

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T Nos 4837, 4838 and 4839 of
1994

IN THE MATTER OF applications by the
Tasmanian Chamber of Commerce and
Industry Limited to vary the Licensed Clubs
Award, the Hotels Resorts, Hospitality and
Motels Award and the Restaurant Keepers
Award

re shift loadings and penalty rates

COMMISSIONER IMLACH

HOBART, 4 October 1994
continued from 23/5/94

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER IMLACH: I'll take appearances.

MR S. GATES: If the commission pleases, GATES S.J, from the Tasmanian Chamber of Commerce and Industry.

COMMISSIONER IMLACH: Thanks, Mr Gates.

5 **MS H. HUDSON:** If the commission pleases, HELEN HUDSON from the Australian Liquor, Hospitality and Miscellaneous Workers' Union. With me I have **MR DARREN MATHEWSON.**

COMMISSIONER IMLACH: Thanks, Ms Hudson. Anyone else?

10 **MR D. CROSSIN:** If the commission pleases, CROSSIN from the Licensed Clubs Association, with **MR M. JOHNSON.**

COMMISSIONER IMLACH: Right, who is going to kick off? Mr Gates.

15 MR GATES: Yes, Mr Commissioner. The applications before you today essentially seek to vary the three Tasmanian hospitality awards, namely the Hotels, Resorts, Hospitality and Motels Award, the Licensed Clubs Award and the Restaurant Keepers Award.

The applications seek to reduce penalty rates applying on Saturdays and Sundays, increase shift premiums, consistent with variations in the federal award known as the Hotels, Resorts and Hospitality Industry Award 1992.

20 Before proceeding further, Mr Commissioner, we would like to make some points in relation to why the application is before the commission and where we believe we go from here.

25 By way of background, the hotels, the licensed clubs and the restaurant keepers awards were all subject to a significant review during the structural efficiency negotiations conducted during 1990-1991 arising out of the October 1989 State Wage Case decision.

All three awards had issues outstanding from those outstanding from those negotiations. For the union's part it was the review of shift loadings pertaining to work after 7.00 pm and before midnight and after midnight to 7.00 am, and for our part it was a further reduction in penalty rates.

30 These two issues were set aside in the state jurisdiction and the parties agreed to abide by the arbitrated decision flowing from the federal jurisdiction.

35 Given the nexus between the federal Hotels, Resorts and Hospitality Industry Award and the respective state awards it was recognised by the parties that the outcome of the federal decision would be a persuasive test case and to duplicate the argument in the State Commission would have been an exhaustive process.

The union has relied upon the nexus with the federal award extensively in the past years to introduce variations into the awards, and this nexus has been recognised by the commission in the past and in its justifications for variations that have been sought by the union.

40 In its decision the Australian Industrial Relations Commission considered penalty rates had a punitive effect on weekend trading, and we see no reason why the nexus and ironclad undertakings of this decision should not be followed through on this occasion.

In fact, persons operating under the state system are, and have been for a substantial period of time, operating in a competitive disadvantage to those who operate under the federal system.

5 It is important to establish that this application is not some folly of the TCCI, and to demonstrate the previously agreed positions of the parties.

We would like to tender an exhibit for the benefit of the commission.

COMMISSIONER IMLACH: Exhibit G.1.

10 MR GATES: Mr Commissioner, this is an unedited transcript of proceedings that occurred in matters T.2839 and 2840 of 1990, and it was an application by the then Federated Liquor and Allied Trades Industries Employees Union of Australia, Tasmanian Branch, to vary the Restaurant Keepers and Licensed Clubs Award.

15 I will just take you through the first page, Mr Commissioner, and you will see there is a Mr N.J.Sherry just down from the top in between the two lines. Mr Sherry, who then became Senator Nick Sherry, appeared on behalf of the Federated Liquor and Allied Trades Industries Employees Union of Australia, Tasmanian Branch, and with Mr Sherry on that day was Miss Christine Huxtable who was the State Secretary of the union. It is also noted that she is now the Federal Secretary of the ALHMWU.

20 If you will turn, Mr Commissioner, to page 11, and what I will do, if we just take you down to the first line which is scribbled across the page, and for the purposes of the commission to go on transcript the notes in the column on the right hand side are mine not the commission's, I will just take you through what he said, Mr Commissioner, as it goes to the crux of the question before you today.

25 *Penalty rates was a contentious issue, and it is an outstanding issue in the negotiations we've had with the employers, and I will come to that at the end when I detail outstanding issues.*

30 *But suffice it to say, Mr Deputy President, frankly if there had been an arbitrated case on the elimination of penalties I think probably we would have had some who would have been struggling too to prevent the elimination of penalties on penalties because I am not aware of many awards where that is the case and, frankly, it resulted because of the poor wording of the award, and it has existed for many, many years.*

But in respect to the other provision of 100% coming down to 75%, as per the hotels -

- that's a reference to the federal award, Mr Commissioner -

35 *- we have consistently argued with the employers and in the Federal Commission and in the State Commission that we should be closely following the national standards.*

40 *If the union is arguing that principle, i.e. that they closely follow federal standards, and if you accept that, then we have a problem of being consistent on the issue of penalty rates.*

If we are not consistent on the issue of penalty rates I believe in fact that we are being inconsistent.

So, it's on the basis of consistency that we are accepting these changes, and I will make some further comments on penalty rates in outstanding issues.

The relevance of that will become clear, Mr Commissioner.

5 If you will now turn to page 28, to the second paragraph, and I will read it for the commission's benefit and for the parties:

The Outstanding Issues - which is the final part of my submission.

10 *In respect to the wage relativities that were incorporated into the federal award they were 'without prejudice'. There may be some variation. I have indicated the clerical area is one where Mr Clues' agreement and the TCCI we have been able to resolve that.*

In respect to penalty rates, shift premiums, broken shift allowance, there are some outstanding matters.

Now, in respect to the Restaurant Keepers Award, and I will deal with that first.

15 *You will see from the consolidation of the divisions in respect to the shift provisions there are different shift provisions in the document we presented to you today because there were different provisions in the old Restaurant Keepers Award.*

20 *The union had the view that those provisions should be rationalised and updated. We could reach agreement with Mr Clues on that matter so we have put that aside, likewise the broken shift allowance, we believe there should be a broken shift allowance in the award. Likewise, we couldn't reach agreement, so we put that matter aside. And the TCCI made a claim in respect to a further adjustment of penalty rates. other than has been outlined here today, and we couldn't reach agreement on that.*

25 *What we have agreed to, and Mr Clues can detail this, but from our point of view we indicate on the record that there is a current case before the Federal Commission which is being seen as a test case in the federal Hotels, Hospitality, Resorts Award on the issue of penalty rates and shift provisions, and we would indicate that in respect to penalty rates, shift provisions and the broken shift allowance the union will seek to employ the nationally arbitrated decision in the State Restaurant Award, and the reason we do that, Mr Deputy President, is to be perfectly frank, we recognise that a nationally arbitrated case will carry considerable weight in this area and we believe that's the appropriate way to resolve those outstanding issues that exist between us and the employers on these issues.*

Will those issues be a single commissioner or a full bench? At the present time they are before a single commissioner, but I certainly anticipate that they will end up before a full bench the way things have been going.

40 *There have been some fairly extensive negotiations. I don't know when it will be arbitrated. It will certainly be arbitrated because there has been no agreement*

reached, and certainly not likely to be any agreement reached, and we will obviously come back to you, hopefully with an agreed document, and if we need to have some matters determined by you clearly they will be up to you based on the federal decision.

5 MR DEPUTY PRESIDENT: But you will copy the federal decision sight unseen.

10 MR SHERRY: I will cop - our union will cop - the federal decision sight unseen. You are a realist, Mr Deputy President, I suspect the TCCI will chop the decision up anyway. I certainly don't think that they'd not present it if given we're reserving that - that's an outstanding issue - and I mean I frankly don't believe if there is changes nationally and our position is not accepted or the Federal Commission arbitrates something and there has to be some sort of adjustment of penalty rates I frankly think our chances of opposing that in the State Commission would be very remote.

15 MR DEPUTY PRESIDENT: I was going to say, are you saying we are not an island?

MR SHERRY: I think we are not an island in some things - sorry - I think we are an island in some things but not in others.

20 I would like, and also I have already drawn to your attention, and we have been consistently arguing a national position and, again, I think you could draw our attention to that in fact, and I am sure Mr Clues will draw our attention to the fact that we have adopted a national position and we would be inconsistent if we adopted a different position in this matter.

25 MR DEPUTY PRESIDENT: I acknowledge the industries that you cover are pretty wide.

MR SHERRY: Yes. In respect to the club situation -

- that's a reference to the Licensed Clubs Award -

30 - it is the same position except in respect to the shift provision, Mr Deputy President, where in the clubs the shift provision doesn't require updating, it is clear, it has not needed any changes at all, so the position that I enunciate in respect to the clubs applies in respect to the penalty rates issue, weekend penalties and those things.

35 Mr Commissioner, that federal decision to which Mr Sherry referred was handed down by Commissioner Gay. of the Australian Industrial Relations Commission after some 3 years of debate on 6 May 1993.

The Tasmanian Chamber of Commerce and Industry was obviously keen to see this flow to state awards, given the ironclad guarantee of the then Senator Nick Sherry - and I don't believe he is a senator here -

MS HUDSON: Yes, he is.

MR GATES: He is? Okay , then - the now Senator Nick Sherry - and approached Ms Huxtable of the ALHMWU in the latter part of 1993. So he approached the union.

This was in relation to the timing of our application. And it is my understanding that the union was not forthcoming in their position in relation to this.

5 Mr Clues, of this office, then made application to the commission on 20 January 1994.

The matter of penalty rates received further discussion before the commission in T.No.4807, 4808 and 4809 of 1993, which was an application to vary the Aerated Waters Award and the Hotels, Resorts, Hospitality and Motels Award, the Restaurant Keepers Award and the Licensed Clubs Award for the \$8.00 safety net.

10 This was by the Australian Liquor, Hospitality and Miscellaneous Workers' Union of Australia.

Suffice it to say at this point Mr Clues of our office was unsuccessful in opposing the variation to the \$8.00 based on the incompleteness of the structural efficiency exercise in those awards. That was, except the Aerated Waters Award.

15 That being, that the penalty rates decision had not been incorporated into the award as per undertakings by the trades union.

The only point we would like to raise with the commission today from that hearing is a response by Mr Greg O'Brien of the ALHMWU to a number of statements put to him by Mr Clues, and that was in essence, that Mr Clues' statements to Mr O'Brien, was that in essence the union was walking away from undertakings given. That is, we will cop the decision sight unseen. The response from Mr O'Brien was, and I quote:

Obviously the union will have to look very carefully and seriously at the matters that Mr Clues refers to because this organisation is one which has prided itself on proceedings with honour in negotiations.

25 And that's in the transcript of the hearings. That statement, Mr Commissioner, is very important, however I can be forgiven now for believing that this statement was said in jest and I will demonstrate justification for this rationale.

30 On the 23rd May 1994, the applications by the Tasmanian Chamber of Commerce and Industry Limited to vary the Licensed Clubs Award, the Hotels, Resorts, Hospitality, Motels Award and the Restaurant Keepers Award came before the commission in matters T.No. 4837, 4838, and 4839 of 1994.

35 Mr Clues, of our office, at this hearing sought and was granted an adjournment of the application. We sought an adjournment based on a request from the union at a meeting at which a representative from the Australian Trades and Labor Council and Ms Huxtable, then secretary of the ALHMWU Tasmanian branch and now federal secretary of the ALHMWU were present. They approached TCCI and sought the meeting to discuss our application, and without going into specific details suggested we adjourn proceedings as the timing was not appropriate. More specifically, that there was a union election to occur and this application might well impact on the result of that election.

40 The union and the ACTU proposed to further submit to TCCI and alternative strategy for our consideration which would deliver equal to, if not, better results than the penalty rates decision.

45 We are not unreasonable, Mr Commissioner, and we were prepared to explore any alternative proposals, and if it transpires that alternative proposals does not satisfy

our members' wishes or if it surfaces that this is just another delaying tactic, then we shall pursue post haste our application.

5 As events have transgressed, Mr Commissioner, we have taken that offer on good faith to have it again refuted. It appears that we have been pursuing the folly of fools in this matter and with our members having been disadvantaged in the market, we're here to rectify an anomalous situation.

10 Sadly, Mr Commissioner, this meeting was not to be the closing scene in this matter - the curtain had far from been drawn. When the commission listed this matter for determination on the 1st September 1994, the union requested - they requested that we honour our agreed position to withhold determination to the 1st October of this year. In good faith and in hindsight, foolishly, we maintained our commitments and sought a further adjournment to a hearing date after the 1st October of this year.

15 Now at this time, given the undertakings of the union over the past 3 years, we believe it reasonable, particularly given the adjournments, that the parties could resolve this matter by consent, that is, to introduce the federal penalty rates decision of 6 May 1993. However, it appears this matter may not be resolved by consent since at a further meeting held on the 16th September of this year, again without going into specific details, the union, with an ACTU representative, sought to tie the penalty rates implementation in the state arena to a decision of the Australian Industrial Relations
20 Commission by Commissioner Merriman. This decision by Commissioner Merriman of the 10th June 1994 adjusts the relativities established under the award with the effect of negating the penalty rates decision - and in some cases it even imposed a greater financial burden on employers.

25 We clearly and unequivocally submit that we did not agree to the linking of penalty rates to this subsequent decision and we believe the union is holding the sword of Damoclese over our heads. The subsequent decision of 10 July 1994 was never a condition precedent to penalty rates implementation. The simple facts of the matter, Mr Commissioner, are this: the union gave an undertaking to, and I quote:

Cop the decision sight unseen.

30 That is the decision of the Australian Industrial Relations Commission. There were no condition precedent attached to this. The TCCI sought discussions with the union as regards implementation in Tasmania of which, to my understanding, we received no response. Mr O'Brien of the ALHMWU himself said, and again I'll quote:

35 *This organisation is one which has prided itself on proceeding with honour in negotiations.*

40 The ALHMWU and the ACTU met and agreed to withhold determination of this matter and that they would come back to us with an alternative proposal. The ALHMWU has not presented us with any specific detailed proposals which might offer state employers equal or greater savings as the implementation of the penalty rates decision would.

45 The TCCI agreed to honour its undertakings not to proceed with its application until after the 1st October of this year. And finally, the union has sought to not honour certain undertakings taken on good faith and even in the presence of the commission. So in summary, Mr Commissioner, the Australian Industrial Relations Commission has handed down its decision on the 6th May 1993 and it went in the employers favour.

Now we don't expect the union to actually put in an application to see the reduction in penalty rates, but what we do expect is that the undertaking be honour and to

continue the observance of the nexus between the federal awards that has to date served them so well.

5 Now we would suggest that this is a very grave situation that we find ourselves in today. An ironclad guarantee was given that they would cop the federal decision sight unseen. It is not a matter of our recollections; it is on transcript as a direct question from the deputy president of this commission in relation to how outstanding issues were to be resolved.

10 Employers under state awards are, and have been for some time, at a competitive disadvantage to employers under the federal award. Commissioner Gay in his statement commented that the current level of payments inhibit the provision of services, ignores industry development, limit employment, are a negative factor for tourism development - particularly international tourism, and in a general way that they are counter-efficiency and productivity by stultifying and wrongly penalising the hotel industry.

15 We seek to day, Mr Commissioner, that the penalty rates decision be implemented as per draft orders submitted before the commission, although I note at this point that they'll require some further amendments to dates, and as the union has said, they will cop the decision sight unseen. We strongly submit that the union has no defence to this case, however to say they should consent to this application.

20 Their defence, we submit, expired three years ago when they said, and I quote:

Our union will cop the federal decision sight unseen.

25 What defence can the union have to that? They did not say, we may cop the federal decision, or we will cop the federal decision provided that we like it. It is mandatory, Mr Commissioner, and not a discretionary statement. That is, we shall cop the federal decision sight unseen. There are no qualifications nor any conditions precedent to the granting of it. Should the commission not allow this application based on our opening submissions, we respectfully request that a further hearing be convened either late this week or early the next week so that we may submit a full case on this matter including the calling of witnesses.

30 Further, as to operative date for this hearing, or on continuation of this hearing, we submit that the operative date be the 23rd May 1994, that being the date of the adjournment before the commission on the last occasion. If the commission -

COMMISSIONER IMLACH: Just repeat that last submission please, Mr Gates.

35 MR GATES: As to operative date? Well what we'd seek today or should there be a continuation of this matter, Mr Commissioner, we would seek that it be the first full pay period to commence on or after the 23rd May 1994, that being the date the previous adjournment was given based on undertakings from the union. If the commission pleases.

COMMISSIONER IMLACH: Thanks, Mr Gates. Mr Crossin?

40 MR CROSSIN: Well, Mr Commissioner, I don't believe I can elaborate any more than what my fellow representative has said. Licensed Clubs agrees with all that has been presented by the TCI. The only matter that I would like to say in regards to relationships - in May at our last hearing, the union agreed that they would not ignore the licensed clubs and with anything that they have brought forward they would bring.
45 With repeated attempts to contact with the union, I still have not heard anything, and the only matter, as I say, I've had to receive through phone calls with the TCCI. But with the presentation of what the TCCI, the Licensed Clubs fully agrees with all those matters. Thank you very much.

COMMISSIONER IMLACH: Thanks, Mr Crossin.

MS HUDSON: Thanks, Mr Commissioner. In reply to Mr Gates' application, I guess there are number of things that I'd like to point out on behalf of the union, and firstly that I think the issue of penalty rates is not as simplistic as perhaps Mr Gates would
5 have us believe. I think the context has to be understood of the comments that were made by Mr Sherry some three - 3.1/2 years ago. Penalty rates were in fact mentioned at that particular hearing as one of a number of outstanding issues that had not been resolved through negotiations with employer representatives. And other issues at that time included broken shift allowance, minimum wage, grades and definitions and shift
10 allowances.

The decision that was made by federal Commissioner Gay in May 1993 in fact produced an outcome which did not really suit either employers or employees and in fact is still causing a great deal of confusion even amongst the Australian Hotels Association and its members. The original application by the AHA sought to substitute
15 existing percentage penalties for weekends and public holidays with flat hourly amounts. It also sought to reduce the period during which shift allowances would be paid.

The union's position obviously to oppose such an approach because of its belief that penalty rates should be paid to employees as compensation for the unsocial hours they
20 have to work in the hospitality industry. The union believes and has always believed that it's only fair to compensate workers who work on weekends, work at nights, work switched shifts or work as casuals without holiday pay, sick leave, leave loading or job security, and in fact are still one of the lowest paid groups of workers in the country.

Certainly we recognise that the hospitality industry is a 24-hour a day industry but even many employers admit that it is sometimes difficult to attract skilled staff to work
25 weekends and evenings even when penalty rates are paid.

The outcome of that case as we know bore very little relationship to the AHA's original application. In fact, because of the inequities involved in the decision some employers, including the largest operator in the hospitality industry in this state, have chosen not to implement the reductions. The outcome was certainly a shock to both parties and
30 certainly was not predicted by anyone at the time. We do know of course that many of our members suffered as a result of the decision, some in fact losing up to \$40 in their take home pay each week - an extremely significant amount for low paid workers. The difference in fact for some between affording the mortgage and not affording the
35 mortgage.

Now to move on to the TCCI application before you today; we did in fact request a delay in the proceedings in this hearing in late May of this year, as the commissioner may remember, and that delay was for 4 months. As Mr Gates said, we requested a delay until the beginning of October.

As you are also aware, during that time, federal Commissioner Merriman made his decision on the minimum rates case in the federal award. This case, run by the union, was based on the very important claim that the federal Hotels, Resorts and Hospitality Industry Award had never had its rates of pay determined in relation to other awards in other industries. Employers in fact both federal and state awards have had the
40 advantage of lower paid awards relative to other industries for a number of years.
45

Naturally enough, we have consequently requested a flow-on of the Merriman decision of June into the three main state awards. We have officially requested meetings with the TCCI in an attempt to resolve this issue and a letter was sent on the 16th September after the meeting that Mr Gates referred to and I have got a copy of that
50 letter, Mr Commissioner.

COMMISSIONER IMLACH: We'll call it exhibit H1.

MS HUDSON: In the letter dated the 16th September, we outlined some five points that we put to the TCCI and those five points included - or the proposal that we put to Mr Gates was, that the TCCI detail its applications so that specific award variations sought can be assessed by the union; that the TCCI and the LHMU determine the extent to which the three state awards are appropriately related to the federal Hotels, Resorts and Hospitality Industry Award 1992; that consideration be given to the consolidation of the three state awards into a single state award; 4) that provided the federal award is the appropriate parent award for each of the three state awards, both the penalty rates and minimum rates decisions from the federal award be implemented as part of a package. In this regard the penalty rate changes would only be effective on a prospective basis as per the intent of the federal decision. And further, the union would be prepared to negotiate the phasing-in of the minimum rates.

And finally, point 5 was that as part of the package a new clause be inserted in the awards which promotes the development of annualised salaries and loaded hourly rates consistent with the proposal put to you several months ago.

A reply in fact was not received to that letter from the TCCI until yesterday; the response did not address the issues raised in our letter but did assume our consent in relation to their application and draft orders which we also did not receive until yesterday afternoon, and I've got - I'd like to submit a copy of the letter that we received in response to ours.

COMMISSIONER IMLACH: H.2.

MS HUDSON: This letter in summary, Mr Commissioner, is a request basically from the TCCI that the union consent to the application before the commission today and that in relation to points 3, 4, and 5 that were mentioned in our letter, the TCCI notes in the last paragraph that they've schedule meetings of members on Monday the 10th October for instructions on these issues.

So it would seem that we haven't received - well, from our point of view, have not received an adequate response to that - to our proposal, and it seems like to me an example of having your cake and eating it too. There doesn't seem to be a willingness to cooperate and come up with a constructive solution to the problem we have before us today. In fact if the TCCI are so concerned about its members and their apparent disadvantages in the market place, one would assume they would have put an application in to reduce the penalty rates as per Commissioner Gay's decision in May '93. We would certainly have been in trouble with our members if we delayed applying for national wage increases in the same way, but perhaps our members put more pressure on us - I'm not sure.

If the TCCI argument is that the federal Hotels, Resorts and Hospitality Industry Award is the parent award or there is a nexus between the federal award and the state awards, one would assume therefore that there would be uniformity of wages and conditions across those awards.

However, at the moment there are a number of inconsistencies and these include, firstly in the Restaurant Keepers Award, there's no allowance for broken periods of work although one does exist in the federal award and the state Hotels Award and the Licensed Clubs Award. The Restaurant Keepers Award also offers to part time employees a 10% loading to those employees who work in licensed establishments, not in any other establishments covered by that award.

There are of course historical - some historical reasons for a distinction between employees who served alcohol and those who didn't and this in fact was addressed in

Commissioner Gay's decision on penalty rates. He in fact pointed out in his decision that there was no further justification for that distinction.

5 Secondly, in the Licensed Clubs Award, there is no leave loading clause and in that award part time employees receive a loading of 7.5% rather than the 10% which exists in other awards. Employers in fact operating under those two awards have therefore had a competitive advantage in the industry for some time in these areas mentioned. There has obviously not been consent in the past that conditions be consistent across awards. In fact these are issues that were mentioned by Nick Sherry in 1991.

10 As we pointed out in our letter to the TCCI recently, now may be the appropriate time to investigate the possible development of a state hospitality industry award, and in fact this would be consistent with the federal Industrial Relations Act where section 150A refers to the review of awards to provide for secure relevant and consistent wages and conditions of employment. The removal of any deficiencies in awards is also mentioned in that particular section of the act.

15 And recently the Australian Industrial Relations Commission safety net adjustment and review decision of September '94 before a full bench refers to a pilot award review program. The federal Hotels, Resorts and Hospitality Industry Award is one of the 10 awards mentioned as priority for review in that decision.

20 It may be that the deficiencies of the penalty rates decision will be reviewed as it could be argued that the decision was inequitable.

25 Finally, I'd like to point out a couple of oversights in the draft orders prepared by the TCCI, even though we only received a copy of those yesterday afternoon, but firstly, in the Licensed Clubs variation I'd like to point out that the clause 35 in the TCCI draft refers only to permanent employees while clause 15 states that clause 35 applies to casual employees. If you look - amendment 1, which is clause 15 at the bottom there, it says provisions of clause 35, shift allowance, shall apply to casual employees, but then if you go over to clause 35 it only refers to permanent employees in relation to shift allowances.

30 Currently in the award it just refers to an employee - it doesn't specify permanent or casual or part time.

35 There is also no mention in the draft order in relation to the Licensed Clubs Award part time employees in shift allowances as there exists in the federal decision. And secondly, in the Restaurant Keepers Award the draft clause put forward by the TCCI - again clause 24(g) in relation to shift penalties, only refers to permanent employees which doesn't exist in the current award, and there's no reference in either clause 13 or clause 24(g) to shift allowances for casual employees, and currently they are mentioned in that award. Again there's no reference to part time employees in relation to shift allowances as per the federal decision.

40 So I'd just like to point those couple of things out in relation to the draft orders presented by the TCCI and to say in conclusion then that it seems obvious that there are a number of issues that need to be discussed in detail. It's not simply a question of consent here today, as I think we need to look at all the issues I've already mentioned and we need some response from the TCCI about how they wish to treat our application in relation to Commissioner Merriman's decision.

45 We would therefore propose, Mr Commissioner, that we perhaps move into conference in an attempt to resolve some of these issues. Thank you.

COMMISSIONER IMLACH: Thanks, Ms Hudson. Mr Gates?

MR GATES: Thank you, Mr Commissioner. Just in response to the some of the points raised by my colleague, most to the context of Mr Sherry's statements, it certainly is my submission that his statement is unequivocal and quite clear in that he is referring to the federal decision and when specifically asked the question by the
5 deputy president, he says, we will cop it sight unseen. Now I'm not aware of any other case which he might have been referring to at that point in time, suffice to say that it is certainly clear from my point of view that it was the penalty rates decision of Commissioner Gay of the Australian Industrial Relations Commission.

10 As to the point alluded to that some workers are losing \$40 per week, I find that somewhat strange in that the decision said effectively that it will not apply to employees engaged as at that time and that over time there will be a gradual phasing down so that they're freezing the rates of pay. Now perhaps if I could be shown some evidence as to where they're losing the \$40 from week to week, I'd be prepared to entertain that.

15 As to the linking in of the decision of Commissioner Gay to Commissioner Merriman's, this was never part of the package and it's never been on the bargaining table - it is only something which has been recently introduced as a way of putting the sword of Damocles over our heads, so to speak, that they're not prepared to give you their consent until we agree to that decision. Now I believe that's certainly unjust and does
20 not show a in good faith. That doesn't say we won't entertain it or we won't come to a consensual position as regards the decision of Commissioner Merriman, but my instructions from members at this point in time are quite clear, that is, we pursue post haste the penalty rates decisions and the points alluded to by my colleague will certainly be addressed by the members of TCCI who it can be effected by. And at that
25 point in time I'll seek their instructions and where we go to from there.

But from TCCI's view at this point in time, the only issue on the table is the penalty rates decision. The ALHMWU has previously agreed to it and it is on transcript. Whether that amounts to perjury that they're not going to pursue, I won't be - I won't entertain that concept. As to the question of nexus, I don't want to be drawn into some
30 backwards and forwards argument at this point in time. If the ALHMWU is prepared to maintain that line, so be it, we'll argue it tooth and nail at a hearing to be convened at the next possible time. We do not believe it is pertinent at this point. Suffice to say that in the - in T.2839 and 2840 of 1990 the specific awards they refer to is Restaurant Keepers and Licensed Clubs. And Senator Nick Sherry said that, you
35 know, we're happy to use - well I'll just paraphrase what he said without going into the exact words - they were happy to use the federal award for the purposes of consistency. And he further said unequivocally that they will cop the decision sight unseen.

40 Now I'm not sure how we're to interpret that. From my point of view it goes in the Restaurant Keepers and it goes in Licensed Clubs and from there it certainly goes in the federal hotels and a direct nexus in that is - is, you know, particularly easy to prove, Mr Commissioner.

45 As to the draft orders, I am prepared to that we may be in error in not having given those across to the ALHMWU. It was my presumption, and I stand to be corrected, that the commission had received copies of the draft orders - we'd received those by facsimile from the commission, and those were our draft orders with the applications, so I presumed all the parties had a copy.

50 COMMISSIONER IMLACH: Well I've got - the application and it includes the amendments sought, the ones referred to by Ms Hudson, as to - you know having omissions and so on, I have before me - the heading is draft order - yes.

MR GATES: I would suggest, Mr Commissioner -

COMMISSIONER IMLACH: Alter the application.

MR GATES: - with respect, that we received these on the 21st January of this year and I would suggest - put it forward - that a copy was also sent to the trade union, but if they say they haven't received so be it.

5 As to the application today, we maintain our previous position, that is, that the commission should make a finding that it be inserted; that their statement 'we will cop this sight unseen' excludes any defence to the contrary and that he was a representative of the trade union and it quite clearly binds the trade union, but, you know, we're always prepared to entertain a consensual settlement to the matter
10 although we reserve our rights that if we are unsuccessful in that, that it go back to the commission for determination on these preliminary matters, and then if it's required we'll put substantial submissions, Mr Commissioner. If the commission pleases.

15 COMMISSIONER IMLACH: Yes, thanks, Mr Gates. Ms Hudson, are you actually claiming that the draft orders in the application didn't arrive or you didn't see them or what?

MS HUDSON: Well, Mr Commissioner, there seems to be some confusion. I assumed that the application put forward today - there would be draft orders associated with that and when they were discussed with Mr Gates on the 16th September he didn't
20 actually mention that the draft orders - the draft orders we would be discussing today were the ones that were in fact put forward in January, and I didn't realise that until yesterday.

COMMISSIONER IMLACH: Right, so really it's a misunderstanding -

MS HUDSON: So no mention - yes - sorry?

25 COMMISSIONER IMLACH: - on your part - is that correct? A misunderstanding on your part as to the significance of the draft order in January?

MR GATES: Oh, some blame can lie with me, Mr Commissioner. When we discussed it I had to go back to my files and ensure that it was the draft order in the file and indeed it was and that's why I made the reference in the subsequent letter to Ms
30 Hudson.

COMMISSIONER IMLACH: Alright, well I'll accept it as a misunderstanding one way or the other, but what about, Mr Gates, Ms Hudson's statement as to anomalies in those draft orders - what do you say about that?

35 MR GATES: Oh certainly, Mr Commissioner, they were prepared by Mr Clues of our office. I've had the opportunity to review those. I haven't at this point in time checked their absolute accurateness, and if the commission pleases, I'll certainly go through and come up with a draft order which is to the satisfaction of the parties - and perhaps that's something we can leave to the parties to discuss.

40 COMMISSIONER IMLACH: Yes, well, I'd ask you to do that, Mr Gates, and before you forward them to make sure that Ms Hudson has had a good look at them and as far as possible agree with the terminology. I understand the position you're in, Ms Hudson -

MR GATES: Thank you.

45 COMMISSIONER IMLACH: - but we've got purported amendments here - I'd at least like the parties to know exactly what they all mean and both parties to agree as to the application if they are endorsed. They may not be endorsed- they may or may not, but I think it's important that we get that clear.

5 Alright, well I'll reserve my decision and I just make the point that it is - seems to me to be a - a situation of arbitration that the parties are at arms length, shall we say, and to that extent and in consideration of the period of time, I think it's inappropriate for me to - to pursue, shall we say, or try and initiate discussions. That's how I see it at this stage. That's without comment to quite a few items that were raised which I'll discuss in my decision.

10 MR CROSSIN: Mr Chairman, if I may, I would like to draw to the attention - of here - of a memorandum put out by the Industrial Commission on the 22nd June 1944: memorandum to all registered organisations in regards to preliminary negotiations and discussions. I believe adhered to this there wouldn't be so much argument here in things, because I believe in this case the union agreed with the Licensed Clubs - I didn't - this application was put in by the TCI, but with our agreement with Mr Gates that the union agreed that they would - in any discussion that they allow the licensed clubs some discussion in it. Well we've had nothing, even though the union did - did agree in May to - to keep us well informed. And repeated phone calls and things like that still never got any answer, so I would like, as you say, - it says here - the - it was directed by the president under Mr James' signature: that in the circumstances applicants are advised that in future applications couched in vague, inaccurate and incomplete terms should be referred - that's a part of it - but in further related point, wherever possible parties involved with an application are requested to engage in preliminary discussions prior to the first formal hearing for the purpose of clarifying different points of view, if any. The adoption of this practice would result in the settlement of a matter prior to hearing and in events should make process of the commission more smoothly.

15 25 Well I must say that we have done this in regards to the wages - minimum wages increases. We met with the union representative at all times and prior to us coming in to this commission we were able to say to the commissioner, we are in agreement, sir. But in this case, I honestly believe - the only information that I have at any time has been by contacting prior Mr Gates' overtaking was with Mr Clues.

30 Now if this comes before the full bench, and the hearing is not agreed to, Mr Commissioner, I must say it was only part - second-hand information which I got from Mr Clues was that the union would accept this, but they would not want to be seen giving away things prior to the - giving away rates or anything like that prior to the union election because it may affect it. Thanks very much.

35 COMMISSIONER IMLACH: Mr Crossin, I want to get this clear, that's why I made the statement at the end of the formal submissions, that it seems to me that the union will - is quite happy to go on with discussions - that's been the case for some time but the employers are not satisfied that they will come to any fruition in relation to penalty payments, et cetera, shall we say in the terms of the application, therefore the employers have come along today and virtually said, we've had enough, we want the decision one way or the other. I mean I take your points of course in accordance with that circular, and I'm saying that in the future I'd like to be more involved, but in this particular matter that's the stage that we've reached - that the employers want the matter arbitrated one way or the other.

45 MR CROSSIN: Also, Mr Commissioner, because - with regards to the letter that we've received from the union, nothing was heard from May until we attempted to bring on the matter in September. Now it seems to me, the union at that stage when you adjourned the hearing, said that they would like to come up with an alternative. Well for 5 months - or 4 months -

50 COMMISSIONER IMLACH: Yes, well just - just a minute Mr Crossin, I understand what you're saying, but there a certain amount of recriminations here that I think the union doesn't want to hear and we understand that, and Mr Gates, and I presume yourself, want the matter decided.

MR CROSSIN: That's correct.

COMMISSIONER IMLACH: So I don't want to hear any more.

MR CROSSIN: Right.

5 COMMISSIONER IMLACH: That's why I made that small speech myself. As I see it that's the position we're in. The unions had their talk, employers have said that we've had enough of that, we want a decision, and this application has been in since January - is that not the position we're in?

10 MR GATES: Well I just, if I may, seek some clarification on that, Mr Commissioner. We're - whilst we seek an arbitrated decision before it, if you require further submissions, we're certainly happy to put those. On the same token we're also prepared to talk to the ALHMWU as regards the whole matters, but it is quite clear and it is paramount in our minds that penalty rates is an issue and it should not be tied to anything else. But if there is a reasonable proposal as to the adjustment to relativities, then certainly I'll put that before our membership meeting on the 10th
15 October.

COMMISSIONER IMLACH: Well, Mr Gates, as I understand it, your position is, taking all that into consideration, you want this matter of penalty payments decided - is that not so?

MR GATES: Yes, it is, Mr Commissioner.

20 COMMISSIONER IMLACH: Now is that your -

MR JOHNSON: Mr Commissioner, may I, on behalf of the Registered Clubs, we want it decided, sir, it's gone on for long enough. And at least we ought to have a decision on these - if there's any amendments or alterations - I believe the unions had enough time and we can always put in another submission for alteration.

25 COMMISSIONER IMLACH: So can the union - Mr Minty Johnson - yes?

30 MR JOHNSON: Yes from the unions - if they wish to they can put into alterations for amendments. They say that there's a clause missing here - not part time. Alright. It should have been picked up, sir. They've had copies of it, - surely. I've got the draft order and the only belief that I have at the moment that wants altered is that it was supposed to commence from the 1st February '94. Let's decide on this and if they wish to come back to us and discuss it, then let them do so and have an amendment to the award. At least let us decide on this - it's been going on for too long. If you don't decide on that, sir, I'm suggesting that you give us a period of time when this has got to be settled. You mentioned it the last time in the award - you hoped you'd hear very soon.
35 That's way back in May and it was adjourned from September. You had your meeting on the 1st September and you adjourned it to the 4th October. We're going on and on and on, sir. I'm sorry.

40 COMMISSIONER IMLACH: Thanks, Mr Minty Johnson. Now - I'll come back - I'll come to you Ms Hudson. Mr Crossin, you've heard all that - you started it. What's your position?

45 MR CROSSIN: Yes. I want to - I want to see it I want to see the decision, Mr Chairman, but what I was trying to say that in the future, we could take notice of these memorandums that you've put out and the licensed clubs not be ignored in any relationship whatsoever because I believe that the union have got another one coming on, on the variations to the award. Well we don't want to be ignored on that.

COMMISSIONER IMLACH: Well I just make the point that I don't want to be ignored either and if any party is dissatisfied with these things, as we all know, these matters can be brought on and we can adjourn into conference at any time. Now nothing has been done about that, but as far as I'm concerned the water has gone under the bridge, we're in a certain position today, and I think we now have the triumvirate
5 agreed on what they want. I'm not disparaging what you've said, Mr Crossin - I think it's well said - but I think we know where we are, and having had all that from that side, it's only fair, Ms Hudson, that you have another go.

MR GATES: Can I just interlude for a minute please?

10 COMMISSIONER IMLACH: Just a minute, just a minute, Ms Hudson.

MR GATES: Perhaps as a gesture of good faith, if it's possible, withhold a decision being handed down till at least the 10th October and that will give the parties time to see if we can reach a settlement to the matter? I'm open to that if Ms Hudson believes we can -

15 COMMISSIONER IMLACH: Well, what you're saying, as I understand it, Mr Gates, is you're agreeable to an adjournment till the 10th October. I mean we've had the proceedings up till now - they're virtually about to close and I'm left with an arbitration decision but if - if - I'm quite agreeable - I indicated that to Ms Hudson - to grant an
20 adjournment now for further discussions - till the 10th October. That's what you're saying, Mr Gates?

MR GATES: I agree to the 11th October, Mr Commissioner.

COMMISSIONER IMLACH: Right. Now, I mean, Ms Hudson, you have the floor; in relation to what's gone on before and this final contribution by Mr Gates, what do you want to say?

25 MS HUDSON: Thank you, Mr Commissioner. Just a couple of points in response to Mr Crossin's remarks. The only - in fact the only meeting that we have had with the TCCI since last I spoke to Mr Crossin, I understand he was actually invited to, but was unable to attend on the day that that meeting was held - that's my understanding from Mr Gates. So I'm not sure whether there's some misunderstanding about lots of
30 discussions taking place that he hasn't been invited to, but I'd just like to put it on the record that there has only been one meeting and he was invited to that particular meeting by Mr Gates, I understand.

In relation to an adjournment, we're quite happy to agree to that, Mr Commissioner. I'm just not sure where that leaves us in terms of our application of Thursday of this
35 week. Mr Gates is saying that he can't give a response to the proposal that we have put to him which links the issues of penalty rates and the minimum rates case until after his meeting on the 10th October, so I'm just not sure whether it is viable to continue with Thursday's hearing or to adjourn that until that date as well.

40 COMMISSIONER IMLACH: Yes. Well just before you say anything, Mr Gates, I think that's a fair point made by Ms Hudson. I think it might be advisable for the parties to have a bit of a discussion on this 10th October - was it Thursday of this week we're due to come back again?

MS HUDSON: Mm.

45 COMMISSIONER IMLACH: On your application and tell me what you want to do. I'd certainly recommend the parties go into further discussions but I make the point that I think it's time that a decision was made about penalty rates one way or the other. I say that for everyone's information. In other words, I'm prepared to make a decision on that without consideration of the other matters, but if I make a decision on that other

matter it is going to affect the other matters. It's a corollary as it were, that if we go plus or minus with today's matter, it's going to be the same with the other matter, and I make that point for all parties. So I think discussions would be well in order and I think the 10th October - or the 11th October is a reasonable time. Now that has
5 implications and I think it's for you people to settle and tell me what you want. Are we are clear now?

So we'll adjourn now and I hope you can get a response pretty soon.

SHORT ADJOURNMENT

COMMISSIONER IMLACH: Mr Gates?

10 MR GATES: Ah, Mr Commissioner, we're pleased to report that the parties will be meeting within the next week to progress some of the matters which have been discussed today and that we ask that the commission set aside some time for reporting back which may involve arbitration of the matter on Wednesday the 12th October - preferably early in the morning.

15 COMMISSIONER IMLACH: What about the 13th?

MR JOHNSON: Thursday, the 13th.

MR GATES: It will need to be after 10 o'clock, Mr Commissioner, if possible.

COMMISSIONER IMLACH: That's alright. Make it half past 10.00, Mr Gates.

MR GATES: That's fine by me.

20 MR JOHNSON: You couldn't make it 9 o'clock?

COMMISSIONER IMLACH: Is that alright then?

MR GATES: Yes, 10.30, Thursday the 13th October.

COMMISSIONER IMLACH: Now as I understand it, today's hearing is adjourned till that day.

25 MR GATES: Yes.

COMMISSIONER IMLACH: And what about -

MS HUDSON: And Thursday's hearing is adjourned.

COMMISSIONER IMLACH: Also adjourned to the same day - are we all happy with that?

30 MS HUDSON: Yes. I think that's what we agreed.

MR GATES: Yes.

COMMISSIONER IMLACH: Right, and then we'll see where we go from there.

MR JOHNSON: Except for, Mr Commissioner, I thought we agreed that we - this order to be approved today.

35 COMMISSIONER IMLACH: No, Mr Minty Johnson, this is what - we're having an adjournment for that. If there's no settlement on Thursday when you come -

MR JOHNSON: I'm sorry, sir. I don't know whether Mr Gates -

MR GATES: Yes.

5 MR JOHNSON: - we agreed to this now, no adjournment of this meeting, but the meeting on Thursday to be adjourned so that any matters which the union wished to bring up that they believe is missing in this will be brought up at that meeting that you put off till the Wednesday - if that's not my

COMMISSIONER IMLACH: We'll just go off the record for a minute thanks, Gay.

OFF THE RECORD

10 COMMISSIONER IMLACH: Now perhaps, Mr Gates, you might tell me about what's proposed.

15 MR GATES: Yes, the proposal, Mr Commissioner, is that the - this hearing be adjourned until the 13th October, being a Thursday, till 10.30 am, and that the matter on for hearing for the commission on the 6th October also be stood over to the 13th October at the same time as 10.30. The parties will in the intervening period attempt to arrive in a consensual position on the matters. In the event that the parties are unable to come to an agreed position then the parties can seek that the commission order a formal decision. Thank you.

COMMISSIONER IMLACH: Thanks, Mr Gates. How's your understanding, Ms Hudson?

20 MS HUDSON: That's how I see it, Mr Commissioner, I agree with Mr Gates.

COMMISSIONER IMLACH: And that's also as I understand it, too. Alright, so we'll adjourn to Thursday the 13th and I wish you every success with your discussions.

HEARING ADJOURNED