is my view, under clause 22, in light of the change - in light of the declaration being sought by Mr O'Brien that, in fact, clause 22(b) ought to be varied. And so that the opening paragraph, in fact, reads and reflects the declaration. Then says: On engagement an employee's constant number of hours on any nominated day and per week shall be established as determined between the employer and the employee pursuant to the contract of service. The other words would remain the same.

So that's the words currently written. There's not necessarily an obligation to set those hours on engagement. That is intended by the use of the term `contract of service'. And there may have been some misunderstanding in the pre hearing discussions that I thought also we would seek to vary those words. It might be something we need to clarify -

PRESIDENT: Yes, well that -

MR SERTORI: - .... to and fro.

PRESIDENT: Yes, that really goes to the next question, given that you are agreed as to the wording and interpretation of the three particular provisions that's contained in applications 4596, 4597 and 4598. How do you want that handled? Do you want it to be done by - I mean, do you simply intend to make application for a consent variation to the award or do you want me to do via an interpretation?

MR SERTORI: I'm sure Mr O'Brien will present his own submission, but in the absence of a declaration it's difficult to enforce the award. We're still left with the problem of people having different opinions as to the meaning of the award. And in the use of the declaration, there are one or two things that concur, one is the alleged offending party is able to see the declaration and make an adjustment accordingly. In the absence of that observance, the matter could be successfully prosecuted. And that will be more time efficient, I would have thought.

In the case of the last matter, part-time and casual employee, we would seek - well I envisage us seeking both an award variation and a declaration. If we again left that simply as an award variation, we may leave open this question as to the meaning of the words.

But Mr O'Brien may need to -

PRESIDENT: Yes, all right.

MR SERTORI: - confirm that position.

PRESIDENT: Yes.

MR O'BRIEN: I concur that we are seeking declarations in the forms that I outlined. In relation to the variation of the award, I was mindful of the normal practice the commission has taken in these matters to seek separate application for variation to the award.

PRESIDENT: Yes, well I have broken with that tradition of recent days -

MR O'BRIEN: Well I'm happy to hear that.

PRESIDENT: - for a specific reason. I wouldn't do it without the consent of the parties, ordinarily. On the previous occasion that I'm talking about I didn't have the consent of the parties, but I still deemed it necessary to make an order to vary.

MR O'BRIEN: Well I would concur, if it's of assistance, that it would be useful to include in place of the first sentence in 22(b), the sentence Mr Sertori read on to transcript, concurrent with an interpretation of the existing provision which I don't concur is inadequate, or is ambiguous in any way. But it more clearly expresses what we have always believed the meaning of the existing clause to be. And -

PRESIDENT: I just wonder how much of this is really an interpretation, if the words `on engagement' are essential. Then maybe that is a change to the precise meaning.

MR O'BRIEN: Well I would suggest that it's a clarification that a contract of service must be entered into at the point of engagement.

PRESIDENT: Yes.

MR O'BRIEN: There must be a contract of service and if it is part-time it must specify the constant number of hours.

PRESIDENT: Yes.

MR O'BRIEN: Now there's a clarification factor here which talks about on particular days because of the fact you're limited by the award in other respects to the total number of hours per day, by minimum engagement, by the day on which you may work at particular rates. And I think that they're certainly of being understood with full reference to the award, and certainly with any understanding of the industry. So the variation to the clause, as suggested by Mr Sertori, makes the wording clearer to the uninitiated without an in-depth understanding of awards.

On the other hand, an interpretation will do the sorts of things that Mr Sertori suggests, that is in dealing with an employer who has a view on their reading of the words in the award, the parties will be able to say that in accordance with the act the award has been interpreted. This is what it means. If you don't agree with that then, frankly, in the absence of a change to the award, your argument will not prevail.

PRESIDENT: Mm.

MR O'BRIEN: And that's, as I understand it, the wish of the employers, it's the wish of my organisation, and the commission is empowered to make such a declaration, if it agrees, of course, with our views on the award.

So that's the way I would see it going, rather than - and I understand what you're touching upon, saying that if the award is ambiguous, then should it be interpreted. And that's not my view.

PRESIDENT: All right, thank you. So 4597 can be dealt with by way of interpretation, a declaration and a variation to clause 22, as proposed.

MR O'BRIEN: Mm.

PRESIDENT: 4596, dealing with call back. Now are you saying - could I ask Mr Sertori, are you saying that you agree with the words contained in application 4596, Mr Sertori?

MR SERTORI: Where they're obviously modified to read as a declaration, yes, I am.

PRESIDENT: And there's no - you don't see any need for any review of those words?

MR SERTORI: No, our view is that the provision is quite clear and, to anticipate your question, likewise the issue of minimum staff and broken shift is quite clear. And, in fact, the overwhelming practice of our membership reflects the fact that the words are clear. Unfortunately, they're not clear to some that Mr O'Brien advises. And if that is the case, I don't believe any further change of word will improve the meaning of the - to illustrate the meaning of the provisions. It requires a declaration from this commission in order to resolve the problem outside the commission.

PRESIDENT: And you're satisfied with those words as a declaration, which would take the form of an order.

MR SERTORI: As they are able to be -

PRESIDENT: Manipulated to fit into that sort of document.

MR SERTORI: Yes, to a declaration. Yes, I am.

PRESIDENT: All right. Good, thank you for that. Okay, that certainly makes it simpler. And I agree with the propositions that have been put.

So that leave us, doesn't it, with 4593?

MR O'BRIEN: Yes. Mr President, Mr Sertori tells me that his members aren't able to agree on this. And he leaves me to understand that the practice is more divided between those who observe our view of the award and those that observe his organisation's view of the award.

PRESIDENT: Mm.

MR O'BRIEN: I did outline at the previous hearing and tendered the exhibit marked ALHMWU.1 .

PRESIDENT: Yes.

MR O'BRIEN: And read through that in some detail to outline the nature of our particular concerns and the reason for the declaration sought. And don't really believe that I need to say a great deal more at this stage. I have been privileged to hear a view other than that which is expressed in the correspondence that we received from Mr Abey, which I exhibited with that document, as to why the award should be interpreted in any other way.

Now under the principles of interpretation, it would be my submission that you, Mr President, would have regard to the words as they're expressed in the award and not have regard for those which are expressed in the common rule award of 13 November 1979, to the extent that there was any difference.

In other words, the provision in this award, as it has been substantially, in fact, has demonstrated in my exhibit 1, since 1979, that is there has been no change of substance since 1979, have distinguished the provisions in this award from those which were said to arise from the common rule award, No. 5 of 1979.

The difference of substance is the qualification that accidents or illness which are covered by medical certificates, in accordance with the sick leave clause in the award - perhaps I'll rephrase that. Absences or illnesses of up to 91 days covered by accidents or illnesses which are sick leave and covered by the sick leave provision of the award, do not break continuous service. Accidents or illness which are covered by medical certificates in accordance with the sick leave clause, but exceed 91 days, do break the continuity of service. Accidents or illness which are not covered by the sick leave clause - and the sick leave clause specifically excludes an absence for which there is an entitlement for workers' compensation - of whatever period, do not, in my submission, break the continuity of service for the purpose of the accrual of annual leave.

If the commission needed to go beyond the question of what the words in the award actually say - and I'm doubtful that the commission does so need - the commission could also have regard to section 84 of the Workers Compensation Act, which is contained in the exhibit, and which says, and I'll quote: If during a period for which compensation would otherwise be payable to a worker under this act, there occurs any period during which the workers would be entitled under the contract of service in force, when the right to compensation occurred, to be absent from his employment on annual recreation leave on full pay, the worker shall be given, by his employer, a similar period of leave on full pay in lieu of the annual recreational leave at some time within 3 months of the date of his return to work or at the termination of his right to

compensation under this act, if he does not then return to work.

And in my submission, that means that the act provides that employees who, in accordance with their contract of service, were entitled to leave, that leave is not - that entitlement is not removed by the taking of compensation.

PRESIDENT: Does the - do you think all this hinges on the comma in paragraph (a) of subclause - sub subclause (b)(ii) of continuous service.

MR O'BRIEN: Yes. Does it all hinge upon the comma?

PRESIDENT: Mm.

MR O'BRIEN: Well there are two commas and the only meaning I could take from those is that the intent was to read it: Absences of up to 91 days resulting from accidents or illnesses which are covered by medical certificates, and it's to differentiate those two. Then in accordance with clause 29 - Sick Leave.

PRESIDENT: So an accident covered by a medical certificate, in that submission, wouldn't be included.

MR O'BRIEN: No, that's not what I -

PRESIDENT: But, I mean, there could be a construction of it, couldn't it, if they were seen to be separate?

MR O'BRIEN: Well I would submit that - the way that the commas appear in that passage, it could be taken to mean: Absences of up to 91 days resulting from accidents in accordance with clause 29 - Sick Leave, of this award, or illnesses which are covered by medical certificates, which wouldn't harm my view of the clause. And I think the commas are constructions to make clear that the illnesses are perhaps medically recognised.

PRESIDENT: Yes, I'm sure that's so.

MR O'BRIEN: I'm looking carefully at the words and trying to look at it in the context that you've mentioned it. I still believe that with - there is almost - well there is no reason, in my submission, to disqualify the qualification, referring to the sick leave clause, in relation to accidents on any reasonable construction of this passage.

PRESIDENT: Mm.

MR O'BRIEN: And I take that to be your indication that that's what the matter turns on.

PRESIDENT: Well I just wondered whether it did.

MR O'BRIEN: Yes. I can't, in looking at the words, see any reason to take it that way. It's been my organisation's view for quite some time, that that is what the clause meant. And, indeed, it seemed to me to be an equitable result, notwithstanding the termination in 1979 of a test case on the matter.

Whether that is the view of the commission or not, of course, this matter doesn't turn on whether it's equitable; it turns on what the words mean.

PRESIDENT: That's right. And so - I mean, there's nothing there that specifically mentions workers' compensation in (b)(ii), to say that a workers' compensation claim shall not break service.

MR O'BRIEN: No, it doesn't say that. It refers you to the sick leave clause, in effect.

PRESIDENT: And the sick leave clause -

MR O'BRIEN: Does say that sick leave is not workers' compensation.

PRESIDENT: Yes, yes. So sick leave virtually - the sick leave clause is ensuring that workers' compensation isn't regarded as sick leave.

MR O'BRIEN: Yes.

PRESIDENT: And this is only saying that sick leave shall be exempt from - shall not break continuous service.

MR O'BRIEN: After 91 days.

PRESIDENT: Yes.

MR O'BRIEN: Yes.

PRESIDENT: Up to 91 days.

MR O'BRIEN: Yes. And I guess the extension of that is that the absences for any period have to be sick leave in accordance with the sick leave provision in the award, to break the service.

PRESIDENT: Yes.

MR O'BRIEN: That is whether it's entitled to a payment or not.

PRESIDENT: But it appears to me to be tackling it from the other direction by saying that absences up to 91 days are okay, as far as continuity is concerned.

MR O'BRIEN: Yes, that's right.

PRESIDENT: And that it's making the proposition that once you go over 91 days, then you are - your service is deemed to be broken.

MR O'BRIEN: Yes.

PRESIDENT: And the question is, where does workers' compensation absence get absolved in accordance with the award?

MR O'BRIEN: And we say, as a result of being disqualified of being considered sick leave, under clause 29, which is referred to for cross reference.

PRESIDENT: Yes. Okay.

MR O'BRIEN: I would be happy to leave the matter there and hear what argument, if any, in addition to that which has been put, will now be put by Mr Sertori.

PRESIDENT: Yes. Yes. Thank you. Mr Sertori?

MR SERTORI: If it pleases the commission, I have looked at this issue as principally being one that you're asked to consider a declaration that goes to this issue of what happens to the annual leave entitlement of an employee who was on workers' compensation leave. I think it is Cleaning and Property Services Award.

In outlining our position, say there is no dispute with us as to the application of section 84 of Workers' Compensation Act. That quite clearly provides that annual leave accrued under a contract of service allow, within a period of 3 months, on the employee's return to work. Obviously, however, the rate at which the annual leave accrues is of course determined by the nominated award, in this case, the Cleaning and Property Services Award.

And it is our position that those relevant provisions of this award limit the accrual of annual leave in any 12-month period to a maximum period if continuous service of 91 days and beyond that continuous service would be broken and annual leave in that 12-month period would cease to accrue. So in other words, a person on worker's compensation, under this award, for a period of, let's say, 12 months would have a maximum accrual based on 91 days or 3 months, not beyond.

Our position is based upon the contention of the meaning of the words prescribed in clause 10(b)(ii)(a) and in support of our position -

PRESIDENT: Clause 9 that should be, do you think?

MR SERTORI: I'm sorry -

PRESIDENT: Yes.

MR SERTORI: - shouldn't work from our private copy of the award - in that case, from the annual leave clause in (b)(ii)(a), and our position is supported by advancing principally two arguments: (1) based on the words themselves; and (2) on the relevance of the decision that - common rule decision that's been referred to in Exhibit ALHMWU.1 which we believe has an effect of helping to illustrate the meaning that we proposed - we submit for the relevant provisions.

We do concede that the wording of (b)(ii)(a) is awkward and perhaps ambiguous, but we believe that it's reasonably - it's reasonable within the context of the award to bestow or construe some intelligible meaning on the words.

Now, in our view, the subclause generates perhaps four possibilities which go to the question of limiting annual leave calculation to this period of 91 days continuous service, that is, accidents where sick leave is claimed; accidents where workers' compensation is claimed; illnesses where medical certificates are provided, and that leaves other absences under clause 29 which arise through the use of statutory declarations and that's a little unclear; either falls within the issue of 1-month as leave granted by the employer or is left aside. However, we principally concentrated on, as we understood the application, relating to the issue of accidents for the purpose of workers' compensation.

In our view, there's possibly two - there's two possible constructions in approaching - or in evolving the meaning of the clause in question. The first is that provision reconstructed could be read to have two separate components and in paraphrasing - in trying to illustrate that it's best to paraphrase the provision, and that would: (i) absences up to 91 days resulting from accidents; and (ii) absences up to 91 days resulting from illnesses where such illnesses are supported by a medical certificate, these certificates being in accordance with clause 29 - Sick Leave.

Now we believe that illustrates the way in which the clause should be read and it's interesting, if we go back and look at

the sick leave clause as it once was, I think it can help to illustrate perhaps some of the construction that's been used in this annual leave clause and I would seek to table, sir, the exhibit.

PRESIDENT: You haven't tabled any exhibits previously?

MR SERTORI: No.

PRESIDENT: No. TCCI.1.

MR SERTORI: Now in ALHMWU.1 you have the current sick leave clause and current annual leave provision. What you don't have is something that illustrates part of the history of the sick leave provision and this exhibit that I've just tabled - and I missed the number, and I'm sorry, Mr President -

PRESIDENT: It's TCCI.1.

MR SERTORI: TCCI.1 - is in two parts. The first is - you will see a handwritten date, 1/7/75, that was the introduction of the sick leave clause - that was - on that occasion the sick leave clause was varied in its entirety and it's the base from which the provision has subsequently been varied or modified since.

And then, it was next varied on 1st - it was next varied on 1st September 1988, which is the variation that is headed `Clause 36' at the front of exhibit TCCI.1, and subsequently modified again on 13 September '91, which is the current provision in the award, which Mr O'Brien tabled.

Now when you go to the start with the 1975 provision, you will see an unusual provision in the award that allowed, in subclause (a) - clause 11 subclause (a)(3), that the award allowed for an employee to claim two single day absences in each 6 monthly period where proof was not required, except for a case where one of those days was taken immediately prior to a public holiday, in which case the employer could request that a statutory declaration be provided by that employee as - or as - I'm sorry - could request that some proof be provided by the employee in order to claim that single day absence.

Now that provision remained in the award immediately prior to the change in 1991, which is on the front of the exhibit. You can see in (a)(3), the provision is identical - similarly worded except for a reference to the Secretary of Labour instead of the Chief Inspector, as was the case in 1975.

And the provision that is currently in the award for the annual leave provision has been in the award in that form through that time when those single day absence provisions were inserted into the award. Now having removed those single day absences in the structural efficiency review, it would be

- it may have been desirable had the parties appreciated the problem to then return to the annual leave provision and consider amending it suitably, because if you consider there are single day absences, where there were single day absences in the award when the annual leave clause was written, it starts to make sense of this concept of illnesses covered by medical certificates because, obviously, there are illnesses covered otherwise, and it then makes sense of why there has to be reference to clause 29 - Sick Leave, because, obviously, one has to go and look at this issue of single day absences versus other forms of absences. And, in my view, helps to illustrate what the meaning that we bestow upon the award, that in this construction that the reference to the sick leave clause is generally a reference to the issue of the manner in which sick leave is taken, and not in the construction that the union propose.

PRESIDENT: You may have to run that by me again, Mr Sertori. I'm trying to grasp the connection fully. I mean, I think I follow it, but I'm a little bit lost as to its relationship to the issue of workers' compensation absences.

MR SERTORI: If we were to assume the sick leave clause was not amended and it still had single day absences in it, in other words, there is sick leave that could be taken 2 single days in each 6 month period without proof except in specific circumstances, if we go to the issue of illnesses and accidents that are part of sick leave, then clearly there is an issue of those absences covered by medical certificates and those that aren't. And it would appear that those that aren't, those single day absences weren't considered by the authors of this award to be something that should be allowed to break the continuous service of an employee.

That being the case, that if you construct a calculation, a continuous service provision, it follows that it should be somewhat different to the normal provision of awards of this commission, in that it will require some construction to cross-reference the sick leave clause so that, effectively, you exclude this issue of the single day absences. And that is why you will notice that the clause refers to - the annual leave clause, for example, refers to medical certificates and yet in the old sick leave clause there is no such mention of - there is a mention in subclause (2) of medical certificates, there's no such mention, for example, in subclause (3).

So the construction is this, what the -

PRESIDENT: Well it does talk about production of proof.

MR SERTORI: Well it doesn't say what that proof ought to be, but only in specific circumstances where a holiday - where the day would be taken immediately prior to a holiday.

PRESIDENT: Yes.

MR SERTORI: The point being there are days that could be taken that don't require proof, 2 single days in each 6 months, and what it would appear the passage was written in such a manner so that you took into account that unusual arrangement in the sick leave clause.

To do otherwise, if we were -

PRESIDENT: I would have thought - if you could just bear with me for a second - that the current 9(b) (2)(a) would have ignored or would have cause some problems with the old clause 31, if the 2 single day absences had remained -

And I take it they're not in the current sick leave clause?

MR SERTORI: No.

PRESIDENT: And - so what - how did the annual leave clause read at that time that you're talking about?

MR SERTORI: As it reads now, except the reference wasn't clause 29. The sick leave clause was differently numbered, other than that the provision -

PRESIDENT: Yes. So, it was just referred to either 31 or whatever it was.

MR SERTORI: Yes, whatever the sick leave clause was.

PRESIDENT: Well, wouldn't that cause - I mean, if that was observed fully, that would mean that any time somebody took a single day absence without any proof, they'd break continuity of service. No?

MR SERTORI: Or it could fall within clause (ii)(b), one month granted by the employer, the point being for the purpose of (a), it is an absence other than one that requires a medical certificate. If, for example, the clause simply said: illnesses - just to isolate an example -

PRESIDENT: Which clause are we looking at now?

MR SERTORI: If the annual leave clause simply referred to illnesses without any other comment and there was no reference subsequently to the sick leave clause, those single day absences would be - would have to be concluded as part of the 91 days.

PRESIDENT: Yes.

MR SERTORI: Now -

PRESIDENT: But having put medical certificates in there, -

MR SERTORI: Well they're not part of the 91 days.

PRESIDENT: But it - I still have problems wondering what about the day that doesn't have a medical certificate. I mean, if this clause existed with - together with the old section 31 sick leave, how did you get over that problem -

MR SERTORI: Well I guess we don't -

PRESIDENT: - of single day absences without a certificate?

MR SERTORI: I guess today we don't have to know the answer to that question -

PRESIDENT: No, but the point is you've raised the issue and you're trying to tell me that -

MR SERTORI: Well I'm trying ....

PRESIDENT: - this one of the reasons why I should -

MR SERTORI: Well I'm trying to illustrate - I think when there is some difficulty with the words, we should have regard to the intention of the authors and the history helps to illustrate that, and I think -

PRESIDENT: Well it's a - yes -

MR SERTORI: - what we have to recall is that there was an unusual sick leave provision in this award - unusual by standard to this commission -

PRESIDENT: Yes.

MR SERTORI: - in that it provided these two single day absences. Now there other awards that had that provision, but generally that's a nonstandard provision.

PRESIDENT: Yes.

MR SERTORI: Where you consider that it makes sense that in the annual leave clause that some attempt was made, in looking at the issue of continuous service, to introduce a nonstandard clause to take into account that unusual sick leave clause, hence the reference to it in the issue of medical certificates being raised. Now whether it was written well or not, is a secondary issue, and that helps to illustrate the way in which this has been constructed, so that what it is trying to do in referencing the sick leave clause is draw some distinction between illnesses with medical certificates and illnesses without, which is allegedly clarified in the sick leave clause.

Now, it may well have been, had this award been interpreted in 1988, we may have had another - there may have been another dimension that caused us a problem, but helps to explain why the commas are as they are, and why the construction is as it is, and why it stands out rather proud now that the sick leave clause is fairly much a - more a standard provision. There is no - none of these anomalous situations such as single day absences.

PRESIDENT: Yes.

MR SERTORI: And so in our view, following that construct .... - that helps explain some of the awkwardness, but in following our construction, we come back to those possibilities that the award is talking of absences up to 91 days resulting from accidents. The reference to clause 29, sick leave goes to the issue of regulating those forms of sick leave that require medical certificates and those that don't. Even in the current sick leave clause, there - it is not necessarily the case that absences might be regulated by medical certificates, so there is still that issue -

PRESIDENT: Of the single day absence, yes.

MR SERTORI: Well of any absence that might require that - it could be that there are other forms of proof required, so again, one has to have regard to those sorts of variations.

Now this is where the clause becomes awkward in the area of - in that particular area, but in our view, doesn't exclude the notion that the concept of absences is universal, either be it absences covered by the sick leave clause or absences other than - I'm sorry, absences as a result of accidents covered by the sick leave clause or absence as a result of accidents not covered or remunerated by the sick leave clause.

The second construction and more substantive one is that if we return then to the words of (b)(ii)(a) and we accept the words as they are written and we accept the use of the way in commas have been placed, albeit, perhaps poorly placed, that we have a concept of absences up to 91 days resulting from accidents. It could be read: in accordance with clause 29 Sick Leave of this award. Now if we concentrate on the words `in accordance with' and borrow something like the Oxford Dictionary to illustrate or paraphrase the meaning, then those words could also mean in harmony or in agreement with, doesn't necessarily follow, in our view, that `in accordance with' means accidents that a remunerated under the sick leave clause, but when you subsequently turn to clause 29, the sick leave clause in fact describes two types of accidents; those that are claimable as sick leave and those that are not claimable as sick leave and are in fact worker's compensatable.

Those that are claimable as sick leave are then remunerated in accordance with the sick leave clause. Those that are otherwise, are then remunerated under the Worker's Compensation Act.

In both cases, the nature of those accidents are in accordance with the sick leave clause - both are referred to. There is - and in our view, it shouldn't be construed that `in accordance with' has to be limited to be paid in accordance with or to be paid under or to be paid as sick leave. It's simply not the words that are used. In our view, that's importing a meaning into a set of words that simply aren't there and that's the difficulty we have with the union's position importing that meaning into that particular words and - which result in, in our view, a rather absurd outcome.

I would have thought that if the union's argument - it was then .... - the annual leave provision in (b)(ii)(a) would probably read something like: absences of up to 91 days resulting from accidents, or illnesses which are covered by medical certificate, for which payment is claimed under clause 29 sick leave of the award. Now if the words said that, I think it'd be very difficult to argue with the union's position, but they don't and again they simply say `in accordance with', and in our view, that is a fairly broad set of words.

We therefore, in our submission, argue that there is in either method of construction of the meaning of these provisions, argue that there is delineation between workers' compensatable and non worker's compensatable absences, albeit accidents or illnesses, under this award, and would - no - and as opposed to the union which essentially is seeking that delineation.

Now, when we go back to Exhibit ALHMWU it contains the much referred to decision of the Tasmanian Industrial Board in CR.No.5 of 1979 which of course was an application to - relating to calculation of continuous service in nominated awards of the Industrial Board system including what was then known as the Cleaners Award, and that case which was one of my earlier common rule matters as I note, was one where the Trades and Labor Council of the day sought to increase the minimum accessible period for the calculation of continuous service to a minimum of 91 days.

Now, in doing so, there's nothing in the decision which was the point of correspondence - point of correspondence raised by my colleague, Mr Abey, to the union. There is nothing in that decision, either by the arbitrator himself or by the Trades and Labor Council that sought to distinguish between workers' compensatable and non workers' compensatable accidents - absences for injury, accident or for that matter illness and in the context of setting that minimum of 91 days, it was clearly the intent of the applicant and it was the

trust of that decision that subsequent and reflection - subsequently reflected in the decision that both worker's compensatable and non worker's compensatable absences in injury, accident or illness should be subject to some sort of limitation of - in this case 91 days in the case of - determining calculation of continuous service.

On page 6, the decision is subsequently made, and in the preamble to that decision in determining a set of words which would apply, at the head of the page, the first full sentence, the deputy chairman of the day observes and I quote: Clearly, there is some risk that no limitation may not be in the employee's best interest. End of quote. Clearly, the decision intended there should be that both - for both - for absences, be it workers' compensatable or non workers' compensatable, there should be some limitation in terms of the accrual of annual leave and it continues: It must be recognised also that leave entitlements are a cost factor which an employer must include in his production cost and the fair figure in relation to an employee's output in a year needs to be fixed. So clearly the intent of the decision was to ensure some limitation and the accumulation of annual leave in the specific case on - when an employee is on annual leave - on workers' compensation leave I should say.

Now, subsequently, the decision is set out at the foot of the page which again, as you can see, with the words nominated. There is no delineation between workers' compensatable absences for illness and accident, and non workers' compensatable absence and it is indicated that administratively each of the awards listed in the annexure A - or attachment A should be varied, as I say, administratively.

Now, subsequently in this award, the figure of 1 month was deleted and that was substituted for the figure of 91 days. Now clearly the spirit and the intent of this decision and the union's submission to it was to address the minimum annual leave accrual for both workers' comp - workers' compensation and non workers' compensation absences, recognising that some limit should apply. The decision was - and I should note - and I'm aware that the decision also notes that it would not seek to vary an award that contained a superior provision.

Now, I am conscious that the union's argument that the only reason why subsequently the award was varied numerically was that it already contained an otherwise superior provision and that falls within the intent of the decision on page 6. If that - if that's the case, one might question why it was the case back on that occasion that given the intent of the decision and the concern of the arbitrator was that there should be some limit on the accrual of annual leave for a person in this specific case on worker's compensation leave, then - and recognise the - that that was in the employee's best interest as well as the employer's best interest, why,

when they came to vary this award, that it wasn't looked at more closely, if indeed there was some ambiacity - obvious ambiguity in the award that might bestow a benefit that the union now seeks, that there is a delineation in the nature of absences and where it is - that applies to workers' compensation, there is no restriction on the quantum of annual leave that might accrue.

The practice of the Industrial Board in those days, administratively, was to liaise with the party where there was any particular ambiguity. That didn't occur and I was involved in that process and I suggest it didn't occur because the award is capable of having the meaning that we construe, that it does in fact limit the accumulation of annual leave in both workers' compensatable and non workers' compensatable leave.

One would have thought - as I repeat - if that wasn't clear, then administratively there would have been some liaison, as was the case with some of the other awards that I was involved on that occasion.

What we believe is therefore the - as a result of that decision, the award was varied to include the 91 days on the basis of reflecting the spirit and intent of the decision was that - and that all periods of absence, be it workers' compensatable or non workers' compensatable should be subject to the 91-day limit. Now, if the award is capable of now doing - being read to do otherwise, it should be - in our view - amended accordingly to reflect that intent of that decision and to reflect the standard that have - that we believe subsequently applied.

Now, drawing some conclusion to the matter, we have to concede the provision that's before you on the annual leave clause is awkward and there is some ambiguity present. Nonetheless, the history of the provision and the nature of the common rule decision and the words themselves we believe, conclude in favour of our position. To accept the union's proposition will result in an extraordinary outcome that an employee on workers' compensation leave is entitled to be over compensated to that compared to the - an employee working through the relevant period.

By way of illustration, what that means is that a person on workers' compensation for an extended period will, in fact, for each 12-month period or 52-week period receive 56 weeks pay as opposed to an employee not on workers' compensation who would only be entitled to their 52 weeks pay because the net effect of Mr O'Brien's submission would result in annual leave payment being in addition to any workers' compensation payment and for employee who are off for a period, say, up to 12 months, they have that potential, absurd outcome.

And we need to be careful when we consider the principles of interpretation that have been generally observed by this commission and which - and one of those principles that generally - speaking generally unless the drafting is such as to lead to no other conclusion, the rules to be followed should not, ipso facto, become the absolute authority for construing a provision which - in such a way as to confer an extreme advantage or disadvantage on an employee - I suppose an employer - and one should also be satisfied the result is not otherwise out of step with the general provisions of an award as a whole.

The problem I have with Mr O'Brien's interpretation - proposed interpretation of the award is in fact it does bestow that advantage on an employee in those circumstances and imposes a cost on an industry that's not without some significance. We must remember that we are dealing with a contract cleaning industry where labour costs approximate some 90 per cent of total costs and that when one varies the cost of labour then it's significant in terms of the contract of the employer or the contract cleaner. So -

PRESIDENT: A couple of things, before you go to the next point. It just interests me that you would say that Mr O'Brien's proposition would result in employees receiving additional pay and that has awoken in me perhaps some misunderstanding of what this about, but I must pursue it.

I thought that 9(b)(ii) simply meant that the absences wouldn't break service. Now I may be moving into unchartered waters here and I do it frequently, but are we talking about including all these absences for the calculation of service or are we talking about not - simply not breaking service for the purpose of calculating previous work.

MR SERTORI: Yes, it's - if we can ignore -

PRESIDENT: I mean, the reason I ask that this because the lead into (ii) - subparagraph (ii): continuous service shall not be deemed to have been broken, has another implication.

MR SERTORI: The concept is that in any 12-month period an employee would be entitled to be absent for 91 days .... where Mr O'Brien have our differences -

PRESIDENT: Yes.

MR SERTORI: - for breaking continuous service for the purpose of calculating annual leave, so if you are off for 12 months, your annual leave when you return would be based on 91-day service period, in other words 1 week's annual leave. You wouldn't get, on return, 4 weeks leave that your colleague got who worked that entire 12 months. Now that's the notion.

So that the employer is not up for some additional penalty I guess for an employee who is - who incurs a long-term absence. Now - otherwise if the absence is less than 91 days or 91 days or less, then the employee will get their full entitlement to annual leave or - other things being equal - in their annual leave year. Now that's the -

PRESIDENT: Yes. Okay.

MR SERTORI: - general practice of these sorts of provisions and why they are there and that's why I draw the conclusion if an absence as an accident whose work is compensatable, it is excluded from the 91 days provision, therefore service is deemed not to be broken which, as I understand Mr O'Brien's submission, a person is off for, say, 12 months exactly, they're due for 4 weeks leave on return and they have in effect achieved 56 weeks pay for that 12-month period.

Of course the other notion is that they are taking annual - they're taking 4 weeks annual leave and they've already been off work for that period, but one must bear in mind that annual leave is not as often thought - I meant for some employees - that it's a paid holiday provided by the employer. It is simply a period of time that a person doesn't have to turn up to work and usually granted on an annual basis or such other form as the award allows and you're going to be paid for that period of absence. It doesn't necessarily follow that you take a cruise or those sorts of things is conjured up in some people's mind. So if you're off on workers' compensation leave, you're off from work in any event, and it follows it's not unreasonable that there be some limit or some restriction on the amount of annual leave one could accrue through that period.

That's principally the argument that's been in the occasion that these sorts of provisions have been looked at and indeed was the argument in the common rule matter.

PRESIDENT: Yes, of course, yes. Okay.

MR SERTORI: So, I have little further to add in conclusion other than repeating -

PRESIDENT: Well can I then direct - ask you to comment on Mr O'Brien's submission in relation to the implications of section 84 of the Workers' Compensation Act?

MR SERTORI: Well I did at the outset. As I said, there's no dispute in my view. Section 84 quite clearly indicates that an employee, will by virtue of being on workers' comp, will not lose any entitlement to annual leave by virtue of being on workers' comp under the act, but the rate at which annual leave accrues - the precise entitlement - is determined by the award. The act itself doesn't determine the entitlement. It

simply says annual leave: The employee shall be entitled to annual and that will be taken within 3 months of the employee's return to work. To determine the quantum, must go to the award, and we go to the award in this case, we're saying that the award limits that accrual as opposed to Mr O'Brien's submission where it does not.

So, in that sense, to assist you, sir, there is no dispute that the Workers' Compensation Act has the application that it does, but it certainly doesn't override the way in which annual leave accrues or is determined under the award. That's the province of the award, and if it did otherwise, one would ask how this commission was able then to regulate annual leave, indeed, if it was regulated under the Workers' Compensation Act.

PRESIDENT: Yes.

MR SERTORI: So -

PRESIDENT: Well it could be a reason why worker's comp is not mentioned in the annual leave provision.

MR SERTORI: Well it's the standard provision. If we return to page 6 of the common rule decision and the provision that the deputy president handed down at that time, that could be said to be a standard provision of this commission and not dissimilar to provisions you would find in other jurisdictions and as you will note, there is no actual mention of workers' comp - there's no delineation between workers' comp and non workers' compensation leave. It's simply, personal sickness or accident.

PRESIDENT: Yes. Well of course if you took - worked on the basis that there was point in mentioning workers' compensation in the award because indeed it is proscribed in the award, then there wouldn't be any need to provide for it in the award.

MR SERTORI: Workers' comp or annual leave?

PRESIDENT: Workers' comp - well annual leave for workers' comp and that in fact it was provided for by the act.

MR SERTORI: Well it's not excluded by the act, but it -

PRESIDENT: Well the Industrial Relations Act excludes reference to workers' compensation in an award.

MR SERTORI: Yes, but all the act is able to do is to say annual leave shall - there will be an entitlement for annual leave and it's effectively subject provision in the award and you are right, there's no need in the award to mention - drawing the distinction between one form of sickness and

another form of sickness or one form of accident and another form of accident. We're forced to do so in the nature of the submission because the union asked to have an interpretation which has the effect of excluding those sort of absences that will come under workers' compensation leave from this calculation to continuous service, so I suppose by default I've started to use the terminology, but - only for illustrative purposes.

PRESIDENT: But I mean the act says the worker shall be given by his employer a similar period of leave on full pay in lieu of the annual recreation leave at sometime within 3 months after his return to work.

MR SERTORI: But it doesn't say how much and it doesn't say in what form. The only way one could determine that is to -

PRESIDENT: Well, if during a period for which compensation would otherwise be payable to a worker, there occurs any period during which the worker would be entitled under the contract of service in force when the right to compensation occurred, to be absent from his employment on annual rec leave on full pay, a worker shall be given that within 3 months, is that what it says?

MR SERTORI: Well the contract of service is in fact the award -

PRESIDENT: Yes.

MR SERTORI: - which defines the nature of that annual leave and it's very clear in - and if we just look at most awards for the sake of this example, that annual leave will be provided subject to the calculation of continuous service provision to determine the actual quantum, so the Workers' Compensation Act prescribes annual leave shall be granted, and the means of calculating that is determined by the award and I think they sit quite comfortably as they in practice as they do in most awards.

It could be said they sit comfortably here regardless of our interpretation. It's just that in my case I say the award is limiting the amount and Mr O'Brien is excluding that that relates to workers' comp by virtue of the construction of the reference to the sick leave clause.

PRESIDENT: Yes.

MR SERTORI: Nonetheless, I think we both share the view that it applies in a similar fashion, although - assuming I've understood Mr O'Brien's submission, I guess.

That being the case, sir, we again see the - draw your attention to the key words of clause 10 being `in accordance

with', and that there is by virtue of our explanation of those words, we see no exclusion of - no delineation between absences that are workers' compensatable or otherwise so that the 91-day limitation applies across those possibilities as opposed to the limitation that Mr O'Brien has submitted. We should suggest that if you are so inclined to accept our submission that clause - the clause - the annual leave clause 9(ii)(a) would be best amended to remove what is possibly an ambiguity and an awkwardness and with the minimum of movement, the second comma that is currently placed in the award after the words `medical certificates' ought to be removed and that at least removes what may be otherwise an ambiguity and we believe that that would ensure that the intention - the meaning that we propose is in fact - is in fact understood. If the commission pleases.

PRESIDENT: Yes. All right. Thank you, Mr Sertori. Mr O'Brien?

MR O'BRIEN: Mr President, the first thing that I would like to say is that Parliament do not agree apparently with Mr Sertori's or his organisation's view that annual leave or annual recreational leave is as good as a workers' comp absence because if they did they wouldn't have put section 84 in the act I presume. I think it's suggesting that because someone is off on extended workers' compensation that they've - they're having a lend of the employer and they weren't the words used, but it's the implication, by then coming back and saying we want to take annual leave, is not a reasonable proposition, neither is the proposition is that somehow that person is getting 56 weeks pay for 52 weeks work, a reasonable, more logical proposition.

If you go to section 84 of the act, what the act is saying - and I won't refer to the words - that under the contract of service that existed at the time of the injury or accident or whatever, which is the award and anything on top of that, if the worker is accumulating annual leave, that isn't broken, subject to the provisions of the contract, so I will agree with Mr Sertori's view that if the award says it is, then it is and if the award says, for example, no annual leave will occur during a period of absence of more than 91 days, you know, in that broadest possible sense, then there would be no accumulation and therefore there wouldn't be leave which had fallen due during the period of workers' compensation which had to be taken or paid for in accordance with this clause.

So, yes, it does turn on what the award says, but I think I can say that if Parliament accepted the view that this was somehow some extreme provision, they wouldn't have included it in the act, and so you would, in my submission, reject the submission that you shouldn't find in our favour because it led to some extreme advantage to an employee; neither would you accept the view that there was somehow a provision of 56

weeks pay for 52 weeks work or the equivalent thereof as a result of this interpretation.

In fact, if you look at how annual leave works, an employee gets 4 weeks leave in the second and subsequent years of service. So they work 56 weeks and then they're entitled to 4 weeks off. And assuming the leave is taken in that period, they work another 48 weeks before they have 4 weeks off. And that's how it accumulates. The mathematics is not important, that's just how it works. But if you really want to talk about how many weeks you actually have to work to accumulate a period of annual leave, well it's 52 in the first year and potentially 48 thereafter.

I found it difficult to grasp the reference to the single day absences until you, Mr President, referred to the, you know, the question of the absences not covered by medical certificates breaking continuity of service and that's possibly a correct view. The meaning of the clause as it stands, and it isn't something that I had been looking at closely and looking at the problem we were trying to correct. But I think that the fourth principle of interpretation, which says that you can't rely upon anything but the words in the clause is the one which pertains in this - sorry, the words in the award is the one which pertains in this case. The commission would not -

PRESIDENT: You don't see any ambiguity in the words, Mr O'Brien?

MR O'BRIEN: I don't particularly see ambiguity, but perhaps if I can deal with the submission about changing the award in that context. Let us say that you took the comma out, as Mr Sertori suggests, what if a person is on workers' compensation, their complaint is occupational overuse syndrome, RSI, call it what you like. It doesn't result from an accident. Is it an illness? And they're more likely to be the people off for more than 91 days, than someone who bumps their leg or arm or whatever. Those people on the amended clauses that Mr Sertori proposes, would not be absent on an illness which is covered by a medical certificate in accordance with clause 29, the sick leave clause because they'd be off on workers' compensation. And that wouldn't be, to use Mr Sertori's words, in harmony with the sick leave clause. Therefore they would be entitled to have their period of absence deemed to be unbroken - sorry, their continuity of service deemed to be unbroken. So if -

PRESIDENT: Yes, there is a problem with those workers' compensable issues which are accidents, but are illnesses and vice versa.

MR O'BRIEN: Well what I'm saying is, Mr Sertori is saying that if you do that, that really achieves what he believes the

award means. If he does that. Let's have a look at - I'm not particularly aware of the nature of the problem with Mrs Breen. Perhaps there was an incident, there was an accident which caused the absences, but if there wasn't, is it an illness, is it covered by the sick leave clause, does it then follows from Mr Sertori's submission that the continuity of service would not be broken? But I think it's for that very reason that the commas are where they are, because the reference to the sick leave clause is to both accidents and illness. And if you go to Mr Sertori's exhibit you'll see -

PRESIDENT: It's really the placing of the first comma.

MR O'BRIEN: I beg your pardon?

PRESIDENT: It's the first comma which I find to be the worst - the offending comma, if it is offending. But that's the one that causes me the concern. Anyway -

MR O'BRIEN: Well perhaps I'll come back to that. The sick leave clause, going back to 1975, has been, in respect to the preamble in the first subclause, the same since 1975. And I don't think it's changed even now to any marked degree. An employee other than a casual who is absent from work on account of personal illness, or on account of injury by accident, shall be entitled to, without deduction of pay, subject to conditions, provided it's not workers' compensation.

PRESIDENT: Yes.

MR O'BRIEN: And I think Mr Sertori was arguing that if you followed my argument through, well if they weren't entitled to paid sick leave, then it probably wasn't - you weren't entitled to any period of absence, let alone 91 days without breaking your continuity of service, if I understood him correctly. But I would say that the - you can be absent on a period of absence which would be sick leave in the ordinary course of events, subject to your entitlement under the limitation to 2 weeks' pay for each of year service, which is fully accumulative.

I believe the submission which deals with the meaning of `in accordance with' being equated to `in harmony' does no harm at all to the interpretation which we seek to place on the provision in the annual leave clause, because if there are absences of up to 91 days resulting from accidents or illnesses, which are covered by medical certificates, which are - using the term Mr Sertori used - in harmony with the sick leave clause, well clearly an absence on workers' compensation leave is not in harmony. .... the clause it's excluded.

PRESIDENT: Yes, I suppose it all depends on your construction of what harmony means and whether it simply means has it been referred to in the sick leave clause. And I suppose you could say, well, yes, workers' compensation has been dealt with in the sick leave clause. Whether that's in harmony in the sense you are trying to interpret it, I'm not certain yet.

MR O'BRIEN: Perhaps if I could say this, that in the preamble it starts off by saying that people are entitled to leave of absence without deduction of pay, and then the first point says the employee shall not be entitled to such leave absence for any period in respect of which the employee is entitled to workers' compensation.

PRESIDENT: Yes.

MR O'BRIEN: Now either the reference to the sick leave clause has a meaning, because if it wasn't there Mr Sertori's view would be eminently supportable. It would simply say absences of up to 91 days which, resulting from accidents or illnesses which are covered by medical certificates. Or even if it stopped at illnesses, Mr Sertori's view would be the correct view.

But it then goes on to quality that. And it's our submission that the reference in accordance with clause 29 - Sick Leave, of this clause, qualifies accidents or illnesses which are covered by medical certificates.

PRESIDENT: Yes, I follow your submission. I understand what you're saying.

MR O'BRIEN: I don't think that there is a great deal more I can put on that point, Mr President, other than to say this, that in relation to this and the other matters we would seek a retrospective interpretation to 23 December 1990. That is the date on which the award in its current form came into effect. It's consistent with our agreed matters and it does not touch - overlap any of the relevant award changes which might have any effect at all on the interpretation. In other words, you, Mr President, would be interpreting the award as it is now and as it has been since December 1990, in respect of the provisions subject to this interpretation. The effect of that would be, in my view, equitable, having regard to the submission which Mr Sertori made about the earlier matters. Even though this is not an agreed matter, I believe, the same principles ought to apply.

And let me say, finally, I said at the outset that I'm given to understand that there is not unanimity in the observance of the annual leave provision within the industry. But I think it is clear that part of the industry agrees with our view on interpretation of this matter and applied it so.

PRESIDENT: Yes, thank you. I should hear from Mr Sertori on those last points you've raised, Mr O'Brien.

MR SERTORI: If the commission pleases, the last aspect of that submission as to the observance of the industry is no more than a statement from the bar table. But, interestingly, it does concede that there are employers in respect to the annual leave matter who observe the award in the manner in which I have submitted, in that they limit the quantum of annual leave for employees on workers' compensation.

If the commission was -

PRESIDENT: I suspect we wouldn't be here if it wasn't the case.

MR SERTORI: That's fine, but the fact that that has been conceded, and even Mr O'Brien concedes that that's at least half of those employers. Of the others it may well be they choose to be generous as opposed to .... the interpretation. If may not be consistently the case they apply the award in the manner Mr O'Brien would prefers.

But if, in this industry, we're to make such a declaration as Mr O'Brien seeks retrospective, that cost is twofold. There is a significant cost of having to pay additional annual leave, which would be 3 weeks for any year concerned, not uncommon in this industry that people can be off for extended periods of workers' comp. So there is a significant cost which, in the present climate, bearing in mind my earlier submission, which is not contested, that 90 per cent of the cost is a labour cost. That would be significant on the employer.

More importantly, this is a contract industry. And if you are to impose increased costs retrospectively, it will inevitably be absorbed by the contractor, him or herself, not picked up by the principal. It may well be the contract is now expired and there is no ability whatsoever to pick up that sort of retrospectivity.

The net effect will be, in my submission, that if you are to apply that - if you are to inclined to concede Mr O'Brien's submission and make your declaration retrospective, you will offend section 36 of this act by having an undue impact on the economy of this industry and we would suggest generally not in the public interest. There should be some substantive reason to apply retrospectivity on any occasion. No argument has been put that would suggest that there is any substantive reason other than the desire by Mr O'Brien that it would be nice for his organisation if you did it.

PRESIDENT: Well, with respect, it has been the subject of an industrial dispute and that's why it is here.

MR SERTORI: Yes, but in making your -

PRESIDENT: And under section 31 an order could be made retrospective -

MR SERTORI: But - that is correct.

PRESIDENT: - in relation to this particular dispute.

MR SERTORI: But it's already been conceded that the matter is broader than -

PRESIDENT: Yes, quite so.

MR SERTORI: - than one individual, and in fact that it only -

PRESIDENT: Does that mean though that the individual who has the dispute before the commission should be denied the opportunity to obtain satisfaction on the basis that it might affect everybody else?

MR SERTORI: Well, if you were to make a declaration as of today, Mr O'Brien's ability to pursue a breach of the award is - against that individual - is not compromised. The magistrate would be able to - would be able to take heed of that declaration in the context of any particular breach that might arise.

The - it's the broader implication that we need to be concerned about in this matter, beyond just that individual company, that of those many companies that are not involved in any particular dispute when observing the award they believe correctly and could be subject to an increase cost over a fairly significant period of time.

PRESIDENT: But if I were to declare from today's date that the award should be interpreted in the manner proposed by Mr O'Brien, that would have the same impact on all the other employers too, wouldn't it -

MR SERTORI: Well we're dealing with -

PRESIDENT: - if they were each taken -

MR SERTORI: That would be my submission at large -

PRESIDENT: - into a court?

MR SERTORI: - in opposing the declaration, but my submission at the moment is going to the specific - of the declaration

being made retrospective. Of course it would have an impact no matter - as I indicated in my submission - but it's a more severe impact if it made retrospective. At least the employer has some ability to adjust as of today, as opposed to trying to recoup monies to pay for a cost that at the time of entering into an arrangement is not a known cost, and this industry, which is subject to contracts, it will look to try and retrieve that cost from the principal. If the contract's expired, he has no ability and it may will be he'd have substantial difficulty anyway to try and obtain a retrospective cost increase.

It's why in this award it's been so important to ensure the minimum rate process is on time. It's why many of the provisions in the award - we've tried to be careful about the issue of operative date because of this unique contractual arrangement, and I make the point to you, sir, that there is - anyone observing the award is - as I have submitted - confronted with a different - the - Mr O'Brien's means of interpreting the award, the cost .... is significant and in this industry that has a compounded effect because of the contract arrangement and your - I repeat, your decision, I would contend, would be offensive under section 36 and I'd ask that - there is no good reason - so I'd suggest there is no good reason for you to make your declaration retrospective -

PRESIDENT: Do you -

MR SERTORI: - to resolve the issue of the dispute that gave rise to this matter - a declaration of today if necessary would adequately deal with that matter.

MR O'BRIEN: Conditions .... apply. 36 doesn't apply to these proceedings, if the commission pleases.

PRESIDENT: And why do you say that, Mr O'Brien?

MR O'BRIEN: Because it says: before the commission makes an award under this act or before the commission approves an industrial agreement, et cetera. This is not the proceedings to do either of those things.

PRESIDENT: Yes.

MR SERTORI: If the commission was persuaded to vary the award, of course, in making the declaration that should be the case and in any event - in any event, to not have regard to the economic impact of any decision, whether it be a statutory requirement or otherwise, we would say it would be offensive and if it's not covered by the act then it certainly - one could construe it to be covered by the main thrust of the principles that we've adhered to.

I forewarn you, sir, that a retrospective application to this industry is a significant burden and we must draw - as it is in any industry but particularly this industry due to its contract nature.

As to this retrospective application of the other matters that's been thrust upon me without - during these proceedings, and whilst I am able to consent to the applications, I am not prepared to consent to their retrospective application, conscious of submissions that I have made. The principle of retrospectivity is one that I am - the policy of my organisation would oppose and I would imagine my members would instruct me accordingly, so on that basis, I also oppose their retrospective application. I don't believe that there is any particular compromise with Mr O'Brien in this area that the declaration be made as of today and in fact, given the nature of observance of our membership of the award generally it is observed, as Mr O'Brien would prefer, but given that we agreed in this process to some minor award variation, I think it reasonable that any declaration be of today's date and that any employer who has unfortunately applied the award in the incorrect manner where a .... given the opportunity to correct that accordingly without any additional penalty, so -

PRESIDENT: But I don't see how they can avoid the bill, do you, if you agree me that the effect of a prospective or date of decision as of today has the same practical effect -

MR SERTORI: Yes, I -

PRESIDENT: - but I think I understand -

MR SERTORI: It was a poor choice of words.

PRESIDENT: - I do understand the - I think what you're putting to me what is a principle of your organisation and I follow that.

MR SERTORI: Yes. Yes. So, on that basis we - I cite two different - whilst on both occasions I oppose the retrospective application of the decision in the case of the annual leave provision where in fact the circumstances are somewhat different and I am quite aware that the decision in favour of Mr O'Brien would have a cost impact and my submission is couched accordingly but retrospectivity is opposed because of the cost impact. In the second area I'm unsure of the impact and given that I am sure my concern about retrospective application and believe that it would be quite satisfactory the declaration be of today's date. If the commission pleases.

PRESIDENT: Mr O'Brien, I give you another opportunity to respond on any of those - other matters.

MR O'BRIEN: Yes, just very - I've already made a comment about the section 36 submission.

PRESIDENT: Yes.

MR O'BRIEN: I have a difficulty with the principle that in interpretations there should not retrospectivity. If you're correct -

PRESIDENT: And that's not a principle. The act -

MR O'BRIEN: It has been -

PRESIDENT: - the act provides for a retrospective declaration and -

MR O'BRIEN: Yes. I -

PRESIDENT: - I've used it.

MR O'BRIEN: I guess I am talking in relation to my experiences in other proceedings under this section of the act. If an award means something and the award has not changed for a period of time, then surely it means the award meant that thing for that period of time. I wonder what the effect of .... retrospectivity is. Let us take the matters on which there is general agreement.

The majority of the industry, one takes it from Mr Sertori's submission, observes the award and has nothing to fear from such a declaration and a minority in the industry obviously does. Now let us say that a declaration made operative of today is made, does that mean, likely or unlikely, that in taking a prosecution for observance of the award unchanged yesterday allows a different finding. Is that in the public interest? I would submit not. I would submit it is in the public interest, if it is clear that the award has contained a provision for some time. These are not proceedings to make conditions. They are to establish a dispute about what they might mean and to the extent that an employer misunderstands his or her obligation under the award, there's no - never been principle I understand which would say they should be protected from the economic consequences of that error, be it deliberate or otherwise, by decisions of this commission.

Now if you are right, Mr President, that there's no difference, then there's no offence to a retrospective declaration, but if there is a difference - if there is a possible difference then, in my view, it would offend the requirement of this commission to act equitably to allow that difference to occur.

Now I - whether it is reasonable or not for me to take this view, it seems to me that Mr Sertori would have less problem

with retrospectivity on those matters which there is substantial industry acceptance of the view we put, and so I'll limit most of my submissions to the annual leave matter and say that if there - even if 80 per cent of the industry has observed the award differently, we are talking about instances where annual leave rights, in our view, accrued for periods of workers' compensation where the absence exceeded 91 days and there aren't that many of them, to be frank. There is no evidence - I can equally put something on the record from the bar table as to what my view is, but I think the reality is that there aren't that many of them spread across this industry to make it an economic cataclysm for you to make the sort of order we seek.

I indicate that probably it would have been good to have worked the matter out in relation to those other matters and it was something that I thought needed to be addressed in completeness before you adjourn the matter and I respect Mr Sertori's organisation's position and Mr Sertori's need to put that submission, but I think in equity, the submission which I put is fair. It goes back to the point which the award was made in substantially its current form and it will have no dire consequential effect on the industry in my submission if the order I seek it made.

PRESIDENT: Yes. All right. Well thank you very much for your submissions. I'll endeavour to get my mind wrapped around them and produce an interpretation and declaration in relation to the - particularly in relation to the last matter we've dealt with. The other three matters will be addressed as agreed previously. I will give consideration to the question of operative date and that will be included in my decisions when released. Mr Sertori, were you concerned about something?

MR SERTORI: I note, in concluding, Mr President, that we talked of - during the consent matters we talked of - the parties, since they were in consent, you're happy to make that variation. I just note there is another organisation that is a party to this award. I'm using my private copy of the award and I'm not sure if they still hold this name - Retail Traders Association of Tasmania, so - or whatever they are now called -

PRESIDENT: Yes.

MR SERTORI: - are also a party to this award and I have no instructions from them, but -

PRESIDENT: Well they -

MR SERTORI: - I'd certainly -

PRESIDENT: - have been informed of the interpretation proceedings and they miss this hearings at their peril.

MR SERTORI: I'd concur with that, sir.

PRESIDENT: Yes. Well, all right. Well thank you very much again. This matter is concluded.

HEARING CONCLUDED