

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. Nos 4614, 4615, 4616, 4617
4619, 4620 and 4621 of 1993

IN THE MATTER OF an application by
the Dean of St Davids Cathedral
for interpretation of nominated
clauses of the Musicians Award

T No. 4618 of 1993

IN THE MATTER OF an application by
the Dean of St Davids Cathedral
for interpretation of nominated
clauses of the Entertainment Award

PRESIDENT

HOBART, 12 October 1993

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Could I have appearances please?

MR M. O'FARRELL: Yes, Mr President, I appear for the Dean of St Davids Cathedral, the applicant in the matter.

PRESIDENT: Yes. Thank you, Mr O'Farrell.

MR D. SHELVERTON: Yes, Mr Commissioner, if it pleases, I'm DENIS SHELVERTON, Secretary of the Musicians Union, with me I have the former secretary, **MR DON CUSHION**, and apart from that I'm also the State Secretary of the other two respondents of the form 1987 state award.

PRESIDENT: Those being - ?

MR SHELVERTON: The Actors Equity and Theatrical and Amusement Employees which has amalgamated recently into the Media, Entertainment and Arts Alliance. I have a letter from the Media, Entertainment and Arts Alliance. We've yet to make the application for the change of registration of Actors and Theatrical

PRESIDENT: Yes. Okay. Thanks, Mr Shelverton. We won't too deeply into that for the moment, but I understand your representation. No other appearances? No.

MR D. CUSHION: If the commission pleases, for the record **DONALD ALBERT CUSHION** appearing for the Musicians Union. As indicated, I was previously secretary - branch secretary of the Musicians Union. I currently hold the position of branch treasurer and federal vice president, so that in the terms of our rules, I am still an officer of this union.

PRESIDENT: Very good. Thank you, Mr Cushion. Mr O'Farrell?

MR O'FARRELL: If the commission pleases. These applications, Mr President, under section 43 of the Industrial Relations Act - by way of background, the applications have arisen out of proceedings No T.4456 of 1993 in this commission, in fact, before you. These proceedings - or those proceedings have been taken by Mr Ian Burk who is the former organist and master of choristers of St Davids Cathedral against the cathedral, firstly for reinstatement on the basis that he claims that he was unfairly dismissed, and secondly for the underpayment of wages to him between 1987 and the 17th of September 1992 when his employment was terminated.

The first question relating to reinstatement for unfair dismissal is not now relevant for the purpose of these proceedings. These present applications relate to whether or not the Musicians Award and it's predecessor, the Entertainment Award, were capable of covering Mr Burk during his employment at St Davids Cathedral and for those purposes it has been agreed between the Musicians Union and the

cathedral that Mr Burk was employed on the basis set out in the transcript of the other proceedings, T.4456 of 1993, on the 7th of October 1993. I don't know whether you wish me to reiterate all of those facts for the purpose of this - ?

PRESIDENT: Well I'd be happy to hear from Mr Shelverton as to whether or not those facts are confirmed.

MR O'FARRELL: Yes.

PRESIDENT: But perhaps before we do that, I should ask the parties whether it is agreed that all these applications be joined for the purposes of hearing.

MR O'FARRELL: Well I submit that they should be heard jointly, yes.

PRESIDENT: Yes.

MR SHELVERTON: Yes.

PRESIDENT: Yes, Mr Shelverton? Thank you. And I presume that the Entertainment Award application, 4618, would probably be the first one addressed.

MR O'FARRELL: That's correct.

PRESIDENT: Yes. Okay.

MR O'FARRELL: Yes.

PRESIDENT: Now you were -

MR O'FARRELL: Well it's -

PRESIDENT: - we were trying to establish whether or not the brief facts regarding Mr Burk's employment at St Davids Cathedral which were outlined at page 25 of the transcript you've just referred to of the 7th of October 1993 are agreed to by representative of the employees.

MR SHELVERTON: Yes, Mr Commissioner. As indicated at the previous hearing they were the agreed matters in relation to Mr Burk's employment. May I point out that there was another additional item in regards to employment and that was Mr Burk's availability for funerals and weddings where in addition to those hours tabled originally.

PRESIDENT: And was that - and when you say that was part of the agreed - are you saying that was part of the agreed facts?

MR SHELVERTON: That wasn't read into the previous transcript.

PRESIDENT: But it was part of agreed material?

MR SHELVERTON: Well I would take that it is part of the agreed material.

PRESIDENT: Anyway, I'll hear from Mr O'Farrell on that. Precisely, you're saying that there was -

MR SHELVERTON: Additional services were required from Mr Burk for the playing at funerals and weddings and any civic occasion outside of the normal calls.

PRESIDENT: And this was on an availability basis -

MR SHELVERTON: On an availability basis.

PRESIDENT: - to be on call?

MR SHELVERTON: Yes.

PRESIDENT: Mr O'Farrell?

MR O'FARRELL: Yes, I don't take any issue with that. In fact, I think that's set out in the draft letter of the 26th of March 1987, which is Exhibit S.1 in the other proceedings.

PRESIDENT: Yes. I actually hadn't heard from you on that issue, as to whether or not you accepted that draft letter.

MR O'FARRELL: Well - yes, we certainly accept that that's a letter which was drafted by the former dean and sent to Mr Burk but it was never returned - acknowledged in any form.

PRESIDENT: Yes. Yes. All right. Very good.

MR O'FARRELL: Well on that basis I won't stop to summarise those facts again.

PRESIDENT: No, I'm satisfied that they've - as long as we - all are agreed that those material facts will be incorporated into the -

MR O'FARRELL: Yes.

PRESIDENT: - information for consideration -

MR O'FARRELL: Yes. Well I -

PRESIDENT: - for this matter.

MR O'FARRELL: - I'd ask that they be incorporated.

PRESIDENT: Very Good.

MR O'FARRELL: The question raised by the present applications, Mr President, is whether the award covered Mr Burk between 1987 and 1992, or put another way, was the position of organist and master of choristers at St Davids Cathedral during that period covered by the Musicians Award and its predecessor the Entertainment Award. Now, for the purpose of doing some housekeeping before I make further submissions, I'd submit that it's best that the applications which have been filed are heard in the following order: firstly, T.4618 of 1993 which is the Entertainment Award application.

PRESIDENT: Yes.

MR O'FARRELL: And there's T.4621 of 1993.

PRESIDENT: Yes.

MR O'FARRELL: That relates to the Musicians Award No.1 of 1987. T.4620 of 1993 which is No.1 of 1988.

PRESIDENT: Yes.

MR O'FARRELL: T.4615 of 1993, No.2 of 1988.

PRESIDENT: Yes.

MR O'FARRELL: T.4614 of 1993, which No.2 of 1989.

PRESIDENT: Yes.

MR O'FARRELL: T.4619 which No.1 of 1990.

PRESIDENT: Yes.

MR O'FARRELL: T.4617, No.1 of 1991. T.4616, No.2 of 1991.

PRESIDENT: Yes.

MR O'FARRELL: Yes.

PRESIDENT: Yes. That's the way I would have done it too, Mr O'Farrell.

MR O'FARRELL: Yes. Thank you. Now just to further elaborate on the situation; we submit that an historical analysis of the award is necessary for the purpose of the case which has been brought by Mr Burk against the cathedral because he must rely on the Musicians Award in order to make out his case for underpayment as it applied to him through the various periods between '87 and '92.

In the case for the cathedral is simply is that the awards - or the Musicians Award did not apply, but because of a number

of changes in the award during the relevant period it's necessary to make a number of different submissions in respect of changes in the award.

Now if I can just outline what we're seeking today; we're seeking declarations by you, or the following three broad declarations, firstly, that the cathedral was not an employer within the scope of the Entertainment Award No.1 of 1987; secondly, for the period of operation of the Musicians Award No.1 of '87 until its amendment by No.2 of 1989, Mr Burk was not an employee who fell within the provisions of the Musicians Award; and thirdly, since the amendment No.2 of 1989, the cathedral was not an employer within the scope of the Musicians Award.

PRESIDENT: Yes.

MR O'FARRELL: And we also say that notwithstanding the amendment to the scope provision in 1989, Mr Burk has never been an employee within the three classes of employees which are contemplated by the various awards.

PRESIDENT: Sorry, just - so you're saying that from 2 of '89 notwithstanding the fact -

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

PRESIDENT: - notwithstanding the fact that the cathedral was not within the scope -

MR O'FARRELL: He was - he nevertheless remained -

PRESIDENT: - he was still not an employee for the purposes of the award?

MR O'FARRELL: Yes, that's correct, yes, yes. Now at that point, Mr Commissioner - Mr President, I would then go on to make the submissions in an almost identical form to those which were put before you on 7th October 1993; now I'm able to do that if you want to hear me or -

PRESIDENT: It might be better if you were to go that process again Mr O'Farrell.

MR O'FARRELL: Yes, certainly. Well now, if I can start then with - with the application 4618 of 1993 which relates to the Entertainment Award and refer you simply to clause 2 - Scope - and paragraphs (a), (b), (c), (d) and (e) which related to suppliers of public amusement or entertainment, proprietors of public amusement or entertainment, ticket selling or booking office, teacher of dancing, bookmaker, or operator of a betting totalisator, we submit that the cathedral is certainly not in those industries and when you look at clause 6(a), the award is binding upon all employers who are engaged in the

industries specified in clause 2, so our simple submission about that is - is that it simply didn't apply to the cathedral.

PRESIDENT: Are you aware of the implications of section 40 of the act - I think it's section 40 - which goes to the coverage - the ability to extend the cover of an award by regulation?

MR O'FARRELL: Well I'm aware of it - I'm not aware of any regulations, but I may need some time to consider that.

PRESIDENT: No, well, I just wondered whether you had thought to address that particular aspect?

MR O'FARRELL: I haven't looked at that - I haven't looked at that aspect but I can certainly have that -

PRESIDENT: Not - I don't want to send everybody else on a red herring but -

MR O'FARRELL: No.

PRESIDENT: - but - or a wild goose chase - perhaps it should have been a bit of a mixed metaphor there - but I think although that power exists it hasn't been applied in respect to the Entertainment Award -

MR O'FARRELL: Well I can certainly have that checked quite easily.

PRESIDENT: - insofar as the activities of the cathedral are concerned, but it may be worthwhile for both parties just to be satisfied on that because that is one aspect that needs to be addressed.

MR O'FARRELL: Yes. Yes. Yes, I'll have that checked now. Under - if I can then proceed to the application T.4621 of 1993, that relates to what I believe is the first Musicians Award. Now I'll just have to take you through once again, Mr President, as - to precisely what we say about this. It's slightly convoluted. We concede that clause 2(a) in relation to musicians is capable of applying to Mr Burk that's so far as that goes. Obviously he's a musician and we'd also concede that clause (b) insofar as it relates to persons who receive remuneration for musical services applies to Mr Burk - so he falls - his employment - his position falls within those two subparagraphs.

When you go to clause 5 - sorry, clause 7 - clause 7, subclause (v) in relation to musical services, musical services means work performed in - and if I can just paraphrase this - we don't - we - well I'd submit that (a) doesn't apply and (b) could - (b) could only apply if it was

possible to find that - that a religious performance was something which a cathedral organist - and Mr Burk in this case - was employed to do. And I'd submit that that's not something which he was employed to do, because quite simply we submit that a church service is not a religious performance, it is an act of worship by a group of religious people and we'd submit that a religious performance would be something like, as I outlined to you last week - the performance a piece of religious-based music, for example, Handel's Messiah, or indeed, a setting to a Bach Mass, which is not actually performed in a liturgical context, that is, it is not performed as part of a ritual - worship by Christians in a church.

So a religious performance, in my submission, is something different than a church service, and of course Mr Burk was employed by the cathedral to play music for church services.

PRESIDENT: Could you extend that then to say that any time an orchestra played any piece of music which had some religious background or meaning, that that would be a religious performance, but if it were played in a church it wouldn't be a religious performance.

MR O'FARRELL: No, that's - it's always going to be a matter of degree, but the one thing that makes a church service different than a religious performance is that is in fact a recognised part of the church's liturgy, so that it's actually something which is done as part of the rights which the church practices in order to - in order for its congregations to worship and that's the difference. The mere fact that an orchestra plays Handel's Messiah, for example, would not necessarily make that a religious performance but if it was - if the thrust of it was on a factual basis as part of some sort of organised religious gathering, not necessarily for the purpose of worship - some organised religious gathering, then that would constitute a religious performance. Of course then you've got matters of degree, but on - my submission is, that on no proper basis could a church service be found to be a religious performance.

And I passed up - I'm sorry I haven't made extra copies, but I passed up to you last week an extract from Collins Dictionary which defined the definition of 'performance' which is:

- the act, process, or art of performing; an artistic or dramatic production. Manner of quality

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- well those are the two definitions which I would rely on and then as opposed to that, the definition of 'service' in respect of church services:

- public worship carried out according to certain prescribed forms; devine service; the prescribed form according to which a specific kind of religious ceremony is to be carried out; the burial service -

- so there's a clear difference in the meaning of performance and service recognised in that particular work. And 'worship', just as an adjunct to that submission, is:

- to show profound religious devotion and respect to, adore or venerate (God or any person or thing considered divine); to be devoted to and full of admiration for; to have or express feelings of profound admiration; to attend services for worship; religious adoration or devotion; the formal expression of religious adoration; rites, prayers, etc; admiring love or devotion -

- and in my submission it's quite clear that notions of worship in church services have no bearing whatsoever on notions of religious performances.

PRESIDENT: And you're extending the definition of 'service' to mean that it has to be worship?

MR O'FARRELL: Yes. In this context, 'service', as I've submitted is a part of the church's rites, so it actually has to have some sort of formal expression. Certainly that must be correct for the Anglican Church which follows recognised forms for various sorts of worship. It has Holy Communion; it has burial service; wedding service; it's in - Evening Prayer in various recognised forms of worship which are not religious performances. They are acts of worship.

And to sum all of that up, what I would submit is what an organist and choir master does, in these terms, is not a religious performance at all. It is, in fact, part of a liturgical form or service - liturgical, sorry, form or service -

PRESIDENT: You're probably right the first time, I think, Mr O'Farrell.

MR O'FARRELL: No, liturgical I would - yes, as part of a liturgical form or office for the purpose of worship. It's an adjunct, we submit, to worship, and the importance of that for the purpose of these submissions, is that the award - where the award refers to religious performances, it doesn't - at any stage - refer in any way to church organist or people

involved in church services. There is no direction in the award that one can glean from all of its terms to suggest that a cathedral organist and choir master would be an employee who falls within the scope of the award.

PRESIDENT: Why, you think, there's the distinction been made about religious performances in the award?

MR O'FARRELL: Well, that provision appears in respect of a number of different sorts of things that a musician can do. It refers to grand opera, grand ballet, concerts or religious performances, general theatrical entertainment, et cetera, et cetera, so it -

PRESIDENT: But on your submission you might just as well have left out religious performance in order - still had the same application.

MR O'FARRELL: Well that may be right. It may also, on that submission, may just have well left out grand opera and grand ballet. What I'm suggesting is that while this is work that is performed by musicians, there's no - there could be no suggestion so far as this award goes, that it was actually intended specifically to catch people who provide services, that is, employment services, to churches for the purpose of acts of worship.

Nevertheless, when you go to clause 7(5)(c) we would concede immediately that 7(5)(c) catches the cathedral because it refers to all other work performed by musicians or - sorry, it catches - it contemplates that Burk might be one of those people and we wouldn't resile from that.

On that basis when you look at clause 6(a) of the award, which refers to all -

PRESIDENT: So really - if I could just summarise what you're saying about musical services, notwithstanding the fact that religious performance should not be seen to be a church service or any activity that the church engages in, Burk would be picked up by -

MR O'FARRELL: Oh, yes, yes -

PRESIDENT: - 7(5)(c) so the award would - if all other things were -

MR O'FARRELL: Were equal -

PRESIDENT: - in - in place -

MR O'FARRELL: - that's correct.

PRESIDENT: - 7(5)(c) would -

MR O'FARRELL: Would be sufficient -

PRESIDENT: - would cover the work of Mr Burk.

MR O'FARRELL: - yes, that's correct.

PRESIDENT: Yes.

MR O'FARRELL: Except - well I'll come back to that. 6(a) where it refers to all private employers who employ persons in the occupations specified in clause 2 on its face catches the employer in this case, but we - my submission is that Burk is still not an employee who is contemplated by the award.

Now it's common ground as you know, Mr President, that Ian Burk was employed in the position of organist and choir master and on that basis the possibilities for him being an employee under the award are as follows: firstly, if you once again go to clause 7 he could be a weekly employee -

PRESIDENT: This is still in 1 of '87?

MR O'FARRELL: Yes.

PRESIDENT: Yes.

MR O'FARRELL: He could be a weekly employee in that - but to do that he would have to be an employee engaged by the week for at least six calls in a week to be performed within six consecutive calendar, including Sundays, provided that in grand opera, ballet, religious and symphonic concerts a weekly employee shall be engaged for at least seven calls per week. Well leaving aside any question of religious and symphonic concerts, it's common ground as I understand it, that - that Mr Burk had - was called five times a week, that is, for three rehearsals and for two services on Sunday. And a call, you will see in clause 7.2 is an appearance for either a performance or rehearsal of not less than 3 hours' duration. So he's - he's not a weekly employee and I don't understand -

PRESIDENT: What - what do you say then to the suggestion that there - that Mr Burk was available for - had to make himself available for all other services?

MR O'FARRELL: Well -

PRESIDENT: Such as weddings and burials.

MR O'FARRELL: - I'd say two things. I don't think that I've agreed that he had to make himself available; I've agreed

that he's on call and was available, but I don't know that it's an actual condition of his employment that it was compulsory to be available, but probably nothing turns on that.

PRESIDENT: Well on - on call is fairly compulsory.

MR O'FARRELL: Well, I suppose so. I suppose the question is whether he had to answer the call, but as I say, it's not - probably not a matter of contention. In any event, I'd submit that - that when you look at what is - what the terms of his employment were, he was only spasmodically asked to - well he's on call but there's no - there's no definite frequency - he's not necessarily called out once a week. There's no suggestion in the facts that he's - he's called out on six occasions every week. He may, I suppose, on that basis, there may be some argument that he was a weekly employee one week and he wasn't in another week, but I'd submit that that couldn't be correct.

The fact is that the conditions of his employment was such that he was engaged by the week for at least five calls - that's - that was what - what he was in fact employed to do - that was the terms of his engagement. He was not employed - he is not engaged by the week for six calls, so he doesn't fall within that definition.

PRESIDENT: Do you think - is there anything sinister in that - that - that perhaps the five calls had been selected as the terms of employment to avoid any notion -

MR O'FARRELL: Oh, absolutely not -

PRESIDENT: - of weekly employee.

MR O'FARRELL: - absolutely not, Mr President. I've - there's nothing sinister in that at all, and this is - I think that as this matter proceeds - depending on how far it does proceed - there will be certainly a suggestion by us that - that up until very close to the end of Mr Burk's employment really no-one ever thought about the Musicians Award. If Mr Burk did think about the Musicians Award he certainly didn't tell us anything about it.

PRESIDENT: Yes, well perhaps we shouldn't - shouldn't enter into that discussion at this point.

MR O'FARRELL: Mm. But no, there's nothing sinister and I'd submit that on the material which is presently before you there's no way that you could draw that inference in any event.

PRESIDENT: Just that - that he seems to fall between all the definitions.

MR O'FARRELL: Well I've - the only submission I make about that is that - is that backs up the general thrust of all of my submissions, that this award was never intended to apply to a church organist - never intended. He's not a regular weekly part-time employee although that sounds as though that is what he ought to be on its face, but that definition refers exclusively to an employee regularly engaged in public ballrooms from two to five performances each week. Now he's - obviously he's not one of those. And a casual employee means an employee who is employed on a casual basis - and he's certainly not employed on a casual basis, he's employed on a regular basis and includes a person who's not employed for a period not exceeding 5 days in any one time. Well, once again, I submit that he's employed on a regular weekly basis to - to at least provide the cathedral with musical services for three rehearsals and two church services on Sundays and other services at call.

So he doesn't fit squarely within any of the three classes of employees which are contemplated by this award. And on that basis, when - although I haven't included these - these provisions in the applications, but when you turn to the wage rates provisions, there's really no - that's clause 8 - there's no - there's no rate which applies to him. If - if an employer went to the provisions and said, now what do I pay Mr Burk, they wouldn't find an employee within the meaning of the award that they could pay according to those provisions.

And there are a number of other provisions to the award; do you want me to run through those again, Mr President, which tend to support that view?

PRESIDENT: Yes, I think you should if you've got anything you want to put on it.

MR O'FARRELL: Yes. Well I'll simply run through them just for the sake of completeness; they're clauses 14(a) and (c).

PRESIDENT: And what - what do you say about those?

MR O'FARRELL: Oh, dear, it's the wrong one. I'm sorry, Mr President, just pardon me for a minute.

PRESIDENT: That's the payment of wages clause.

MR O'FARRELL: Yes, that's payment of wages. Well -

MR CUSHION: I thought he said '14'.

MR O'FARRELL: - that couldn't apply to him because he's not a weekly employee - or (c) - he's not a casual employee, so 14(a) and (c) couldn't apply. The other provisions of that

aren't particularly relevant for the purposes of the present submission. Clause 20 -

PRESIDENT: Does that mean that a part-time employee doesn't get paid at all?

MR O'FARRELL: Well I don't know -

PRESIDENT: Well that's a good question -

MR O'FARRELL: - but he's not one of them.

PRESIDENT: - that's a good question though arising from your submission that -

MR O'FARRELL: I suppose he's a weekly - he could be a weekly employee in the sense that he is - if he's a part-time employee, he's - I suppose he could be a regularly weekly part-time employee and he falls in that.

PRESIDENT: Yes. Yes.

MR O'FARRELL: But - I mean, one of the problems we have with this is wrestling with these provisions. In some respects they - well, in many respects they don't seem to fit many of the sorts of scenarios that one could throw up. Clause 20 relates to the various loadings which might be given to various different musicians under the award, for example, a leader gets 20 - that's 20(e) - gets plus 20 per cent on the basic wage right but none of these provisions have any meaning whatsoever unless you can actually strike his basic wage right under clause 8 and of course we submit that that's impossible.

23(a) and (b) relate to overtime. Again, you'll see for Sundays - (i) weekly employees and regular weekly part-time employees; and (ii) for casual employees. It doesn't seem to have any particular application to Mr Burk.

PRESIDENT: Well that is if your submission is -

MR O'FARRELL: Is correct, yes.

PRESIDENT: - accepted that he's not a weekly employee. He's not a regular weekly and he's not regular part-time weekly and he's not casual.

MR O'FARRELL: Yes, that's correct. Public holidays is the same submission. 24(a), (b), (d), (f) and (g) all relation to terms of engagement of weekly employees and weekly wages and weekly calls - weekly number of calls, et cetera, et cetera, and none of them, in my submission - without being able to find an appropriate definition in which Mr Burk can sit - none of those provisions have any particular application.

Now, if you look then at - or if I can just reiterate those submissions. All of the submissions I've just previously made apart from those in respect of the Entertainment Award, I'd reiterate those submissions in respect of the application T.4621, T.4620 and T.4615, and that then brings us to T.4614 which -

PRESIDENT: What you're saying there is all those award variations repeated the various clauses that you've been referring to.

MR O'FARRELL: Yes. I think essentially they changed the wage rates.

PRESIDENT: Yes.

MR O'FARRELL: Yes, that's all. Section - sorry, the application 4614 to relates to the introduction of clause 6 - Parties and Persons Bound and that fundamentally changed - or changes the position, we submit, from - it would be from the 10th of April 1989 onwards. Now, it's - for the purpose of this submission, clause 2 remained the same, so it still binds musicians and people providing musical services.

Sorry, I just lost my - yes - clause 2 remained the same in the sense that it referred to musicians and people providing musical services. Clause 6 changed to bind all employees - all employers, sorry, who are engaged in the industry specified in clause 2 - Scope. Now, the big change in this is that whereas clause 6 use to refer to people who employed employees in the occupation specified in clause 2, it now - what clause 6(a) demands is that all employee - all employers - or those people who are bound are those employers who engaged in the industry specified in clause 2, so it became an industry award, and the cathedral is not engaged in that industry.

PRESIDENT: Do you the variation to the parties and persons bound clause affects the scope? I mean, the scope is the key to any award.

MR O'FARRELL: Yes. But it doesn't -

PRESIDENT: And the scope still refers to occupations, doesn't it?

MR O'FARRELL: That's correct, but -

PRESIDENT: And you're saying that because the parties and persons bound clause was changed for whatever reason to deal with an industry rather than an occupations and that should override the scope clause.

MR O'FARRELL: Well, I submit, Mr President, that the award has to be applied according to its terms and the question which has to be determined so far as this my submission is going is whether or not the cathedral who - which also obtained certain rights under the award, is a person who is bound by it and if it is not, then on the face of it I would say that the award has no application to the cathedral as an employer.

PRESIDENT: Are you aware how the scope - the parties and persons bound clause was altered and for what reason?

MR O'FARRELL: I'm not absolutely aware of the reason for that, but -

PRESIDENT: It may take a bit of research -

MR O'FARRELL: Yes.

PRESIDENT: - I could - yes, I can earnestly inform you of that - it would take a lot of research. But -

MR O'FARRELL: Well I might be able to -

PRESIDENT: - it appears that the parties and persons bound clause was changed in virtually all awards -

MR O'FARRELL: Yes.

PRESIDENT: - as a result of consideration of a number of matters going to award interest and -

MR O'FARRELL: Mm.

PRESIDENT: - it does seem at this moment - and I can't vouch for that, that all - all private sector awards were amended in exactly the same way without having had regard to the fact that some of them were occupational awards.

MR O'FARRELL: Well that may be correct, but nevertheless, the amendment was made and -

PRESIDENT: Yes.

MR O'FARRELL: - and - and in my submission my client is entitled to rely upon that.

PRESIDENT: Notwithstanding the fact that there are two contradictory provisions in the award.

MR O'FARRELL: Well they don't - they - well, with respect, Mr President, they're not contradictory at all.

PRESIDENT: And why is that?

MR O'FARRELL: Because the scope provision directs its attention to - to those persons - pardon me for a second - the scope provisions refer specifically to work performed by private employees engaged in the following occupations, so it looks - it looks towards those people who are employed as musicians or who are persons who receive remuneration for musical services. The parties bound clause looks so far as clause (a) is concerned at the employer and whether or not an employer is actually bound to adhere to the provisions of the award.

Now - so in that sense they look - they look at different aspects of the - of the subject matter; one towards the employee and one towards the employer - they can be read together without -

PRESIDENT: But then if you go - if you have look at paragraph (b) -

MR O'FARRELL: Yes.

PRESIDENT: - in - in 6, the - even the employees are required to be employed in the industry. Now what is -

MR O'FARRELL: Yes.

PRESIDENT: - what is the industry if it's an occupational award?

MR O'FARRELL: But it - well, look -

PRESIDENT: That's why I ask the question - don't you think they're contradictory?

MR O'FARRELL: Well the industry is - is the industry of - of providing musical services to people, but that's -

PRESIDENT: Well, that's part of it and that includes anyone who is a musician.

MR O'FARRELL: That's correct. So you -

PRESIDENT: And -

MR O'FARRELL: - so - but those employees are bound or could be bound, but you also have to find that there's an employer - for the purposes of applying the award, in my submission you have to find that there's an employer who is also bound. And once that alteration was made, our simple submission is that, you know, notwithstanding anything I've put about Mr Burk not falling within the classes of employees under the award, the - insofar as it may have been bound by the previous awards, the church was no longer bound. It doesn't - it's not in that

industry - it's - I'd submit that it's in fact in the industry of trying to be flippant of providing religious services to people as opposed to musical services.

Now if I can just - I reiterate that submission so far as applications T.4619 T.4617 and T.4616 go, and that's - those are all of my submissions in respect to the award. I'll just refer you briefly to industrial relations regulations concerning the question which you asked me at the outset. This is regulations 295 of 1984 refers in column 1 to entertainment - the Entertainment Award and refers to work being musical services being performed by a musician in a cafe, hotel, restaurant or similar establishment or place - so that has no bearing on the present case. It doesn't refer in any particular to the Musicians Award and so far - so far as I know - and I expect that these regulations are up to date, there are no other regulations which extend the award.

PRESIDENT: Yes, thanks -

MR O'FARRELL: Those are my submissions.

PRESIDENT: - yes, thanks, Mr O'Farrell. Mr Shelverton?

MR SHELVERTON: Yes, Mr Commissioner, I refute everything that's been said by Mr O'Farrell. I'd like to refer you, sir, to a decision by the President of the Industrial Relations Commission dated 16th December 1988: Stated another way, I am of the opinion that the effect of -

PRESIDENT: What was this - what matter was this in, Mr Shelverton?

MR SHELVERTON: That was in the case of a definition of assistant as handed down by the commission in T.1681 of '88.

PRESIDENT: 'T'?

MR SHELVERTON: 1681 -

PRESIDENT: Eight, one -

MR SHELVERTON: - of 1988 -

PRESIDENT: Yes. And what - were we dealing with a dispute or an award or - ?

MR SHELVERTON: Yes, it was a matter of an interpretation in the retail trades area.

PRESIDENT: Right.

MR SHELVERTON: The Retail Trades Award.

PRESIDENT: Yes.

MR SHELVERTON: Re clause 7 - Definition of the System. ^{Assistant}

PRESIDENT: Yes.

MR SHELVERTON: The words of the president were: I am of opinion that the effect of regulation 14 of section 40 of the act is to extract from a parent industry award a certain classification or classifications and extend to award-free employees the wage rates applicable to that work. Further, he went on to say: Regards should be had to what is physically being done the employer - by the employee concerned. That work should be tested against the particular classification and/or definition nominated by the regulation. If the employee concerned is carrying out work, the nature of which is the same or similar to that envisaged by the classification concerned, then provided no other award or agreement applies, the employee concerned is entitled to be paid in accordance with the salary rates prescribed for the classifications set out in the regulation.

In applying such tests it is neither necessary nor relevant to have regard for the scope clause for the parent award. And goes on further to say: Most awards covering private employees and employers are industry awards with the industry stated in the scope clause. Other awards affecting private employers and private employees are referred to commonly as occupational awards. Subject to the constitutional capacity of the employee organisations to enrol as members persons in any industry, those awards may apply to the work performed regardless of the employers industry. The one exception might be where the employer is bound by an industry award that includes that classification, for example, a cleaner.

PRESIDENT: So what were the specifics about this interpretation? Can you enlighten me?

MR SHELVERTON: A challenge as to whether the definition of assistant under the Retail Trades applied to the Retail Trades Award, in particular to door-to-door sales people. Whether the sale was made at the door or whether the sale was made from the point of distribution. And canvassers as well were treated in the same light:

(a) directly covered as employees under the terms of the Retail Trades Award as Assistants;

(b) covered in any case by reason of the regulation, common rule or general application extension of that classification in circumstances where no other award applies; or

(c) award free.

PRESIDENT: And was there a specific regulation dealing with a shop assistant?

MR SHELVERTON: Well:

Regulation 14 provides for extension of existing award classifications to employees not specifically provided for in an award, but who are performing work of a class envisaged by a nominated classification. That classification may or may not be defined in the specific award referred to in the Regulation.

Reduced to more easily understood language, Regulation 14 complements Section 40 of the Act.

Section 40 comprehends extension by regulation of the whole or any part of an award -

PRESIDENT: Yes. I asked Mr O'Farrell to address that and he has done so and established that the regulation doesn't go to the issue of work performed in the church. It deals, as I understand it, with cafes and restaurants and things of that nature.

MR SHELVERTON: Well one question I have in relation to a religious performance in regards to a church, Mr Commissioner, how would you define a liturgical dance? Is it a performance or is it a ceremony?

PRESIDENT: I'm not certain -

MR SHELVERTON: That's the difficulty that -

PRESIDENT: - of the relevance of liturgical dance to this issue.

MR SHELVERTON: Well is it a performance or - a liturgical dance is performing normally to music and the music is provided by the organist during the ceremony. It's a matter how fine you draw whether it's an act or whether it is a performance.

The other thing that I'd like to refer to is the declaration of the president in the making of the award on 17 December 1987. The president's words were:

Right. Well now, your Union should consist of an unlimited number of members who are:

"... instrumental performers, and any other persons who receive remuneration for musical services ..."

Including in that was the conductor or singer - conductor of singers, sorry. He went on further to say:

In short you're saying: a musician is a musician, and you look to other parts of the award for any extra payments that might be attracted because of extra skills or disabilities.

In the wage case -

PRESIDENT: Is that out of a decision of President Koerbin's, is it?

MR SHELVERTON: Yes, in the commencement of the Musician's Award of '87.

PRESIDENT: It's not from transcript?

MR SHELVERTON: It's from the transcript.

PRESIDENT: Yes, I think - I'm not certain I can pay too much attention to what took place in the transcript, Mr Shelverson, in an interpretation.

MR SHELVERTON: Too many papers, sir, if you could just bear with me for a couple of moments.

PRESIDENT: I understand the problem.

MR SHELVERTON: If you look at the principles of the National Wage Case of September '91, in relation to principle 2(a). It was the endeavour of the union to simplify all other musicians from the extensive list of definitions. Historically, if we were to go back to the 1924 award of the Musicians Union there were some 29 classifications all told. Included in those classifications, sir, was the classification of 'organist', which stood alone.

Over a period of years the union has endeavoured to reduce the number of classifications and further to conform with the guidelines of the National Wage Cases, where endeavours were made by not only this union, but all unions to modernise awards in terms of the National Wage Case. We'd submit, sir - this is exhibit, being the 1924 Musicians Award where it refers to the position of 'organist'.

PRESIDENT: Mr Shelverson, in an interpretation I have to address the words that are here now. Why would you want to tell me what happened in 1924?

MR SHELVERTON: What I was endeavouring to do, Mr Commissioner, was relate - Mr President, was to relate the fact that the position of 'organist' was included in our

original award and over a period of years with award modernisation and rationalisation of the various clauses that these were brought back to some eight categories.

PRESIDENT: Yes, all right. If Mr O'Farrell raises no objection to that material.

MR SHELVERTON: Well the other thing I was going to raise as was referred to me by my offsider, Mr Cushion, was that Mr O'Farrell was able to submit some awards of previous nature.

PRESIDENT: I don't think I've seen any awards other than those which were part of the application, Mr Shelverson. Anyway what do you want to extract from the 1924 -

MR SHELVERTON: Well I just wanted to submit that, sir, based on the fact of the various classifications that applied in 1924.

PRESIDENT: All right, we'll mark this S.1.

MR SHELVERTON: Further to that, included in there is the definition - the difference between a weekly and a casual employee.

PRESIDENT: Okay.

MR SHELVERTON: I'm sorry, the pages have just got out of order in the shuffling around.

PRESIDENT: Do you think I've got all the pages?

MR SHELVERTON: In that one, yes, sir. It's the first actual - actually it's the first general award of the Musicians Union.

PRESIDENT: Yes, I see.

MR SHELVERTON: The other thing that I wish to -

PRESIDENT: What do want - are you going to address it?

MR SHELVERTON: If you refer to page 45 and page 46, I think it is, sir, you will see the - the rates as laid out covering religious performance - at the bottom of page 45, grand opera et cetera: Where the employee is employed in grand opera, grand ballet, concerts or religious performance the following rates shall be paid. And it goes over for the extra performances, rehearsals, casual employee and a casual leader.

PRESIDENT: Yes. But that doesn't say anything different does it - to what's currently in the award?

MR SHELVERTON: No, no, there's no change, sir, it's just the history that I was endeavouring to build up to the - the fact that was specifically in the award in 1924 - we're now some 70-odd years down the road and we maintain that they're still religious performances - they're still part of our industry.

PRESIDENT: Yes. Yes, well you're going to have to produce more than simply say that this award which had religious performance in it in 1924 proves that a religious performances were - that's conducted in a church. Now I think that's probably your task on that point.

MR SHELVERTON: Just further to the - the history of the award and the classifications, Mr President, the - the former secretary, Don Cushion would wish to contribute to it.

PRESIDENT: Yes, certainly. Mr Cushion?

MR CUSHION: If the commission pleases, I believe that it would be appropriate and if it's acceptable to you, I would briefly outline some of my own background so that you understand that when I give evidence it's based on substantial activity in the industry as a practitioner.

I still find it somewhat embarrassing even though I've been retired as a musician to have to talk about myself, but it seems it's the only appropriate to proceed.

PRESIDENT: I'm prepared - I'm prepared to accept your experience in the - in the area of provision of musical services, Mr Cushion.

MR CUSHION: Yes.

PRESIDENT: I don't think you need to have to prove that to me.

MR CUSHION: I thank you, sir. As a matter of fact, if I were to outline it in total you would probably think I was 103 where in fact I'm only 65, but I'd - sufficient for these proceedings to be able to inform you that - to inform the commission that I have in fact performed with four of the symphony orchestras in this country, 24 years as principal trumpet with the Tasmanian Symphony Orchestra; I've had the good fortune to give many religious performances which don't require any definition other than the fact that they took place.

The reference to Handel's Messiah leads me to inform you that I've performed either 50 or 60 performances depending whether you call a repeat performance one or two performances of Handel's Messiah and I can assure Mr O'Farrell that it certainly had religious significance for me at all times. And they were performed in many different locations. Sometimes in

a hall, sometimes in halls with good acoustics, some with bad, and on a number of occasions in various churches and cathedrals. So there's an example, if you like, where Mr O'Farrell seemed to have some difficulty about whether there was a fine line - I can assure him that if there was a line at all, those performances were on the side of religious performance, and on many occasions they included the use of the church organ and the church organist because of his familiarity with the particular organ that was required.

As far as the award is concerned, I think it's important that

-

PRESIDENT: Well that's - that's really what we've got to address.

MR CUSHION: Yes, sir - that should be aware that - or be made aware of the fact that prior to becoming state secretary, I was federal secretary of this organisation for 11 years and as such had to put my expertise as a musician into practice across many awards. And on many occasions musicians do flow from the casual to the weekly employee status and I think the quaintest thing that was said by Mr O'Farrell is that Mr Burk, in his opinion, didn't fall within any of the three categories, therefore he was award-free.

I can assure the commission that many musicians are employed on a casual basis, of one, two, three, four and five calls per week and sometimes they are fortunate enough for that to be increased to six, seven or eight or even more. And what occurs is that the musician moves from one category to the next in the payment of his wages.

PRESIDENT: With the one employer?

MR CUSHION: Yes, sir. I would quote for you during my term as both federal secretary and state secretary when I was required to set up orchestras or bands as they preferred to be referred to, sometimes for accompaniment of the Moscow Circus. The rehearsals could start on Wednesday or a Thursday because of the limitation of getting all of the equipment to another state and they would do four, five or six casual calls in one week, start the next week with eight performances and be a weekly employee. And at the end of the season because they then had to pack up the equipment and be required to go to another state they could be a casual employee again for a part of the last week.

PRESIDENT: And you are claiming that that's the practice?

MR CUSHION: That most certainly is the usage and practice in our industry, sir. Disney on Ice was exactly the same. We recently - if you have a visit from a substantial artist, such as Shirley Bassey, when she came to Tasmania there were only

three calls, but when she went back to Melbourne there was an extended season and at least 10 of those musicians travelled from Melbourne to play here with us. When they went back to Melbourne they were on a weekly employment rate. So there has to be a clear understanding that if they don't fall within the three categories as claimed by Mr O'Farrell they do not drop out of the award. As I said, the only way that I could put that is that in all the years I've been in the industry that's something new but it is wrong. It is wrong in application and it is wrong in usage and practice. I've never in all of those years heard of that reference but there's always something new in the industry.

In the matter of the occupational award and the establishment of the award in 1987, I would like to draw to the commission's attention my intent - the intention of changing it to occupational award was brought about by a small number of pianists we had in our membership who worked in restaurants playing dinner music. By and large, they played three, four or even five nights per week, but at no stage did they perform six nights per week and I was concerned for those musicians who, under the terms of the award - and I agree here with Mr O'Farrell that the regular weekly part-time employment section did not apply - I was concerned that whilst they were casual musicians they would not be deemed to be sufficiently employed to be - to have available to them either annual leave, or long service leave, and in the case of one musician who sadly passed away just recently, he had performed in a restaurant for 7 years. In the winter he played three nights per week, and in the summer months he played five and he put it to me that whilst he was more than happy to continue working there, he was concerned that he may have been dismissed at the 9-year mark or close to the 10-year mark and there would be little we could do about it. I was even more concerned that he would not be eligible.

I also put it to the commission that musicians can be employed by different people in the same premises. This was in my evidence to President Koerbin when we made the application to establish the occupational award, whereby a musician or good of musicians could perform in a hotel who were respondents to the federal award, known as the AHA Award, on a Friday evening and on Saturday evening, could have been engaged by a private party for weddings, receptions or something similar and under those circumstances, the hotelier was not the employer, therefore if there was any dispute about the payment of wages, then we did have a difficulty under the industry award that existed, in other words, the Entertainment Award.

I put this matter or these matters to President Koerbin and it's a matter of public record that he accepted the union's submission or submissions that if the commission was to make an occupational award, having a common rule effect in the example given, the performers would be entitled to the benefit

of an occupational award and he went on to make a number of other statements in his reason for decision, T.902 of 1987.

Now the other contention of the cathedral is that Mr Burk was not an employee and they've given their reasons, but I would submit to the commission that there's something that -

PRESIDENT: I think the contention was that Mr Burk was not an employee for the purposes of either of the awards. I think there was any challenge to the fact that he was an employee.

MR CUSHION: Very well, sir, I understand what you say, however, I think it's important that if Mr O'Farrell is saying that he is award free, then it's my understanding that he is not an employee and I submit, in behalf of -

PRESIDENT: No, that isn't correct.

MR CUSHION: In other words -

PRESIDENT: You can be a non award employee.

MR CUSHION: Yes. Well I come back or continue with the same line of reasoning then from the employer's point of view, is the control test. Now a control test for a musician is quite substantial and in the case of the cathedral we contend that it's also substantial in that they were the - they are the party that instructed Mr Burk as to when he should appear -

PRESIDENT: Yes. I don't think there's a challenge to whether or not Mr Burk was or was not an employee. Could I just clarify that?

MR O'FARRELL: Absolutely not. No, we certainly accept that he was our employee.

PRESIDENT: Yes.

MR CUSHION: Then could we ask, does Mr O'Farrell also agree that the cathedral is an employer?

PRESIDENT: I think there's a challenge to that either, Mr Cushion.

MR O'FARRELL: No.

MR CUSHION: I thank you for that, Mr Commissioner, because that makes our position easier, and I come back to my original statement and repeat it, that the intent - the intention behind my application was to ensure that this was an open award.

PRESIDENT: Yes. But that may well have been the intent, but what - do you think the words fully reflect that intent? Is

that - this is the whole purpose of an interpretation, to example the words that have been used to see whether they - or see what their correct meaning is.

MR CUSHION: Yes, sir, I believe that they are correct, otherwise I would not have accepted them in 1987.

PRESIDENT: Well - I mean, what is the - okay, the words are there and we accept that the words are there, what do they mean? Now, Mr O'Farrell is saying they mean that Mr Burk's award free virtually because he - the scope of the Entertainment Award doesn't cover or didn't cover the church, that the definitions of employees covered by the award seem to exclude Mr Burk, and further, that the change to the parties and persons bound clause seems to take the church outside of the application of the Musicians Award.

MR CUSHION: Yes, sir, I understand exactly what you are saying. In the - this is the copy of the award, is it?

MR SHELVERTON: making of the award and his decision.

MR CUSHION: Yes. In our application submitted by me, it said that: this application by the Musicians Union for a declaration by the president that the following occupations or callings are when employed by a private employer in any industry in Tasmania, occupations or callings in respect of which award could be made by the commission - and then we go on to say what those occupations are.

Now, we feel that we made it clear to the commission - to the president, that that was the intention of our application - that was what was behind it. We were satisfied that the decision reflected our application, otherwise we would have pursued the matter further and again, I would reiterate my earlier contention that it was based on the fact that we were concerned about people who were in the industry of the provision of victualling, restaurants, et cetera, who were not in the industry of entertainment. I think that's the most important part and Mr O'Farrell pointed out that it was an entertainment industry. We agree with him. We agree with him, that was the problem.

PRESIDENT: So you're really saying that on Mr O'Farrell's first application he is correct?

MR CUSHION: We're saying that on his first application, that -

PRESIDENT: That is the one dealing with the Entertainment Award.

MR CUSHION: Yes, sir, - there had to be a cut off point and if you - we contend that from the time it became an open

award, Mr Burk most certainly is covered. Prior to 1987 there may be some doubt.

PRESIDENT: Yes. All right. And then as to the definitions of the employees in the award, the weekly, regular part-time and casual, how do you - what do you have to say about them?

MR CUSHION: Well I hoped that I had made it clear in that I believe and contend that musicians do move from casual employees to full-time weekly. I don't believe that he is a regular weekly part-time employee under any circumstances, even though he worked five calls. The intention of the award and the usage and practice is that if you're not a weekly employee, then you are a casual employee, but it certainly does not mean -

PRESIDENT: It doesn't say that anywhere though, does it?

MR CUSHION: It hasn't been necessary to say that since 1924 so if we need to address that I would be happy to refer it to our federal secretary, but if Mr O'Farrell can point out that the ABC Award, which is worded the same way, doesn't have any difficulty with it; the Television Industry Award doesn't have any difficulty with it; the Hotels Award doesn't have any difficulty with it and the Musicians General Award which covers the area that I referred to - and it covers the biggest shows that visit this country - do not have any difficulty with it, I think we would have great difficulty to convince the federal commission that they have been wrong and that all the employers for the last 70 years have been wrong and that all musicians unions officers and its members have been wrong for all that time - are wrong, then we're prepared to look at it, in the meantime, we do not accept that contention. If the commission pleases, that's all the evidence I wish to submit.

PRESIDENT: Okay. Thank you very much, Mr Cushion. Mr Shelverton, have you got further submissions? Have you - are satisfied you've addressed all the points raised by Mr O'Farrell?

MR SHELVERTON: Yes, Mr Commissioner, we think we've covered the points from our side of the table. As I said before, the award has been endeavoured to be modernised over the years, doing away with the various long range of categories and as Mr Cushion pointed out, the nature of our industry being in the industry of musicians and the various problems that the industry has as a whole, we could go on possibly and list every special classification of music for every type of performance, not just relating to church or concert. The people that do the corner busking, maybe we should have included rates of pay and conditions for them in an award. It's such a comprehensive industry that the old documents were some 70 pages thick which these days has now been condensed

down to about 20 to 22 pages. With award rationalisation and trying to apply structural efficiencies these days, it's very difficult and we seek your advice, sir, as to whether we should look at increasing our range of classifications in our awards instead of decreasing. That's all I wish to say, sir.

PRESIDENT: So, you - do you have anything to say about the point that Mr O'Farrell raised concerning the change from - or anything more to say about the change from an occupation - alleged change of it from the occupational award to an industry award?

MR SHELVERTON: Just bear with me for a moment, sir, while I endeavour to find the full bench decision of 1988.

PRESIDENT: Yes.

MR SHELVERTON: I did have all these in order originally but they've been moved about. Sorry for that. If I can refer to the Australian Industrial Law Review of the 8th of June 1989 where it reported the decision of the full bench and in that it said: we agree that where necessary the number of classifications in an award should be reduced. The purpose of such process should be to provide clearly defined skill levels, broadbanding of functions and multiskilling. However, it would frustrate the purpose of the structural efficiency principle and impose rigidities in work arrangements if a classification structure were to be created based on narrow divisions of skill. The range of work functions to be performed and the skills required must be the determinant of the appropriate number of levels in a classification structure.

PRESIDENT: Not that a lot turns on it, how many skill levels were removed from the Musicians Award at that time?

MR CUSHION: Could I answer that?

MR SHELVERTON: Yes. I'd have to call on the former federal secretary on that one.

MR CUSHION: If the commission pleases, we have been reducing the numbers and the categories of musicians for many years. 1970 was for the first major decrease and I'm mindful of your original statement that when you asked, 'Do you have all of the pages of the original award', and it went to something like 50-odd pages. In - pre 1970 there were 10 categories of musicians -

PRESIDENT: Yes, I'm really only interested in change between post the decision that Mr Shelverson was relying on.

MR CUSHION: Yes, I understand that, sir. I'm just pointing out that we were ahead of the game, if you like, whereby we

had reduced the numbers in 1970 to the type of aim and condition that the full bench talked about in 1988 -

PRESIDENT: Yes.

MR CUSHION: - and we had reduced by then to something of the order of 5 or 6, and if you add the leaders and - band leaders and conductors, you'd probably only extend it to 8, but there was no change in that particular year that you refer -

PRESIDENT: Yes. No, that's the point, you see, we're really only look at the awards as they were in place at the time that they were alleged to have apply to the cathedral and they obviously haven't changed in that period. Okay. Mr - yes, Mr Shelverton?

MR SHELVERTON: Yes, there's one other thing, that I would like to tender as an exhibit, Mr Commissioner, and that's in relation to the Cathedral Ordinance. The Cathedral Ordinance, section 5(4) -

PRESIDENT: Are you tender that as an exhibit?

MR SHELVERTON: Yes.

PRESIDENT: Yes.

MR SHELVERTON:

(4) to provide facilities for pastoral, theological, liturgical and musical training;

(5) to encourage the staging of appropriate music, drama and related arts;

I would submit that.

PRESIDENT: Yes, we'll mark this S.2.

MR SHELVERTON: We would submit, sir, that we don't entirely agree with the definitions given by Mr O'Farrell in regards to religious performance.

I regard 'religious' as being something godly or faithful, and 'performance' is to perform a rite, and those definitions are taken out of the Hymann Australian Dictionary, 1984 Edition.

PRESIDENT: We can go dictionary shopping for quite some time.

MR SHELVERTON: Yes. I use an Australian dictionary, sir.

PRESIDENT: The commission generally relies on the Macquarie.

MR SHELVERTON: The Collins. I just raised that as a matter that we disagreed with.

PRESIDENT: What particular definitions were you going to disagree with?

MR SHELVERTON: Well the words 'religious performance'. As I said previously I regard as godly or faithful; 'performance' is to perform a rite.

PRESIDENT: Are you going to tender those? Which -

MR SHELVERTON: The word 'religious' and the word 'performance'. Sorry, I haven't highlighted them.

PRESIDENT: Religious, the definition of religious, and the definition of?

MR SHELVERTON: Performance.

PRESIDENT: I'm going to find that very difficult in a section dealing with the 's's.

MR SHELVERTON: Oh, I am sorry, you must have the wrong page there, sir. Sorry about that.

The other submission I would like to make -

PRESIDENT: That will be S.3, Mr Shelverton.

MR SHELVERTON: Thank you. The other submission I would like to make, sir, is - as you mentioned the Macquarie Dictionary - we have a definition of that also present.

'Performance': musical, dramatic or other entertainment; the performing of ceremonies or of music'. I submit that, sir.

PRESIDENT: Yes, S.4.

MR SHELVERTON: It was on the basis, Mr Commissioner, that of the definitions of the award 'religious performance' that we are convinced that the State Musicians Award has the coverage for Mr Burk as a cathedral organist, given the fact that he is providing musical services, he receives a remuneration and he gives a performance.

That's all we wish to - oh, I am sorry, I thought I had finished.

'Entertainment', if I can submit as a further submission, the definition of 'entertainment'.

Once again it is from the Macquarie Dictionary: 'an exhibition or performance of some kind'.

PRESIDENT: Yes, S.5, thank you.

MR SHELVERTON: I think that's all we would like to -

PRESIDENT: Will you take me back to S.2 and tell me more about the ordinance that you tabled?

MR SHELVERTON: 'Cathedral Ordinance', it is a reprint containing the principal act with the amendments in force at the cathedral.

It is an Act by the bishop, clergy and laity of the Anglican Church in Tasmania, and synod, assembled as follows: it's the running orders, as I understand it, sir, for the operation of St. David's Cathedral.

It's effective date was 23 December 1987. Also the period that we have in question in our submission.

PRESIDENT: Now you have highlighted -

MR SHELVERTON: Highlighted the two main -

PRESIDENT: - the two purposes?

MR SHELVERTON:

The purpose of the cathedral shall be to provide facilities for pastoral, theological, liturgical and musical training; to encourage the staging of appropriate music, drama, and related arts.

PRESIDENT: And?

MR SHELVERTON:

To promote further Christian unity.

The second one more:

To provide facilities for pastoral, theological, liturgical and musical training.

We'd see the 'musical training', sir, as being part of Mr Burk's duties in relation to the training of the choir on the first three engagements as laid out in the agreed document.

And, as I raised earlier, the fact of liturgical dancing, that is normally done to church music during a ceremony. Apart from that, the -

PRESIDENT: Yes, is that dealing - is that all you want to say in relation to Purpose 4?

MR SHELVERTON: Mr Burk's duties, and the purposes of the cathedral, and as we understand what it is about.

PRESIDENT: And what do you say about Purpose 5?

MR SHELVERTON: Well, Purpose 5, sir, we maintain that that is what actually does take place within the cathedral. I could possibly venture to say that not all liturgical services would be held in St. David's Cathedral. There may be some held at Hutchins School.

The other thing that I would like to raise is also as part of Mr Burk's duties was that he ran for 2 weeks of the year camps for choir boys - for 2 full weeks of the year, as I understand it.

Is he a permanent employee whilst he is running those camps? Is he a casual, or is he a part-timer?

As I understand it, his remuneration was not altered in any shape or form, but he had to -

PRESIDENT: Yes, so that's really, the question is is that work which the award covers, firstly, and secondly, we could look at what his classification was at the time. But if these camps are conducted by Mr Burk are you saying that that, too, is a musical performance?

MR SHELVERTON: Yes, sir, in relation to the fact that it was the training of choristers to continue on with the choirs at the cathedral, and this is the reason the camps were run.

And we would maintain, sir, that the rehearsals and performances are both covered by the award and they both have the same rate of pay, sir.

And the other thing is -

PRESIDENT: Well, that's been challenged, you see? You say it is covered by the award, tell me how? Really I am looking at 1987 onwards.

MR SHELVERTON: Under definitions, sir, of clause 7:

'Call' shall mean and appearance for either a performance or a rehearsal of not less than 3 hours duration.

PRESIDENT: Yes.

MR SHELVERTON: We would maintain that the -

PRESIDENT: Where is the word 'call' used in the award so we can apply that definition to it?

MR SHELVERTON: In relation to the time of engagement - weekly employee -

PRESIDENT: Again in definitions, is this?

MR SHELVERTON: No, it is under the wage rates.

PRESIDENT: Well, let's have a look at definitions first.

MR SHELVERTON: Under definitions it is the second item - under item 7 - 'Call -

PRESIDENT: Yes, that tells us what a call is. And where else is it now used in definitions?

MR SHELVERTON: I haven't learnt this award off by heart yet, sir.

PRESIDENT: In relation to a weekly employee, where is -

MR CUSHION: If I can assist the commission?

PRESIDENT: Yes, Mr Cushion.

MR CUSHION: Again by usage and practice in the musical industry there is a 3-hour minimum call, and that means that it doesn't matter whether you perform for 1 hour, 2 hours, or 3 hours - that's at the discretion of the employer - and if you refer to 'Regular weekly part-time' you'll see that it says under 8(b) 10% with a minimum of 3 hours for each engagement, and then you'll find that that's referred to again under 'casual employees' 20% with a minimum of 3 hours for each engagement.

PRESIDENT: Yes, but it doesn't refer to 'call' though, does it?

MR CUSHION: Yes, sir. If you go to clause 8(C)(a) and (b) the 18 divisor is used on the basis of six calls of 3 hours' duration, and (b) the 21 divisor is used on the basis of seven calls of 3 hours' duration.

So it is in the award, and it is also constant throughout the industry.

PRESIDENT: Okay. Now, that gets us into the wage rates clause, what about the definitions of the employee, because the weekly employee and the regular weekly part-time employee are defined, and the regular weekly part-time employee is defined as a person who is engaged in public ball rooms for

from 2 to 5 performances for a period of not less than 4 weeks duration.

MR CUSHION: We contend, sir, that the whole aim of the open award is that it covers all other employers. We do not list them all, nor could we do so because of the casual nature of the industry.

You would be aware, as I indicated, that -

PRESIDENT: But it is fairly specific, isn't it?

MR CUSHION: What is specific, sir?

PRESIDENT: Public ball rooms.

MR CUSHION: Yes, because you have asked me not to refer to previous awards, but that's where it came from, from the pre-1970 award, and it was quite -

PRESIDENT: And there have been no other tests on what 'public ball rooms' means?

MR CUSHION: No, sir, because they have disappeared from existence. And even when they were in existence there were ball rooms - the reason for the differential, sir, was the theatres worked either 6 or 8 calls per week - six nights per week and then two matinees, six nights per week with one matinee or just straight six calls - but dance halls did not, in my lifetime experience, open six nights per week. They were the five night variety, and that gradually with technology and what they like to call improvements in music it came less and less to the point where there were no longer any ball rooms in existence, in my knowledge. If they do, they are dancing to taped music.

PRESIDENT: Yes, so virtually you are saying the award hasn't caught up with current practice.

MR CUSHION: That particular section has. I do not believe that the rest is out of date in any way.

PRESIDENT: Okay. Then we go to the 'weekly employee' and I think it is agreed there that Mr Burk was not regarded as a weekly employee. Is that what I can deduce from what's been put?

MR CUSHION: That has been what's been put by Mr O'Farrell. The fact that he is paid weekly in our view is not of paramount importance. That is covered by another section of the award that says it shall be paid immediately at the conclusion of an engagement or not less than once per week. And that's done to assist bookkeeping and the normal operations of any business.

PRESIDENT: But in relation to the definition of weekly employee you would concede do you that Mr Burk is not covered by that definition?

MR CUSHION: No, we don't concede that, sir. I hope that I have made it clear that an employee can move from one category to the next, and all that would be required of the cathedral is that if Mr Burk went to six or seven calls and became an employee they should have applied the award as it was intended and reduced the rate to a weekly rate, which is 20% less than the other rate, and then paid him annual leave.

And that's why I referred, sir, to the matter of 'Moscow Circus' and 'Disney On Ice' where they moved from one category to the other simply because the provision is in the award for them to do that. And we have no objection to that. We can have no objection to that.

PRESIDENT: Do you say that the award provides for moving between the categories of employees?

MR CUSHION: Yes, sir.

PRESIDENT: Yes, that's interesting.

MR SHELVERTON: Nothing to -

PRESIDENT: - concludes your submissions?

MR SHELVERTON: Nothing further.

PRESIDENT: Yes. Thanks, Mr Shelverton. Mr O'Farrell, do you have anything to respond do?

MR O'FARRELL: Yes, I do, Mr President. Firstly, in respect of the suggestion under the award people are entitled to move their employment, I'd submit that I've been looking through the award as it presently is. I can't actually find those provisions. Clause 28 may be the - terms of engagement clause may be something that Mr Cushion has referred to, but that seem to throw up more problems than it solves because - for example, if Mr Burk was engaged as a weekly employee - just for example - and he then moved to be a casual employee which, on the suggestion from that side of the table this was what was happening, on each such occasion, then he would really need to be given at least week's written notice of termination. Now, that can't be the case. And there are further problems thrown up -

MR CUSHION: You won't get a chance to respond to that.

MR O'FARRELL: - there are further problems thrown up by clause 28(c) - I think it's (c):

- the engagement shall not be altered to a weekly engagement for which a lesser sum is prescribed except on a week's notice to the employee.

So, again, if you want to move him about, you've got to give him adequate notice. And that's just not what was happening in Mr Burk's employment on the facts as we know them and nothing has been put to the contrary that he was a regular employee and he went and did three rehearsals and two services each week.

So there are - in submission, weekly employee just simply can't apply. Casual employee similarly can't apply and casual employee really can't apply on the basis - because it means an employee who is employed on a casual basis - now there is no question that Mr Burk was not employed as a casual because he was employed on a weekly basis. He was there each week.

PRESIDENT: How were his additional calls paid then?

MR O'FARRELL: They were paid by a fee which was - I think if you look in the letter previously tendered - they were paid an extra service fee - a fee of \$30.00 per service and then fees, wedding and funeral fees approved by the dean. That was the draft terms of his employment and those are as the cathedral certainly understood arrangement, and that was in fact the arrangement. He was, in fact, paid \$30.00 for each service and wedding and funeral fees.

Now another point that Mr Cushion raised on - as to this moving about between employment was that the cathedral should have adjusted his wages up and down accordingly, but the fact of the matter is that this is a claim - or this springs out of a claim which relates to non compliance of the award, that it proceeds upon the assertion by the union that Mr Burk was in fact an employee within the meaning of the award and entitled to award rates.

Now that - the fact is, is that he wasn't paid award rates otherwise we wouldn't be here and it's just really a question then of what the arrangement was. He was - it was not contemplated certainly from the cathedral's point of view, and you will see that from the draft letter and also from what's been put before you, that the award did in fact apply. He was paid a set yearly salary and given extra amounts for services which he performed from time to time when he was called. So it doesn't squarely fit within the sort of arrangement, in my submission, that is contemplated by the award.

Now, there are only two other points. I would submit that Mr Shelverton referred you to decision T.1681 of 1988 relating to assistants under the Retail Trades Award. That, without having seen that, it sounded to me as though that related to a

specific application to regulation 14 and specifically the schedule which - to which is set up by regulation 14 which specifically referred to assistants under the Retail Trades Award, so I'd submit it's of no real assistance to - that example is of no real assistance to you in this case.

As - the only other point I wanted to raise was the question of the Cathedral Ordinance. With respect, it's an extraordinary proposition to advance that this could possibly have any affect upon the wording of the award and indeed, if it's put in respect of a submission that what the cathedral is doing is providing for religious performances, I'd certainly have no submission against that in that 5(4) promotes as one of the cathedral's purposes the provision of facilities for pastoral, theological, liturgical and musical training, but that's not what we're talking about here. We're talking about the provision of music for the purpose of church services.

PRESIDENT: Well what other musical training would the church be involved in?

MR O'FARRELL: Well I suppose - well I don't know that there is any. I suppose the training of the choir is about it, but -

MR: Organ students.

MR O'FARRELL: Organ students, which Mr Burk had regular students and again, that's - I don't know how regular, but he certainly had students and that's referred to in the draft letter of the 26th of March: package includes the right to use the organ and practice piano for teaching purposes provided that your students pay \$3.00 per hour to the council for the use of the organ to cover power and maintainence costs, et cetera.

PRESIDENT: And you wouldn't - and the training of the choir wouldn't be encompassed by 5(4)?

MR O'FARRELL: Well I suppose it would be. I certainly wouldn't - I wouldn't shrink from that, no.

PRESIDENT: No.

MR O'FARRELL: I think - that's correct. But the 5(5) is in slightly different category: to encourage the staging of appropriate music, drama and related arts. That's obviously something which is separate from the daily concepts of worship which are really picked up by 5(3).

PRESIDENT: Yes, it does seem an interesting sidelight then to the activities of the church.

MR O'FARRELL: Well it hasn't been an infrequent occurrence that - that - particularly in St David's Cathedral various different sorts of performances have been put on for the entertainment of the public as opposed to the provision of worship for the parishioners. So it's - it's just - anyway, really, the effect of the ordinance is simply to set up what the purposes of the cathedral are and it really shouldn't be read in any other way or as - as

PRESIDENT: Well it does - does give a hint as to the nature of the work performed within the cathedral.

MR O'FARRELL: I suppose that's correct, yes, yes, yes.

PRESIDENT: Yes, alright.

MR O'FARRELL: Yes, the Dean has just said, it gives a hint as to the permissible uses that the cathedral might be put. Now -

PRESIDENT: Yes, that -

MR O'FARRELL: - the only other point -

PRESIDENT: - I can understand that in terms of encouragement, but 5(4) is actually to provide - and that's a direction to provide musical training.

MR O'FARRELL: Well it's - I'd accept that the wording is mandatory but I'd submit that it's - it's very much in line with any other constitutional sorts of documents which don't - while they appear to be mandatory they affect direct -

PRESIDENT: Yes.

MR O'FARRELL: - they're really merely directory to say what - what you can and can't do. But anyway -

PRESIDENT: Yes.

MR O'FARRELL: The only other point - I'm sorry, I said I only had two, I've got three - the only point -

PRESIDENT: I've already got three.

MR O'FARRELL: Well, I've got four then. The decision T.902 of 1987 which was referred to by I think Mr Shelverton that related to an application for a declaration pursuant to section 33 of the act in relation to the making of the Musicians Award in - it was really a declaration by the president that an award could be made by the commission as opposed to have any effect on the actual making of this particular award.

PRESIDENT: Well in fact it does have a very -

MR O'FARRELL: Well it says what you can make -

PRESIDENT: - clear -

MR O'FARRELL: Yes.

PRESIDENT: - set of directions as to how the award can be made, and in fact it sets the boundaries of the award.

MR O'FARRELL: That's correct, yes, yes, but nevertheless it - the submission which I wanted to make about it was that in fact it doesn't really, apart from, say, that musicians, et cetera, et cetera, are people in respect of whom the award can be made, it doesn't really assist - assist the actual difficult questions of interpretation which have arisen as a result of the application of the particular award which was made.

PRESIDENT: Yes, I follow your submissions. Very good. Well thank you very much for your contributions. I'll ponder over them and produce the written decision in due course. Thank you very much.

HEARING CONCLUDED