TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T Nos **9520 and 9521 of 2001**	**IN THE MATTER OF** applications by the Construction, Forestry, Mining and Energy Union, Tasmanian Branch to vary the Building Trades Award & Building and Construction Industry Award, respectively Re: award review
T Nos **9531, 9532 and 9533 of 2001**	**IN THE MATTER OF** applications by the Construction, Forestry, Mining and Energy Union, Tasmanian Branch to have the interest of the Retail Traders Association of Tasmania; the Tasmanian Sawmillers Industrial Association; and the Transport Workers' Union of Australia, Tasmanian Branch, respectively, deleted from the Building Trades Award

COMMISSIONER ABEY

HOBART, 18 September 2001
Continued from 17 September 2001

TRANSCRIPT OF PROCEEDINGS

Unedited

(WOULD PARTIES PLEASE READ THIS TRANSCRIPT CAREFULLY)
(ANY QUERIES SHOULD BE DIRECTED TO THE COMMISSION WITHIN 14 DAYS)

HEARING RECOMMENCED 9.40am

COMMISSIONER: Before we commence, yesterday I marked an exhibit from the TCCI - a letter dated 17 September - as TCCI.1. In fact it should be TCCI.2. And similarly, I'll mark the exhibit which Mr Bodkin referred to - the AIRC full bench decision of 27 May 1999 as **EXHIBIT C.9**.

Mr Bodkin, yesterday I did ask the question whether there was any prospect of still trying to resolve this matter by agreement. Are you in a position to respond or can you tell us where we should be heading today?

MR BODKIN: Well, I've just had a brief discussion with Mr Flanagan and Mr Flanagan advised me there is some possibility of the AWU consenting to this, but they're not in a position to get final instructions at the moment. So what we propose is that I put my submission as to why the award should be made which is a submission that I would put regardless of whether there was consent or otherwise because obviously the commission needs to be satisfied that there are sound reasons for making the award sought. So it's proposed that I would proceed with the submissions basically for the making of two new awards - a new building trades and a new building construction industry award and that the AWU either today or some time later would then be in a position to advise whether they consent to the application or not.

COMMISSIONER: Yes. Mr Flanagan, can you confirm that arrangement?

MR FLANAGAN: I think that's a fair summary of the position, commissioner.

COMMISSIONER: Yes. It seems an eminently sensible way of going about things.

MR BODKIN: So, commissioner, first I'll handle these submissions in two stages, the first stage we'll deal with the Building and Construction Industry Award and then followed by the Building Trades Award, and as you mentioned just a moment ago, there is a collateral matter with the Building Trades Award, and that is, the award interest parties. I think at least one of those parties you mentioned is no longer a registered organisation in the State of Tasmania - the Transport Workers' Union.

COMMISSIONER: That's right.

MR BODKIN: So there shouldn't be a problem there. But we'll come to that later. The first thing I'd like to do is to make a number of amendments to the draft award which was filed with the application

and I've prepared a document which sets out the proposed amendments.

COMMISSIONER: **EXHIBIT C.10.**

MR BODKIN: Now the reason for these amendments is that some are basically drafting corrections, some are expense-related allowances which recently increased in the national awards and which should be reflected in the proposed new awards, and another one which I'll come to was an omission - an oversight - from the original draft. But the first one deals with the supersession clause on page 4 of the proposed new award and in fact in the original draft award, it said that the proposed new Building and Construction Industry Award supersedes three awards, namely the current Building and Construction, the current Building Trades and the Civil Construction.

In fact it doesn't supersede the Building Trades Award at all. So what would happen is that (b) would deleted and existing (c) would become (b).

The next one goes to page 43 - the Tool & Boot Allowances, and page 46 - Meal Allowances. These are expense-related allowances which were recently increased in the National Building and Construction Industry Award. I tender the variation to that award made by Vice-President Ross on 12 September. I also tender a calculation sheet which sets out the relevant CPI figures upon which that variation is based.

COMMISSIONER: We'll mark the order as **EXHIBIT C.11** and the calculation sheet as **EXHIBIT C.12.**

MR BODKIN: I think these would be fairly uncontroversial amendments, commissioner, so I won't dwell on them.

The next one is on page 75 - the Public Holidays clause. Since the application was filed, there was a variation to the National Building and Construction Industry Award which deals with the question of work actually performed on 25 December, and this flows from the test case decision in the federal jurisdiction in so far as public holidays are concerned.

In other words, where a substitution occurs for 25 December, in other words, where 25 December falls on a Saturday/Sunday and then Christmas Day is observed on the Monday as the public holiday, if somebody actually works on 25 December under the test case decision, they are entitled to a loading of half a day's wage for a full day's work on 25 December.

As I understand it, that test case decision has been adopted by the Tasmanian commission, if I'm not mistaken. But in any event -

COMMISSIONER: It doesn't ring a bell, but -

MR BODKIN: There are several test case decisions in relation to public holidays and this goes back probably four or five years, so we've been a little slow, but I tender the actual variation to the National Building and Construction Industry Award. It's print PR903751.

COMMISSIONER: **EXHIBIT C.13.**

MR BODKIN: And in the order made by Commissioner Harrison on 4 July this year, he actually made two variations. The one in item 3 in fact was an error, and that was deleted by a correction order issued on 6 July which is attached to exhibit C.13.

The relevant variation is item 2 on the first page of C.13 which is the change I'd seek to make to the public holidays clause in this award. Again, because of the history of state award following the federal award in relation to conditions of employment and indeed wage rates it would not seem to be a controversial matter.

The next one - page 82 - Compensation for Clothing & Tools. This is another adjustment to expense-related allowances. On page 88 in the draft award, there is a clause headed, Special Tools and Special Clothing. Now one item that was omitted - and this is an item that's currently in the Civil Construction and Maintenance Award. It's currently clause 31(f) of that award. It deals with the provision of special protective gear for employees using powdered lime dust. This was inadvertently omitted from the draft award and the union seeks to amend the proposed award by including that provision.

The next change is at pages 91 and 92 - Fares & Travel. These are expense-related allowances.

Page 94 - Living Away From Home Allowance - again expense-related, as is Camping Allowance on page 97. On page 98 - Travelling Expenses.

If I could take you back to page 1 of C.10, commissioner, that's the amendments. You will note that in the third item, page 46 - Meal Allowances, we seek to vary two amounts. There's an amount of $10 and an amount of $8.30. The $10 is in the Civil Construction Award and the $8.30 is the Building and Construction Industry Award.

In other words, in the two awards you have different meal allowance provisions and there are slightly different conditions attached to the meal allowance.

In the state civil award, meal allowance becomes available when overtime worked after ordinary hours exceeds one and a half hours. In the Building and Construction Industry Award it's payable when the overtime worked is one and a half hours or more. There's a slight

difference in that provision. In other words, if you're under the state and indeed the National Building and Construction Industry Award, once you've worked, if you're going to work - or once you've worked one and a half hours overtime, once you've reached that one and a half hours, you're entitled to a meal allowance of $8 - well, it's currently now $9.30. Under a state civil award, once you reach one and a half hours overtime you don't necessarily get meal allowance unless you go a minute over the one and a half hours.

COMMISSIONER: The $8.30 to become $9.30 -

MR BODKIN: Yes.

COMMISSIONER: - that's the figure that's taken from your national award is it?

MR BODKIN: Yes. And the $11.20 is, I think the amount that's now gone into the state civil award.

MR FLANAGAN: I wonder if I can just assist there, although I would need to check it, I think that in fact the state civil award was on $10.40 and has now been varied to $11.60.

COMMISSIONER: That's what I suspect is the case, yes.

MR FLANAGAN: I will need to confirm that, commissioner.

MR BODKIN: What I put there is alternatively. This could be either a matter by consent or indeed arbitration; that there be one meal allowance provision in the event that the commission determines that the scope of the award should be amalgamated and that that provision be the national award provision. In other words, there would be a lower amount, but the conditions under which it applies would be somewhat more liberal for the civil construction workers.

It seems to me that one of the objects - and I'll come to this in more detail shortly - one of the objects of this whole exercise is to rationalise the award provisions and to have differing meal allowance provisions does present some difficulty in administration.

So it seems to me, commissioner, that now would be a good time to do it because if you're moving from $10 - if it's currently $10.40 in the civil award, well it would go back to $9.30 which is a reduction actually. But on the other hand there would be a liberalisation in the conditions surrounding the granting of it. In other words, once you've worked your one and half hours overtime you would be entitled to a meal allowance.

Now I have no information on what in fact happens in the field; whether employers under the civil award would deliberately limit overtime to one and a half hours so as to escape payment of the meal

allowance. I doubt it very much because I mean if you're going to work overtime one a half hours is not the normal - I mean the normal run of events a 10-hour day is the standard day but anyway I put that forward at this point because it seems to me that this would be a good time to rationalise that provision in the award. Certainly if there is consent that ought to be done, and indeed if there's not consent, well the commission ought to give consideration to doing that. But I'll come to that in a little more detail shortly.

So those are the amendments that the union seeks to make to the draft award.

I now come to the submissions-in-chief and I have prepared an outline of submissions. This may make it easier to follow, commissioner. I tender a copy of that outline.

COMMISSIONER: Do you want that marked as an exhibit, Mr Bodkin?

MR BODKIN: Yes, perhaps it could be marked, commissioner.

COMMISSIONER: **EXHIBIT C.14**.

MR BODKIN: The first section of this submission deals with the jurisdiction of the commission to make the proposed award. Now I refer to section 33 of the *Industrial Relations Act 1984* subsection (1)(a) provides that:

> *The Commission may make an award in respect of -*
>
> *(a) all or any private employees employed in an industry.*

Subsection 33(3) provides that:

> *The Commission, in making an award under this section, shall specify the industry to which the award applies.*

If you go to section 3 of the Act, industry is defined as:

> *any industry, trade, business, undertaking, profession, calling, function, process, or work performed, carried on, or engaged in by a private employer.*

That's a very wide definition of industry, I might say.

I refer to the decision of Commissioner Watling on 3 May 1988, which is exhibit C.1 in these proceedings. At page 3, the commissioner said, and I quote:

> *I have been persuaded by the submissions of the parties for the need to establish a Building and Construction Industry Award with a title of the same name and I decide accordingly.*

Now, commissioner, the scope clause approved by Commissioner Watling at page 4 of his decision was in similar terms to the scope clause in the proposed new Building and Construction Industry Award.

In industrial and legislative parlance, the meaning of the term 'building and construction industry' is well established and is understood to embrace a number of sectors including the building and civil construction sectors. For example, in the federal arena, the National Building and Construction Industry Award and the Building and Construction Industry (Northern Territory) Award apply to both building and civil work.

The Tasmanian *Building and Construction Industry Training Fund Act 1990* Schedule 2 sets out the work to which the Act applies. It clearly covers building and civil work, thus the building and construction industry is an industry for the purposes of section 33 of the *Industrial Relations Act 1984* and the commission undoubtedly has jurisdiction to make an award with the title and scope of the proposed new Building and Construction Industry Award.

Before I go on, commissioner, I mentioned a number of instruments there. I just hand up the scope of the National Building and Construction Industry Award.

COMMISSIONER: **EXHIBIT C.15.**

MR BODKIN: This is an extract from Print SO643 and on the second page of the exhibit you will see there is a definition in 4.13 of construction work and it refers to buildings or structures in the third line.

On the next page there is a definition 4.14 of construction work and it again refers to buildings or structures.

Then on the next page which is page 20 of the award print under Clause 6 - Coverage of Award, it refers to the coverage of the award to tradesperson classifications in 6.1.1(a) and it can be seen in the third line. It refers to persons engaged on construction work as defined. So in other words tradespersons under this award can be employed on buildings and structures. So structures go beyond the pure building sector.

On the following page at 6.1.2, it's the coverage of the award to labourer classifications and you can see that it's more limited there because it refers to builders labourers employed on or about any building. So the national award, whilst it applies to tradesmen on building and structures, it applies to labourers on buildings.

And then in 6.1.3 - Operators, it simply refers to the broad coverage in the third line of construction, maintenance, alteration, repair or demolition work.

So as far as operators go, there's no limitation on the sectors that the award can apply.

Then you can see the localities. 6.2.1 so far as tradespersons are concerned it applies in Tasmania as well as other states.

6.2.2 - it applies to builders labourers in Tasmania and other states.

6.2.3 - it applies to operators in Tasmania and other states.

And in clause 7 are the parties bound and there was some discussion about this yesterday, and that is, in respect of the coverage that the AWU has of carpenters and joiners employed by Crown or local government authorities. That's the extent of their coverage under the award.

I also mentioned the Building and Construction Industry (Northern Territory) Award. I hand up a copy of an order made by Commissioner Eames on 11 February 1998.

COMMISSIONER: **EXHIBIT C.16.**

MR BODKIN: This is a common rule award and the order I've handed up is in Print P8750 is the common rule declaration so it sets out the scope of the award and you can see in clause 1(a) and 1(b) that the award applies to what's termed the building industry in (a), and in (b) civil and/or mechanical engineering. And then it goes on to specify various civil and mechanical engineering sub-industries, perhaps - might be a way to describe them - but the point I'm making here is that this is an award of the federal commission called the Building and Construction Industry Award and clearly the scope of it covers building and civil work.

And finally on this same point, I tender Schedule 2 of the *Building and Construction Industry Training Act 1990* of Tasmania.

COMMISSIONER: **EXHIBIT C.17.**

MR BODKIN: And you'll note the title - the *Building and Construction Industry Training Fund Act*. Schedule 2 sets out the building or construction work to which the Act applies and plainly in 1 it applies to buildings or structures, subject to the building regulations, and in 2 construction work in respect of or in connection with - and then are set out various civil type construction activities. Likewise in 3 and 4, and 5 deals with demolition of buildings or structures and 6 deals with the removal of asbestos from a building or structure and 7 deals with any similar work.

So the sum total of those last three exhibits, commissioner, is to support the proposition that there is an industry which can be properly referred to as the building and construction industry and that the scope of the proposed award falls within that industry, therefore the commission has jurisdiction to make this award.

I'd also refer briefly to the inspections that took place yesterday and I would submit that a number of conclusions can be drawn from those inspections. Firstly, there are construction sites where the mix of civil and building work is fairly evenly distributed and the classic example of that would be the cricket ground site.

Secondly, there are construction sites where work arguably falls within the scope of the three existing awards and one could think of both the cricket ground and the Aquatic Centre. I mean the Aquatic Centre was built just a few years ago but there was a considerable clean-up and repair job done recently following the fire. But in respect of both those projects - the cricket ground and the Aquatic Centre, arguably there are three awards apply to construction and repair and renovation work.

The Building and Construction Industry Award would obviously apply to building tradespersons and builders labourers. The Building Trades Award would also seem to apply to tradespersons and plant operators. The Civil Construction and Maintenance Award which under its scope refers to sporting complexes and to demolition work in the scope and to car parks and to footpaths and to curb and channelling work. I mean that award arguably applies to civil type labourers at least and possibly the plant operators.

So on that type of project it would seem that there will be no great upset to the current industrial regulation provisions if three awards were replaced by one.

The next point I think a conclusion that can be drawn is that every building site - and I think this is quite obvious - every building site has a civil works component. Before a building can be constructed there must be earthworks, there has to be bulk and detailed excavation work done. A number of jobs we saw yesterday, there were piling works, for example the car park project, the Hungry Jacks project - piling works going on there - paths and roadways. So there is a significant civil works component on every building site.

The next point is that there is a considerable cross-over of employers and employees between the building and civil sectors. Now I mean it's only to be expected in a state like the size of Tasmania anyway where the available work is limited and you have various companies competing. But we actually saw evidence of that yesterday.

Now it may be that there are some smaller companies that rarely or perhaps never cross over. Undoubtedly there are. There are some

companies that only do civil work and some companies that only do building work. They would be the smaller companies in the main. But it's my submission that the fact that there may be some that don't cross over, there's no evidence that those companies would be prejudiced by the making of the proposed new award.

The next point that I think can be drawn from the inspections is that many building and construction companies in Tasmania obviously operate under federal certified agreements - or at least observe the terms and conditions of the national Building and Construction Industry Award. Now whether they're actually bound by that award would require some investigation as to whether they had ever had a dispute found or whether they were ever a member of a relevant employer organisation which is bound by the award. And of course there is also the fact that the terms and conditions of the state awards generally follow the federal awards anyway. So in that respect there isn't a great deal of difference.

But okay, we can take for granted that many companies, perhaps the majority in this state operate under federal arrangements. But again, that is no reason why the evidence from the inspections should not be taken into account. And the reason I say this is, firstly, the nature of work performed on building sites and construction sites does not vary according to state or federal industrial regulation. The way the work is carried out, the interchange, the intermix, doesn't vary simply because company A is under a state award or company B is under a federal award. And as I mentioned, the relevant state awards tend to be mirror images of the federal instruments anyway.

The next point is that it's well known that the building and construction industry operates under a highly competitive tendering system and that competitive tendering system does not distinguish between federal and state industrial award regulation. Furthermore, new players regularly enter the industry while others exit and that is due in the main to the competitive tendering process. Companies come and go.

Now employers who are not personally bound by a federal award can revert to the state system merely by resigning from a federal employer organisation. In other words, if company A is a member of, say, the Civil Contractors Federation and observes the terms of a federal award by virtue of that membership, they can resign and straight away they revert to the state award, and that does happen from time to time. I mean it doesn't happen a great deal but it does happen.

So there is obviously scope and in fact it happens that there is - some companies would interchange between federal and state regulation.

As the federal *Workplace Relations Act* currently stands under section 111AAA it is virtually impossible to rope-in a company now to a federal award if they're currently bound by a state award. The only way you

can achieve that is if you have consent of all the parties and the federal commission is satisfied.

COMMISSIONER: That's a change from the old days, Mr Bodkin.

MR BODKIN: It is - a deliberate change. It's part of the new system and indeed as far as the national Building and Construction Industry Award, virtually all the roping-in these days apply to the State of Victoria where there is no state regulation.

And finally, even though a company may be bound at the moment by a federal certified agreement, that certified agreement by legislation does not have an indefinite life. There's a maximum period of three years that a federal agreement can operate. It can be renewed of course, but it's not like the old federal award system where an award virtually goes on and on and on.

So the point I'm trying to make here, commissioner, is the fact that some of those companies we saw yesterday are covered by federal arrangements. It doesn't really - shouldn't distract you from the way that - from the evidence of the way the industry is organised and operates and shouldn't distract you from the actual mixture of civil and building work that you saw yesterday.

Now if I could go back to the outline of submissions now to the second section and that deals briefly with the background of the present application. In a preliminary decision made by Commissioner Watling on 3 May 1988, the commission approved the terms of a scope clause for a new award to cover the building and construction industry. That's exhibit C.1 in these proceedings.

Following further conferences and hearings, the commissioner, in 1990, decided to make the new Building and Construction Industry Award in two stages and that can be found in his decisions which are exhibits C.2 and C.3 in these proceedings.

The first stage covering the building sector came into effect in 1991; the second stage to cover the civil construction sector has not yet been completed. The present application is intended to give full effect to Commissioner Watling's decisions. The circumstances of the industry, in our submission, have not changed so as to make those decisions less appropriate than they were in 1991.

The structural efficiency principle continues to be relevant to the building and construction industry awards because the restructuring process started before Commissioner Watling has not yet been completed. The structural efficiency principle provides inter alia for an examination of award matters to include specific consideration of the scope and incidence of the award and for updating and/or rationalising the list of parties to the award. That can be found in 61

Industrial Reports 408 at page 413. I have extracted page 413 which I just tender and briefly take you to that.

COMMISSIONER: **EXHIBIT C.18**.

MR BODKIN: As you can see from the head note, commissioner, this is an extract from the State Wage Case of July 1996 in Tasmania and the structural efficiency principle is set out and you'll see, I've asterisked those points. There are numerous matters that can be covered by the structural efficiency principle but they do include those two points, updating and rationalising the list of parties and making specific consideration of the scope of incidence of the award.

Furthermore, commissioner, the review of awards became part of the State Wage Fixing principles in the State Wage Case of July 1996 and in the State Wage Case of 1997, the commission inserted a new principle 16 - Award Review Process, into its statement of principles.

In February 1998 the president of the commission wrote to registered organisations about the result of a conference to facilitate the review process. He stated that:

> *Members of the Commission have been apprised of the results of the conference and will proceed to call on awards for review in consultation with the organisations involved.*

In the State Wage Case decision of 6 July 2000, the commission decided at pages 52 to 53, to retain the award review process principle in simplified form and noted that the principle:

> *Continues to provide that the commission, if necessary, may bring the review process to a conclusion by arbitration.*

Just before going on, I tender a copy of that letter I referred to from the president of the commission on 5 February 1998.

COMMISSIONER: **EXHIBIT C.19**.

MR BODKIN: It sets out what had been agreed by the parties and I just draw your attention to the concluding page of that with the paragraph starting: *Members of the Commission* - which I've quoted a moment ago.

The third section of my submission deals with the rationalisation of building and civil award provisions. The structure and content of the proposed new building and construction industry award is consistent with the requirements of principle 12 - Award Review Process. Wherever possible, conditions of employment and classification structures have been standardised both internally, that is to say, as between building and civil construction workers, and externally, that

is to say, between the state Building and Construction Industry Award and the National Building and Construction Industry Award.

Standardisation of state and federal construction award provisions is highly desirable because of the mixture of state and federal award employers engaged in the industry. Historically, the state building and construction awards have closely mirrored their federal counterparts.

Of the 53 clauses in the proposed new Building and Construction Industry Award, complete rationalisation has been achieved in 45 clauses. Substantial rationalisation occurs in four of the remaining eight clauses. Over time, commissioner, it should be possible to achieve complete rationalisation in most, if not all, of these eight remaining clauses but I do stress, over time.

I think I need to go into this in somewhat greater detail and I have prepared an exhibit, commissioner, which hopefully will give you the full picture of the extent of the rationalisation that would occur if this new award were made.

COMMISSIONER: **EXHIBIT C.20**.

MR BODKIN: The way this exhibit is set up, is that it follows each part and each clause of the proposed new award, that is the draft award you have in front of you. Where you've got seven definitions, that refers to clause 7 of the draft of the proposed new award. In the box beneath that, BCIA7 refers to seven of the existing Building and Construction Industry Award. In other words, that summarises what the current provision is. The right-hand box, I note straight away there's a typo in the first box. Instead of BCIA7 it should be CCMA. If you could just amend that and hopefully that's the only typo.

In other words, what that exhibit says under that heading is that in 7 of the current Building and Construction Industry Award, it contains:

> *Definitions for numerous classifications, items of equipment, etc, for "Employees engaged in Division A (Building Industry)".*

The corresponding provision in the Civil Construction Award, which is clause 7 of the current award, contains:

> *Definitions for numerous classifications and items of equipment.*

The important thing is the comment that appears below. That tells you what the new award sets out to do. In clause 7, the new award:

> *- combines the two sets of existing definitions (many being common to both awards). Classification definitions go into Part III, clause 14 "Classification Descriptors".*

That's the way the exhibit is set up.

The next one is clause 8 of the current award. On the left-hand box there is a summary of what the current provisions are in the building award, in the right-hand box in the civil. This is one of those clauses that at this stage it's best to retain the existing provisions because they're so far apart, basically. To bring them together immediately would cause problems because in the building sector you've got a mixture of daily and weekly hire. In the civil sector, everyone is on weekly hire. In the building sector you've got casual loadings of 33⅓ per cent for labourers and 20 per cent for plant operators. In the civil it's 20 per cent for everyone.

It's just a bit of a hard task at the moment in that particular clause to give everyone the same provisions but as I've mentioned earlier, over time something can be done about that.

Clause 9 - Work Organisation - they currently contain the same provisions, perhaps not in the same words but effectively the same so the Building and Construction Industry Award provisions have been retained. They are identical actually.

In 10 - Presenting For Work But Not Required - this is one where there is no corresponding provision in the Civil Construction Award and on page 2 of the exhibit it says that in the new Building and Construction Industry Award:

> *- this provision applies to all employees (subject to inclement weather arrangements for tradespersons and builders labourers).*

In other words, under the current provision if a brand new employee presents for work, he's entitled to eight hours payment. He's entitled to eight hours work or payment in lieu. It seems to me, commissioner, that is a provision that would be fair to apply across the board.

In 11 - Stand Down of Employees - both awards contain similar provisions and so in the proposed new award the existing BCIA provision would apply to all employees.

Clause 12 - Termination of Employment - the new BCIA maintains the different provisions for daily and weekly hire employees. The termination provisions for plant operators have been standardised. This is one where there's partial rationalisation. In other words, the plant operators will have the same provisions because currently they're basically the same but persons on daily and weekly hire are obviously going to have different provisions so that affects the tradespersons and labourers.

We then move onto Part III, Clause 13 - Wage Rates - there's been some standardisation here because under the current arrangements, the plant operators although they're in different groupings in the civil and building awards, basically there's very little difference between the wage rates that apply. So, what we do here is to maintain separate

classification structures for civil labourers but consolidate the plant operator classifications.

You'll see there's a note at the top of page 3:

> *CFMEU reserves the right to apply for insertion of a competency-based classification structure for all employees in the event that the National Building and Construction Industry Award is varied for same.*

What that refers to is the classification structure which has operated in the national award for the past five years by agreement. It's a skills-based classification structure which can be seen actually in exhibit C.11 which is the expense-related allowance exhibit. It can be seen on the first page there. It has, old wage group, new age group which is CW7 down to CW1 new relativities and hourly rates.

That is a system that operates in the national award only by agreement. Currently the federal commission is considering an application by the CFMEU to make that the provision throughout the award. That will go to a full bench so it's some time off before that happens if it's going to happen. At this stage, all I say is, the CFMEU reserves its right that in the event that the national award is varied for that system to become the only classification structure in the federal award, we would seek to apply the state award to reflect that.

Clause 14 - Classification Descriptors - the existing descriptors have been consolidated into the new award. The same applies for 15 - Supported Wage System.

In Clause 16 - Inclement Weather - this is another one where - it's a fairly - inclement weather has always been a fairly controversial matter, so it's best to retain the existing provisions in the civil and building sectors, building basically having 32 hours inclement weather for daily hired workers, civil having no time lost due to inclement weather, although I think in the field that probably is not what happens but in any event, for the time being we would seek to retain those different provisions. That's one of the difficult ones to standardise.

17 - Mixed Functions - basically, we retain the existing separate provisions for tradespersons and labourers and plant operators but we consolidate the Building and Construction and Civil Construction provisions for plant operators because they're basically the same now anyway.

Clause 18 - Payment of Wages - we substantially consolidate the Building and Civil provisions and the whole clause has been redrafted in similar terms to the National Building and Construction Industry Award which itself was simplified last year in a decision by Commissioner Merriman and so wherever we've followed the National

Building and Construction Industry Award, we've adopted the simplified provisions because that just makes sense, commissioner, to do that.

In Superannuation - currently in the Building and Construction Industry Award there is no current provision whereas in the civil award there is an obsolete provision. The proposed new building award would provide for the National Building and Construction Industry Award superannuation clause. That may be amended at some time in future regarding the definition of ordinary time earnings.

There was a recent decision of Commissioner Jones where the commissioner found that fare and travel allowances are part of the ordinary time earnings. The reason he found that is that the Taxation Department says they are. That, effectively, results in about an extra $5 contribution to superannuation by the employer. However, that's being appealed, I understand, by the employers, so that's all up in the air and that's another one that in the event that the decision of Commissioner Jones stands, then we would seek to vary this award in the event that it's made, to contain the same definition of Ordinary Time Earnings.

Coming out of Allowances - in Industry Allowance there is a difference. The amounts there mentioned $18.40 and $15 I think have been varied anyway as a result of the latest State Wage Case but for the purpose of this submission there is a difference of about $3 in the industry allowance. How that has come about I don't know because in every other building and civil award throughout Australia, industry allowances are the same in both sectors. I suspect that - I just don't know how civil would have $3.40 a week less industry allowance than building and shortly I'll be taking you to a decision in the federal commission some years ago where it was held that the industry allowance in the building and civil sectors should be the same but we say they should be the same so the proposed new Building and Construction Industry Award prescribes the allowance of $19.10, which is the current national allowance for all classifications.

In the Underground Allowance - Clause 21, again, I may have had old copies of the awards. I don't know if the $1.80 per day versus the $1.40 per day in civil was entirely correct but they're so close as to not matter, commissioner. We propose that the current national amount go into the new award.

Clause 22 - Tool and Boot Allowances - there are no provisions in the current civil award but the new Building and Construction Industry Award does not extend tool or boot allowances to persons who currently have no entitlement. Basically, tool allowances are paid to tradespersons, boot allowances are paid to refractory brick workers and the new award makes it clear, that it continues to apply there. Someone who is currently under the civil award who doesn't have an

entitlement to those wouldn't get an entitlement merely by the fact that these awards were effectively amalgamated.

The same applies for Multi-Storey Allowance - there's no current provision in the civil award but I notice it is a leave reserved matter. In fact there is a multi-storey allowance in the AWU Construction and Maintenance Award, the national award, maybe that's why it is reserved but the new Building and Construction Industry Award replicates the simplified national award provisions and of course nobody gets multi-storey unless they're working on a site where it applies, so there's no question there of somebody under civil getting something that they otherwise wouldn't have been entitled to receive.

Clause 24 - First Aid Certificate Allowance - civil award has no provision which is an obvious defect. I think practically every award of the commission would have - particularly in an industry where injuries are virtually part and parcel of the daily work routine. It is appropriate that civil workers who are qualified first aid attendants receive an allowance so what's proposed is that new award would contain the current national award prescription.

Meal Allowance - Clause 25 - I've already dealt with that. The new award maintains the current differences between the two awards but alternatively, commissioner, I would put that if the parties can consent to this they ought to consent to the National Building and Construction Award provision applying as a standard to both building and civil workers and that would even further rationalise the award. Eventually it's got to happen. It just doesn't make sense, you're going to have workers on the same site but under two different awards at the moment getting different meal provisions. It makes even less sense if they're under the same award.

Clause 26 - Special Rates - the range in the current civil award is smaller than in the Building and Construction Industry Award but basically the reason for that, commissioner, is that in the building award there's an extensive range of special rates that are confined to particular tradespersons. So, the amalgamation of the two awards is not going to result in anyone currently under the civil award getting a bonanza in special rates. I've noted there:

> *As special rates are payable only in the specified circumstances, the wider range are notionally available to civil construction workers will have no significant cost impact.*

We then move on to Clause 27 - Hours of Work - the proposed new award maintains a potentially different method of working ordinary hours for civil construction workers. In other words, under the Civil Construction Award they may have the RDO system or shorter daily hours in lieu of an RDO but the new award does not alter that option in the civil area.

Clause 28 - Breaks - the new award contains a common prescription in the terms of the simplified national award provision. Virtually, there's very little or no difference between the current provisions in both awards. They're different words and different nuances but basically it comes back to the same thing.

Clause 29 - Overtime and Special Time - again, overtime in the industry is basically time and a half for the first two and double with various minimum provisions and recall provisions but at the end of the day there's very little difference, so we've simply adopted the national award provisions which itself is in generally similar terms to the existing state award clauses.

In regard to Shift Work which is clause 30 - the new Building and Construction Award contains a simplified national clause which includes at clause 30(k) a provision:

> *- that employees engaged on shiftwork on a civil construction project be paid 15% loading for afternoon and night shifts, and 30% for permanent night.*

In other words, the status quo on civil sites is retained. If you go to the current state and federal building awards, they refer to afternoon shifts of 50 per cent and 25 per cent for morning and early afternoon shifts and that would apply on a building site but there is this rider in the national award, that where work is performed on a civil site, then the provisions of the AWU Construction and Maintenance Award apply, which is only 15 per cent. So, this proposed new state award does not alter that balance, so that's one that perhaps over time can be further rationalised but I would think that that would probably occur in the federal area before it occurs in Tasmania, but you never know.

Clause 31 - Weekend Work - again, the prescriptions are basically the same in both awards so we adopt the simplified national award provision as a common prescription.

Clause 32 - Annual Leave - there's very little difference between both existing awards. The proposed new award contains the simplified national award provision as a common standard.

The same can be said for Clause 33 - Personal Leave - the new award contains the simplified national personal leave clause provisions. These accord with the principles laid down in test cases by the Australian commission. Such principles were adopted by a full bench of the Tasmanian commission in December 1996, a report in 71 Industrial Reports at page 231.

Parental Leave - both the current awards contain the rather huge four part parental leave clause which probably should have been done away

with in these awards some time ago. At least it reduces the size of the award by about three or four pages to put in the simplified provision.

Jury Service - here again, although the wording is different, in effect, both awards are basically the same so the new state award would contain the simplified national award jury service provision as the common prescription.

The same would apply for Clause 36 - Public Holidays and Public Holiday Work - both awards have the 11 standard public holidays, double time and a half paid for work on a public holiday so, effectively, there's no difference. We adopt the simplified national award provision there.

Clause 37 - Settlement of Disputes - both current awards have a full stage procedure. The proposed new award contains the simplified national award settlement of disputes clause. That includes a training leave provision in 37(j) of the proposed new award which allows duly appointed union reps up to five days paid leave per year to undertake training that will assist them in their settlement of disputes role. That's a national award provision, commissioner, which we think would be very useful in the state award.

It's one thing to have union delegates conversing and dealing with disputes with the foreman and with representatives of the company. It's another thing to have union delegates who have received some proper training, which is a form of training agreed between the employer and the employee to assist those delegates in their role. We think it's very desirable that there at least be an opportunity for them to undertake training leave in relation to settlement of disputes.

Clause 38 - Amenities - we maintain the status quo there, commissioner, because basically the building award contains - the only amenities referred to there are boiling water and cool drinking water. I think - it may well be under state legislation that there is a significant role for amenities on building sites whereas in the civil award there is a comprehensive provision there. The proposed new state award, building and construction industry, would maintain that status quo by replicating the current provisions.

Clause 39 - Compensation for Clothing & Tools - basically, you've got the same provisions in both awards and the new award would retain the existing building construction clause as a common prescription.

The same applies for Clause 40 - First Aid Equipment.

Clause 41 - Injured Workers - there is a provision under the Building and Construction Industry Award for the employer to provide transport for injured workers to attend a doctor or a hospital and there's no corresponding provision in the civil award, although there is one in the federal Construction and Maintenance Award so I don't know why that

know why that is but it seems to me, commissioner, that in an industry of this type, again where accidents unfortunately feature quite prominently, it is desirable to retain this provision and to extend it to any civil workers who currently would not have a right by award and what is the right for the employer to provide transport. Well, one would think that most employers would do that anyway. I don't think there's any great cost impact involved there.

Clause 42 - Protection of Employees. The new Building and Construction Industry Award amalgamates the current provisions of the civil and building awards and where provisions in both awards are similar, the Building and Construction Industry Award wording is retained.

Clause 43 - Special Tools and Protective Clothing - the new award amalgamates the provisions of the two awards but generally retains the status quo by confining existing civil construction award provisions to civil construction workers. And that can be found in subclause 43(g) of the proposed new award and there's a note there about the powdered lime dust having been omitted from the draft award, and I've now amended that. We seek to insert that powdered lime dust provision into any award that the commission may make in these proceedings.

Clause 44 - Tools and Lockers - there's no provision in the civil award for tools and lockers, however, as tools and lockers obviously relate to tradesmen with tools, it's not going to be a provision that's suddenly enforced upon civil construction employers. It only applies in the specified circumstances so it won't affect the civil construction workers.

45 - Fares and Travel Pattern Allowances - the new Building and Construction Industry Award contains the provisions of the simplified national award as applicable in Tasmania. When I prepared this exhibit there did seem to be a difference between the fares and travel between the building and the civil awards in Tasmania. I don't know why there would be a $1.80 difference. It may be that at that stage the civil award hadn't caught up. Certainly, federally, the fares and travel allowances are the same as between the National Building Award and the AWU Construction and Maintenance Award.

The other anomaly is that in the current civil award in clause 17, it prescribes a fare allowance for metropolitan areas only. That must be an oversight because it would be simply wrong in principle and logic to have a fares allowance applying in the metropolitan area but no fares allowance applying outside of the metropolitan area. I think there's been a mistake somewhere along the track. There can be no justification for that. What's submitted is that the new award should contain the provisions of the simplified national award as applicable in Tasmania that there be a standard fares and travel pattern allowance to employees in both sectors in the state.

Clause 46 - Living Away from Home - Distant Work - generally, there are similar provisions in the existing awards. The proposed new award contains the simplified national award provisions as a common prescription.

In clause 47 we seek to put in a new clause which is currently not in either of the existing state awards and this deals with civil operations traineeships. Civil operations traineeships has been a national award provision since 1995 and what it provides is that when the traineeship system came in under the national training framework around about that time there was an agreement reached between the CFMEU and indeed the AWU at national level, that there be these civil operations traineeships where young workers could undergo a traineeship similar to an apprenticeship and be paid a reduced wage as prescribed by the award, which would increase in the first, second and third years. The wage rates are based on the National Training Award.

I don't know why this wasn't replicated in the state civil and building awards but it seems to me that it's a national award provision that applies in Tasmania and elsewhere. It's highly desirable that young people be encouraged to undergo training as plant operators because there is a shortage of skilled plant operators. Most of them are getting pretty long in the tooth but I wouldn't think that this would be a controversial matter because it's something that's been the subject of agreement between the Civil Contractors Federation and both of our unions for the past five years.

48 - Apprentices - there's no current corresponding apprenticeship provision in the civil award and bringing the civil workers under one award is not going to change that because the apprenticeships relate to specified trades. That is in a state of flux obviously, particularly in Tasmania, as to what constitutes an apprenticeship. For the time being, I think it's desirable that the existing provisions be retained and when there's further developments in relation to an apprenticeship well the award can be varied.

49 - Job Stewards - there are provisions in both the current awards and we seek to insert a common provision which is in the Building and Construction Industry Award. We seek to retain that as a common provision.

Likewise, clause 50 - Posting of Award and Clause 51 - Posting of Notices and Clause 52 - Right of Entry. It's probably not even necessary to have a right of entry clause but sometimes it's useful to point to an employer who may have other ideas and has never heard about the *Industrial Relations Act* and say, here's the award, have a look at that.

COMMISSIONER: Employers aren't like that, surely, Mr Bodkin?

MR BODKIN: No. Out in the back blocks I understand there's one or two like that.

Clause 53 - Time Records - the Building and Construction Industry Award has extensive provisions. The civil award simply says, the employer is to keep time and wages records in accordance with the IR Act. What we've done here is to insert the current National Building and Construction Industry Award provision which requires the employer to keep a record of the employee's name and classification, hours worked each day, gross and net wages and deductions, workers' compensation policy and superannuation scheme contributions.

Those are matters that continually cause disputes on construction sites. Checking up as to whether proper deductions have been made, whether the company has a current workers' compensation policy and whether they're contributing their required superannuation guarantee requirements into a fund. Unfortunately, there are some employers who simply think that superannuation is not something that's required by law or statute and that compensation policies are something that can be forgotten about. It's most important that duly authorised representatives of both our unions are able to check the employers records with ease to find out whether those contributions and policies have been kept up to date.

On the penultimate page of the exhibit, commissioner, is a summary of the rationalisation that would occur if you made the award in the proposed terms. You can see that all the clauses in the left-hand column - actually, it starts at clause 7 because clauses 1 to 6 are not really a rationalisation, they just refer to award title, scope, et cetera. It follows that there's got to be a rationalisation from clauses 1 to 6. This exhibit deals with 7 onwards and in the left-hand column are all the clauses where there would be virtually a complete rationalisation of the provisions between the current two awards.

In the right-hand column are those where there is partial rationalisation and there are further sub-categories there. The ones with an asterisk are where there is no change to the existing discrete provisions for building and civil work but I would say, with the proviso, that Clause 25 - Meal Allowance could be appropriately rationalised as part of this exercise so perhaps meal allowance is one that could be moved over to the left-hand column.

That's really all I want to say, commissioner on the nuts and bolts, shall we say, of the rationalisation of the two awards. I think it's important to do that rather than just hand up a rather thick document and say, here's a document, we reckon it would be a good award to make. I think it's desirable that I go into that small amount of detail at least so that everybody understands what is going to happen if this award is made.

COMMISSIONER: Thank you for that, Mr Bodkin. Would it be a convenient opportunity for a short break?

MR BODKIN: Yes.

COMMISSIONER: We'll adjourn for 10 or so minutes.

SHORT ADJOURNMENT 10.55am

HEARING RESUMED 11.13am

COMMISSIONER: Yes, Mr Bodkin?

MR BODKIN: The next section of the submission deals with classifications and wage rates. Mr Flanagan has just drawn my attention to one matter and that's the - the draft award that's before the commission is the one that was filed, I think, in May or April. It apparently does not contain the latest safety net adjustments.

COMMISSIONER: Right.

MR BODKIN: The document I'm speaking to does because that's a document I'd sent to the parties shortly after May, after the federal decision, saying this is a changed document, it's got changed wage rates and work-related allowances and some minor drafting amendments.

Perhaps the best way to deal with this, commissioner, is to say that I have what would be the current award with the safety net and with the expense-related allowances on computer disk and could provide that to the commission as the final document.

COMMISSIONER: Yes, that would be quite acceptable.

MR BODKIN: Dealing now with the submission at section 4 in relation to classifications and wage rates, an examination of the classifications in the existing Building and Construction Industry Award and the existing Civil Construction and Maintenance Award shows that they cover similar core groups of labourers and plant operators. The wage rates currently assigned to these core groups are, in the case of labourers, identical, or in the case of plant operators, almost identical.

This pattern has existed for a considerable period of time in state and federal awards covering the building and civil sectors. It can be traced back to a decision of Commissioner Watson in the former Australian Conciliation and Arbitration Commission in 1970, reported in 133 CAR at page 225. I just briefly take you to that decision, commissioner. I hand up a copy of it.

COMMISSIONER: **EXHIBIT C.21**.

MR BODKIN: This in fact was the last full work value done in both what was then the Federal Builders' Labourers Award and the AWU Construction and Maintenance Award. It was one of those old time work value exercises where the commission went around the country, including Tasmania, and inspected classifications for the federal award and you can see on the second page of the exhibit, that there are many former luminaries of the industrial relations world there including Mr Koerbin and Mr King, Mr Roberts for the Public Works Department and Mr Chipman for the Forestry - that's a good name, Mr Chipman for the Forestry Commission of Tasmania.

COMMISSIONER: It is.

MR BODKIN: It's a sort of who's who of parties in the civil construction area.

COMMISSIONER: Gary Black gets a mention I notice.

MR BODKIN: Indeed. This decision was handed down on 13 August 1970. The part I want to take you to in particular is at page 232 to the third new paragraph, there's a reference half-way there to something Mr Koerbin had said and it goes on to say, and I quote:

> *Mr Davies also drew attention to section 51 which raises the whole question of whether the 'building industry' can be seen as separate and distinct from the 'construction industry'. The employers have widely opposing views on this.*
>
> *To my mind the question of nexus and like classifications in the two awards is not quite so black and white as some would argue nor can the 'industries' of building and construction be either merged or separated by the use of terminology such as 'civil engineering construction'. The fact remains that despite the difference in the respective award Scope clauses the work of certain classifications is so similar in each award as to justify the same rate of pay.*

That was a finding made in 1970. Then if you go over to the next page, which is 233 of the report under the heading of, Classifications Reviewed, the commissioner dealt with the rigger classification and the scaffolder classification. In so far as rigger was concerned, he said:

> *This is a classification which in my opinion covers comparable work in both the building and construction awards.*

He made a similar comment about the scaffolder classification, because at this time, Commissioner Watson was doing work value reviews in both the Builders' Labourers Award and the AWU Construction and Maintenance Award. He issued separate decisions but the inspections and his considerations were done contemporaneously, in effect. So he had that in mind.

At page 235 the commissioner dealt with industry allowance and in this particular matter the union, which in this case was the AWU, was claiming that the industry allowance for civil construction workers should be higher than the industry allowance for the building workers because conditions on civil sites were dirtier, et cetera. There may well be a lot of merit in that in my view but that was the claim. The industry allowances at that point in time in both the awards were the same.

In his reasons, over on page 236, Commissioner Watson said in the last paragraph on this page:

> *Prima facie this proposition is attractive but there are difficulties which, in my view, preclude its introduction at this stage. Most of these stem from the inescapable fact that in many areas (the submissions of Mr Howard and Mr Roberts pointed out some) members of the Union are engaged on very similar work, in similar environmental conditions and using the same materials, as builders labourers and carpenters. It is true that probably most builders labourers are working on urban or suburban sites and do not face some of the social disadvantages incurred by construction workers in remote areas, but not all construction workers are in remote areas and, when they are, they are frequently well provided for with accommodation, messing and recreation of a high standard. I know this is not always the case and herein lies the whole point of the averaging principle. Some are worse off than others some of the time. This is concisely explained in the quotation referred to by Mr Howard, from a decision of the New South Wales Industrial Commission (Beattie J., President; Cook and Sheldon J.J.) on 6 June 1970 in which it was said:*
>
> *'We recognise that, whichever approach is adopted, some fairly rough averaging is required. The disability allowance method requires averaging as to the incidence of disabilities which all concerned suffer in varying degrees from time to time. Account must be taken of the fact that sometimes the disabilities manifest themselves in extreme forms and sometimes hardly at all.'*

Half-way down the page, at the conclusion of this particular section, Commissioner Watson decided that he would give an amount, which was then $4.50 for the industry allowance. That, effectively, was the same allowance that went into the building awards and that has been the situation federally ever since and in every state jurisdiction ever since, as far as I'm aware, the industry allowance in the building and civil sector awards are the same. How it's got out of kilter in Tasmania, I don't know. It seems to me that there are no proper grounds for having a lower industry allowance in the civil sector than there is in the building sector.

Commissioner Watson then made an observation or a finding on page 237 under the heading of, Miscellaneous Matters, where he dealt with Part 2 - Mechanical Equipment, and he said:

> *This part of clause 10 was adjusted by consent following the Commission's work value exercise of comparable classifications in the Engine Drivers' and Firemen's (General) Award in 1968. I have no information before me in this matter which would indicate the necessity for further adjustments at this time.*

The relevance of that, commissioner, is that the classification structures and basically the wage rates in both the civil and building areas have their origin in the former Engine Drivers' and Firemen's (General) Award. So, even though there has been separate award coverage for plant operators in all that time, the last work value that was done was done in the Engine Drivers' Award and it has applied to both the building and civil sectors.

In my submission, that is further reason why an amalgamation of the state building and civil awards effectively would not be a novel thing. It would not create any anomalies. The anomaly in my view is the fact that there are separate awards.

Continuing with the submission on page 3, to the third-last paragraph. The proposed new Building and Construction Industry Award substantially rationalises classification structures and wage rates currently appearing in the building and civil awards. While separate classification structures are retained for builders' labourers and civil construction labourers, the plant operator classifications have been amalgamated.

It should be noted that the Australian Industrial Relations Commission is currently dealing with competency-based classifications in the national award. When that matter is finalised the CFMEU will make an application to this commission for the insertion of a similar classification structure into the state award. It is expected that the end result will be a further rationalisation of the classification structures for building and construction workers covered by federal and state awards.

Just before going on, I did prepare an exhibit, commissioner, dealing with those core classifications.

COMMISSIONER: **EXHIBIT C.22**.

MR BODKIN: The way this is arranged, on the first page it deals with the groupings of labourers in the Building and Construction Industry Award, that's the current, and the current state Civil Construction and Maintenance Award and you can see that the highest rate, which is the same in both awards, the key classifications are riggers and dogmen and then in the Civil Construction Award are unrelated

classifications which have been slotted in at that particular grade and the same can be seen for group 2 in the building, which corresponds with group 3 in civil and with group 3 in building which corresponds with grade 2 in civil.

In other words, you have key classifications which appear in both awards and, Mr Flanagan mentioned this yesterday, they currently have identical wage rates and then grouped around those in both awards are other classifications which have been assigned to those groups. A similar pattern can be seen in relation to plant operators. Both current awards have key types of machinery, basically currently around the same rate of pay. The proposed variation would have one structure for plant operators and would rationalise those rates to bring them completely into line.

Again, this was something that was - this idea of key groupings was mentioned by Commissioner Watson as far back as 1970 and it's quite obvious, commissioner, that in both sectors there are similar classifications doing similar types of work and currently receiving similar if not identical rates of pay, one further reason why the proposed new award would not effectively be a radical departure from the current arrangements. It would simply be a rationalisation and a simplification of the current arrangements.

At the top of page 4, I mentioned that the carting and driving classifications currently contained in the civil award have been retained. These rates appear to me to be very low and may be the subject of a future application. Trucks are used on building construction sites and would be covered by this award when operated by employees of a building and construction contractor. The new Building and Construction Award and indeed the current civil award would not apply to employees of transport companies making deliveries to building and construction sites.

The support personnel classifications - that is, classifications for cooks and clerks, are currently contained in the civil award - don't appear in the new award. It seems to me, commissioner, that there hasn't been much attention paid to those classifications over the years and there doesn't seem to be any real grounds for including them because it seems to me that there are other awards that would cover clerks and cooks. In a building and construction industry award per se, it would not be appropriate to include those classifications. Where cooks are provided in camps invariably these days, commissioner, they are provided by catering contractors rather than the employer themselves.

Section 5 of the submission deals with the award interest. The parties to the current Building and Construction Award are CFMEU, AWU, Master Builders and TCCI. The parties to the current civil award are CFMEU, AWU, AMACSU, which is the white-collar union, the TWU which is no longer registered, I understand, as a state organisation, and TCCI. AMACSU and TWU do not appear as parties to the new

Building and Construction Award. Technically, the present application before the commission is to vary the Building and Construction Industry Award in which neither AMACSU nor TWU have an interest.

As the new award only applies to private employers in the building and construction industry, the parties set out in Clause 5 - Award Interest of the draft award, in my submission, are the appropriate parties. That would be consistent with principle 12.1(iv) which requires that each award be reviewed to ensure the updating of Clause 6 - Parties and Persons Bound or Award Interest.

Next, in relation to the conversion of the Building Trades Award, integral to the award rationalisation process is the conversion of the Building Trades Award into an exclusively off-site award. All of the on-site work previously covered by the Building Trades Award will now be covered by the Building and Construction Industry Award. It follows that the new Building and Construction Industry Award and the new Building Trades Award should become operative on the same date in order to avoid confusion and indeed, in order to avoid a vacuum, for example, in regard to tradespersons on civil sites. If you simply made the Building Trades Award now purely an on-site award without making a new Building and Construction Industry Award, there would be a vacuum for tradespersons on civil sites.

I will go into the Building Trades Award in greater detail when I've concluded my submission in relation to the Building and Construction Industry Award but that particular point about operative date is quite important.

The next section deals with consistent award formatting. None of the three current awards have been reformatted in accordance with principle 12.1(i). The new award has been generally reformatted so as to provide for consistency with other awards of the commission. Whilst the award has been divided into 11 Parts with related matters grouped into each Part, a sequential clause numbering system has been retained throughout the award and thus, in my submission, there is substantial compliance with the award formatting principle.

To explain that, commissioner, if you take the draft award, you'll see from the index that it's divided into Part 1, Part 2, Part 3 but the clause numbering system - in Part 1 there are clauses 1 to 6. Instead of in Part 2 again going clause 1 to 6 or 7, it continues onwards, 7, 8, 9. There is a reason for doing that, commissioner, and that is, in an award of this size and scope it does become very awkward to be making cross-references to clause 1 of Part 2, clause 1 of Part 3, et cetera.

I know what the system is in pretty well all of the reformatted awards in Tasmania. When you came to Part 2 you'd start at clause 1 again and if you came to Part 3 you'd start at clause 1 again. It seems to me from the principle and indeed from - it seems to me that it would be

permissible to retain a sequential numbering system in the circumstances of this award. Indeed, the award reformatting in Tasmania followed the award reformatting system in the federal arena originally.

Although the federal system divided the award into parts and this can be seen from the current national award they retained a sequential numbering system. They didn't restart the clause numbers at the beginning of each Part. In that respect the Tasmanian awards, in so far as formatting is concerned, have gotten out of kilter. I'm not saying that the Tasmanian system is wrong. I'm just saying that in this particular award it would be easier for the parties to follow if that sequential numbering system is retained.

In other words, if someone says, well, what clause is industry allowance in and we could simply say, it's clause 20 on page 42. We don't say it's clause 1 of Part 4. The problem in this industry is, you have a lot of small contractors. That's the nature of the industry, most of the work is done by a large number of smaller contractors. You don't have the huge workforces that you find in other enterprises. You've got delegates trying to read the award, you've got foremen trying to read the award and it seems to me, commissioner, that it would be simpler just to have it in this way. So, what I put to you, commissioner, is that to reformat it in this way, although it slightly departs from the norm in the Tasmanian system, is nevertheless a substantial compliance with the relevant principle.

Finally, in this award, I'll deal briefly with demarcation issues. These received quite an airing yesterday but I think in conclusion I'd like to say this, as the CFMEU and AWU are both parties to the existing building and civil awards, there's no apparent reason why an amalgamation of the two awards would give rise to demarcation disputes. Under the current award arrangements both unions are entitled to enrol to the extent of their eligibility rules.

In general terms, both unions have the ability to enrol plant operators. The AWU has the ability to enrol civil construction labourers and the CFMEU has the ability to enrol tradespersons and builders' labourers although as you would have noted, on building sites you saw civil work obviously being done by building workers. In fact, the evidence was at Hungry Jacks, there were carpenters doing labouring work in those trenches. That's something that's come about with award restructuring over the past 10 years and the structural efficiency principle where strict classification demarcations have been - and multiskilling et cetera, and unfortunately in some cases down-skilling has become the order of the day.

But we say, that not withstanding this overlapping constitutional coverage, demarcation disputes between the AWU and CFMEU in Tasmania have been rare. There is no reason to believe that the present situation would change merely as a result of the making of the

proposed new award. In any event, the commission has the power to deal with and to settle any demarcation dispute which may arise between the two unions.

Now this is something that is within the knowledge of the commission as presently constituted because, commissioner, you'd be aware and it's been brought to your attention that there are currently informal demarcation arrangements between the AWU and the CFMEU in Tasmania on civil projects. Examples of current projects being the Westbury/Hagley By-Pass done by Leighton Contractors where there is a project agreement to which both of our organisations are parties and there is an understanding on that project as to what the demarcation arrangements are. A similar situation applies with the ABT Rail Project at Queenstown. Again, that's a project that's still running - a civil project with joint AWU and CFMEU union parties - no demarcation disputes.

And you're also aware of the Sorell Causeway Project of John Holland's which is about to get under way where the AWU and the CFMEU are currently jointly negotiating a project agreement with John Holland there. There are understandings there about what the demarcation arrangements will be. This has been a satisfactory way of dealing with the matter in Tasmania and from the CFMEU's point of view, the mere making of this new award - and the amalgamation of the civil and the building awards provides no grounds whatsoever for saying that there's any change to the eligibility entitlements of the CFMEU. Obviously they don't. It doesn't impact upon our eligibility and the amalgamation of the awards is not going to result in some attempt by the CFMEU to say to workers, well, we now have some right to enrol you which we didn't have before.

Well, obviously that would nonsense because I mean both unions are parties to both relevant awards at the present time.

So I mean demarcation is a matter that's proper to be taken into account by the commission in the making of this award, particularly in view of the matters that have been raised over the past couple of days. But in my submission, it is not a matter of such weight in the present proceedings that should persuade you to refuse the application for the proposed new award.

So that would complete my submission in relation to the Building and Construction Industry Award. I now would move on to the Building Trades Award and this will be much quicker, you'll be pleased to know, commissioner, because basically what's been proposed in the Building Trades Award is to excise all those matters relating to on-site construction work and to leave a purely on-site award.

Now there are a number of amendments again that need to be made and I hand up an amendment schedule - or a schedule of amendments to the draft award.

COMMISSIONER: **EXHIBIT C.23.**

MR BODKIN: One thing that isn't mentioned here again is the 2001 safety net adjustment. I think that in the document that was originally filed the pre-safety net wage rates appear. They would obviously have to be altered. And there has been a document circulating between the parties which does contain those variations, plus a number of small drafting matters that were agreed to by the parties in their earlier discussions.

As I understand it, there is pretty well consent on the making of this award, although one matter that has been raised by the TCCI fairly late in the stage is the scope and I'll come to that - perhaps I'll come to that. If I could take you to exhibit C.23.

What's proposed here is that we retain the title of Building Trades Award. In the application it was proposed to be called, I think, the Building Trades Off-Site Award. It is desirable, I've been convinced of this, by the TCCI in particular to retain the title Building Trades Award because that has implications for certain regulations, I understand, that refer to the Building Trades Award.

In clause 2, this would be an amended scope which would read that:

> *This award is established in respect of the offsite building trades industry, which includes:*

- and then from (a) to (j) are a number of trades and occupations most of which currently appear in the scope of the Building Trades Award.

Some of the - this is a reduction of some of the areas of activity referred to in the Building Trades Award because quite mysteriously the current Building Trades Award refers to, amongst other things, scaffolding, rigging, steel fixing and steel tying, and to construction or demolition of wooden or concrete walls, piers, et cetera, which is obviously on-site work.

COMMISSIONER: Yes.

MR BODKIN: And to roof tiling. So the amended scope would simply refer to off-site activities and there would be a proviso which reads:

> *Provided always that the place of work shall be other than on a construction site.*

Now in discussions with TCCI, they have put - and this is one of the difficulties when they're not represented here today - they put a proposal for a different definition. What they're proposing is that the off-site building industry would be defined as: work performed in or in connection with the building industry other than work performed on a construction site.

That has not found favour with the CFMEU. We believe it desirable to as far as possible follow the current scope of the Building Trades Award and do what was basically originally intended and that was simply to excise the on-site activities that are currently provided for in that award. So in my submission the scope should be as on exhibit C.23.

That would have one particular consequential provision; there would need to be an alteration to the definition of 'off-site' in the definitions clause where off-site would be defined as:

- *any place other than a construction site.*

And a similar definition would apply in respect of 'shop work'. There would need to be a slight change to the definition of shop work. In other words, off-site would always refer to a construction site which would be any site in the building or civil sectors for that matter.

Tool allowances would go up, commissioner. I have already tendered a calculation sheet which explains where those allowances come from for which CPI indices have been changed.

And meal allowance would go up in clause 19, and compensation for clothing and tools on page 43.

So those are the amendments that we'd seek to make together with the safety net adjustment and a number of smaller drafting changes that were previously agreed to by the parties.

I've done a brief submission which I hand up, commissioner.

COMMISSIONER: **EXHIBIT C.24**.

MR BODKIN: The first section deals with the jurisdiction of the commission to make the award. Again I refer to section 33(1) and 33(3) and to section 3 - the definition of 'industry'.

The scope of the current Building Trades Award is, *in respect of the building and construction industry including* - and then they've set out various sub-industries such as carpentry, joinery, et cetera.

The amended CFMEU scope clause amends the current clause in line with the original intention of the commission, that is, to convert the award to a purely off-site instrument.

When regard is paid to the definition of 'industry' in section 3 of the Act, it can be seen that the expression 'off-site building trades industry' is appropriate for the scope clause of the restructured Building Trades Award. The remaining sub-industries in a restructured clause can properly be categorised as industries, trades, processes, et cetera, carried on or engaged in by a private employer.

Examples of awards in which the scope clause specifies a general industry constituted by various sub-industries include the Metal and Engineering Industry Award, the Farming and Fruit Growing Award and the Automotive Industries Award.

I've set out then extracts from those relevant state awards. For example, the Metal and Engineering Award, it has no fewer than 45 sub-industries specified in the scope clause including at (1) mechanical and electrical engineering (2) smithing (3) boilermaking and erection, et cetera (4) bridge and girder fabrications, and so on. In other words, it would not be a novelty, commissioner, for an industry award to spell out various sub-industries and various trades and occupations and it's my submission that for the purposes of section 33 of the Act, those sub-industries constitute an industry.

A similar thing can be found with - if you just ignore that one headed, Curtin Civil Engineering, I don't know how that got there.

If I could take you over to the - if you could just delete that one headed, Curtin, and the following page. We then go to the Farming and Fruit Growing Award which then says that the *award is established in respect of the industry of farming and/or fruit growing*. And then it sets out various sub-industries such as sowing, raising, et cetera of grains, vegetables, even peat moss, fungi, hops, nuts and other specialised crops. Then it goes on to cover livestock farming and then on to fruit growing and then seed farming and then apiaries and the flower industry and viticulture. So here is another example of numerous sub-industries being covered by an industry award.

And finally, the Automotive Industries Award - the scope of that is established in respect of a number of occupations including automotive engineers, service station proprietors, builders, repairers and wreckers of motor bodies, et cetera, sellers of motor vehicles, even down to driving school instruction. That's all deemed to be part of the industry covered by the award.

So in my submission, commissioner, there would be no jurisdictional difficulty in making a new Building Trades Award with the scope as set out in the amendment that I have put forward.

As for all of the other conditions in the award, as I understand it, they're agreed, commissioner, with not much controversy and certainly total agreement that there needs to be a separate off-site award and the way to do is to convert that Building Trades Award into an off-site award which was the original decision of Commissioner Watling.

So those are my submissions, commissioner. In so far as a complete up-to-date draft of what's being sought, I do have complete up-to-date drafts on computer disk which can be provided if the commission could make use of those.

COMMISSIONER: Well, I think it would be helpful, yes. Thank you, Mr Bodkin.

MR BODKIN: That completes my submission.

COMMISSIONER: Thank you, Mr Bodkin. Mr Flanagan, what's your position, please?

MR FLANAGAN: Commissioner, since your comments yesterday afternoon I've been attempting to obtain some instructions in relation to whether or not there may be a mechanism by which the matter could move forward by consent. I have been unable to obtain those instructions and what I would be seeking at this stage is a brief adjournment now to see if it's possible to get some instructions on that matter.

In the event that I am unable to obtain instructions, I note the commissioner's comments in respect to the TCCI and their inability to attend and if necessary then it may be that the AWU would need to likewise provide written submissions to the commission. However, I would like the opportunity to have a brief adjournment to see if I can obtain some instructions in relation to a way forward with consent.

COMMISSIONER: Like, to two o'clock or something of that order?

MR FLANAGAN: Yes, something like that.

COMMISSIONER: Have you any objection to that, Mr Bodkin?

MR BODKIN: No, commissioner.

COMMISSIONER: We'll adjourn till 2.00pm.

SHORT ADJOURNMENT 11.53am

HEARING RESUMED 2.00pm

COMMISSIONER: Yes, Mr Flanagan?

MR FLANAGAN: Thank you, commissioner. Thank you for that adjournment. I've had the opportunity to obtain some instructions and unfortunately we're not able to proceed on a consent basis. In those circumstances, and having regard for the fact that the TCCI is to make their submissions in writing, the AWU would seek that same opportunity within a time frame considered appropriate by the commission.

COMMISSIONER: You'd prefer to do it in writing rather than on another day?

MR FLANAGAN: Yes, that's my instruction, sir.

COMMISSIONER: Do you have any objection to that, Mr Bodkin?

MR BODKIN: No, commissioner.

COMMISSIONER: Four weeks?

MR FLANAGAN: Yes, that's -

COMMISSIONER: Mr Bodkin, I've allowed Mr Flanagan four weeks to respond. Overly generous?

MR BODKIN: It seems fairly generous.

MR FLANAGAN: Three?

COMMISSIONER: Twenty-one days. Okay. I will allow the AWU and the TCCI 21 days from today to put in a written response. That response should also be forwarded to Mr Bodkin obviously, and you will have the normal right of reply and hope springs eternal and I wouldn't lose sight of the possibility of getting an agreed outcome if you can at any stage up until the last moment.

However, that's as far as we can take it today, so the commission stands adjourned and I'll await to hear from the parties.

HEARING ADJOURNED 2.03pm

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