



*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, 17 September 2001  
Continued from 28 June 2001

**TRANSCRIPT OF PROCEEDINGS**

Unedited

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

**HEARING COMMENCED 3.15pm**

COMMISSIONER: Yes, Mr Bodkin?

MR BODKIN: Yes, commissioner, following the inspections this morning it was agreed that we would return to the commission this afternoon to place on record the nature of the - or what we have actually seen and I propose to do that by way of our organiser, Mr White, giving evidence to the commission as to the work we've seen today and the types of contractors that carry out this work and what I propose is that Mr White now proceed to give that evidence.

COMMISSIONER: Yes, thank you.

**WILLIAM THOMAS CHARLES WHITE, sworn**

MR BODKIN: Mr White, just for the record, could you give your name and address for the purpose of these proceedings?..... My full name is William Thomas Charles White. Address is care of CFMEU, 33A Newtown Road, Newtown.

And what is your occupation, Mr White?..... Construction organiser.

With which organisation?..... With the CFMEU - C&G Division.

How long have you been an organiser with the CFMEU?..... Coming up to three years.

Is that in the State of Tasmania?..... In the State of Tasmania, yes.

What geographical areas of Tasmania do you look after?..... The state. Organiser for the state.

Would that be the entire state, is it?..... The entire state, yes.

Which industry or industries do you organise?..... Mainly the building construction area.

What do your duties entail? Do you visit sites?..... Mainly visit sites, yes.

And what would you do when you visit sites?..... A few things: just check on the sites; check on the safety; talk to our members on the site; any that are not members try to recruit them as members.

Now we went to a number of sites today and I think the first one was the site of a Hungry Jacks drive-in restaurant at Glenorchy - is that correct?..... That's right, yes.

35 For the record, could you tell the commission what was on that site before construction commenced?..... There was a restaurant of some sort. I'm trying to think of the name of that restaurant.

COMMISSIONER: The Lone Star, I think it may have been.

40 WITNESS: Yes, Lone Star and before that it was Sizzler's. Loan Star and Sizzlers, that's right, yes.

MR BODKIN: So what happened to the former buildings that were on that site?..... It was demolished. I'm not sure by whom. I heard that it was going to be. I went out that way - this is going back probably a couple of months ago - and the building was still there. The  
45 next time I went out that way it was gone.

Who was the main contractor on that site?..... Bells Construction and Technologies.

50 Yes. And do they employ workers on that site?..... They employ workers. Other than the supervisor, I didn't observe any of their workers there today, but the previous occasion I was out there they had a leading hand carpenter and a labourer.

Approximately how many times have you visited that site since construction work began?..... Today would have been the third time.

55 When we went there today, we saw work being carried out. Could you describe to the commission the sort of work we saw and who was doing it?..... There was a small excavator there. There was obviously trenching for the footings. There were, working around the footings just cleaning them up with shovels, what appeared to be some  
60 labourers but my knowledge of those workers they are employed by Stephen Little. Stephen Little is a formwork contractor and those men were basically carpenters, but they were doing the work of labourers. There was a plumbing contractor there.

65 And what was the name of the contractor that had the excavator on the site?..... Hazell Bros - Earthmoving Division.

You said that they were excavating footings. What other sort of work was being done there at that time?..... To my memory, I can just remember the excavation of the footings plus there would have been trenching for the drains for the plumbing.

70 And this is going to be a drive-in type of restaurant?..... It will be a drive-in type of restaurant and I understand when it's done the drive-through will be - well, according to what the supervisor said today - part concrete and part seal.

75 What type of seal would that be?..... Well, it would be bitumen seal.

And what type of contractor would do that?..... Obviously a sealing contractor; probably somebody like Roadways or the like thereof mainly involved in civil construction. Probably some driveway work in other areas - housing or construction areas.

80 I understand that when you visited that site previously, did you take any photographs of work being carried out?..... Yes, I did, I took some photographs of Hazell's plant on the job.

And you have one such photograph for the commission to look at today?..... Yes. I've put numbers on the back of the photographs.  
85 That's number 8.

COMMISSIONER: Just before you do that, I'm just trying to establish the exhibit list. Is anyone going to own up to who put in A.1?

MR FLANAGAN: If you can tell us what A.1 is, sir?

90 COMMISSIONER: A.1 is the full bench decision of 13 June in the rules matter.

MR FLANAGAN: That would have been us.

COMMISSIONER: So that would have been 'A' for AWU?

MR FLANAGAN: Yes.

COMMISSIONER: So we'll mark this photo **EXHIBIT C.4**.

95 MR BODKIN: Mr White, the next site we visited was the cricket ground at Bellerive?..... Yes, that's right.

Who is the principal contractor there?..... Once again, Bells Construction and Technologies.

100 Could you tell the commission what type of work is being carried out there?..... Probably a little bit of everything. There's been demolition of old grandstands; demolition of some old toilets there; new grandstands being erected where those toilets were; part of the old grandstand's been re-used in that one, some of the others that have been demolished have been transferred to other parts of the ground.  
105 There has been, what I would consider, major excavations by Ron Carthew around the majority of the area of that ground. Part of that excavation would have been for the new indoor cricket practice facilities. There's outdoor practice facilities that have been excavated and ready to be - I think they have to put clay base down on them and  
110 then turf them.

Who was doing the demolition work?..... The demolition was Hobart Steel Fixers. How he comes into demolition I'm not sure, but that's his role there.

115 Have you encountered that company before?..... Yes, only on steel fixing.

Where?..... Around various sites. The last commercial site I can recall being on before that was the Kingborough Council Chambers - that was Hansen Yuncken job at Kingston doing the steel fixing there.

120 So is this something new - their involvement in demolition work?..... The first time I've known of him in the commercial field. He does a bit of work around in the housing area. He probably does anything and everything he can grab there.

Now you mentioned Ron Carthew. What type of contractor is Ron Carthew?..... Ron Carthew is a civil contractor.

125 And what work was he doing at Bellerive today?..... Today just -

Well, perhaps I should - what work has he been doing up till then?..... Well, the excavation work for the new buildings and for the driveways. He's only done partial preparation for the car park area but his work there is ongoing. He's going to continue with that car park area. It's not a big car park, but he'd be doing the base work for that anyway. I doubt very much if he'll be doing the sealing of it, but he'd be doing the base work for it.

135 Was he doing any other work, to your knowledge, on that site?..... Other than the excavations for the grandstands and the buildings, I mean that's basically the whole lot of the new buildings there and the new stands, he would have been - part of that excavation would have been trenching for the footings. I don't believe he did any trenching work there for the plumbers. They probably would have had either their own machinery in for that or subcontracted out to somebody else and I'm not aware of who that was.

Now, we're also informed there that there is picket fencing and paths and landscape walls?..... That's right, he used to do that, yes.

Who was that?..... Ron Carthew used to do that work - the landscaping and the picket fence and also some agriculture draining.

145 Have you encountered Ron Carthew on any other construction sites before?..... Quite frequently, yes. Yes, Ron Carthew does a lot of excavation on construction sites.

150 What type of construction sites?..... Things like the Aquatic Centre, the Concert Hall, Beach House units. Well, Ron Carthew has been on those jobs. He would have been on plenty of others that have

probably not come into mind at the moment. The new car park at the Casino.

What sort of car park is that?..... A multi-storey car park. Probably only I think two levels - I think it's only two levels.

155 What other contractors or subcontractors did we see at Bellerive or involved at Bellerive besides that Ron Carthew and Hobart Steel Fixers?..... Today there was a painter there - Bob De Groot.

Yes?..... A form worker - J&K Constructions - they were working on the grandstand.

160 Yes?..... There was a Groombridge rock breaker there - Civil Construction; he was working with demolition.

Who was on the footings, do you recall - working on the footings - or excavating for footings?..... Ron Carthew has been doing all that so I assume that he would have been there today. I know he's  
165 contracted to do it. There is sometimes a machine there from Sutcliffe's Civil Construction, but that's on hire to Ron Carthew.

Do we have any photos for that site? I don't think we do?..... No.

Well, then, we might move onto the third site we inspected which was the Aquatic Centre in Hobart. Now I understand that work has just  
170 recently finished there. Could you tell the commissioner what happened?..... That was back in around about April and it's only just - I think it opened on Saturday - work has been completed sometime in the last two to four weeks and because of the toxic substance, just about the whole place had to be cleaned and some of it  
175 had to be repainted. Now that work of cleaning involved cleaners - builders labourers doing a fair bit of that cleaning.

Who was the employer?..... The employer was a cleaning company out of Melbourne called Restorx.

Do they clean building sites?..... Usually they clean up after fires,  
180 yes.

So you said they employed builders labourers on clean up?..... Yes, they did. Well, they didn't actually employ anybody directly, they used a labour hire company, another company out of Melbourne called Tangent Project Management and the labourers were hired through  
185 advertising down here in Hobart.

So when the cleaning work was completed, what other work had to be done on that Aquatic Centre?..... Well, when the cleaning work was completed, obviously the painting wasn't done until that was completed. To be able to clean it, there was a requirement for  
190 scaffolders there and there was a roofing contractor because the roof

195 had to come off in sections and the insulation taken out and then the area up in the roof - the trusses, et cetera - the whole lot had to be cleaned completely and then new insulation put in and re-roofed again. The external walls had to come off - the external cladding had to come off and the insulation out of there and new insulation put in after it had been cleaned - not the insulation, I'm sorry, after the walls had been cleaned.

So you've mentioned scaffolders, painters and cleaners?..... Yes.

200 Who was the principal contractor or the project manager?..... The project manager there was once again Bell's Construction and Technologies and the painter was Bob De Groot and the scaffolders were Instant Scaffolds and I didn't actually see it go on, but I saw the measurement for the replacement of tiling and that was Montile.

Montile?..... Montile was the subcontractor there.

205 That Aquatic Centre is a large centre, is it?..... For Tasmania it's large, yes.

And what's contained within that centre?..... Well, the swimming pools, cafeteria, offices, gymnasium. I think that's probably it.

210 You said that work recently finished there, is that correct?..... That's right, about say somewhere between the last two and four weeks.

We then proceeded to a car park in Market Place in the city?..... Yes, that's a Hansen and Yuncken job.

215 Could you tell the commission basically what's being built there? Well, first of all, what was there - if anything was there - and what's been built there now?..... What was there was an old building - I think a two-storey building commonly referred to as the old Ag Bank and there was another building - about a four storey building - they had to be demolished and work was contracted out to Hazell's Civil  
220 Construction. There was asbestos contained inside the buildings. Hazell's are licensed asbestos removalists so they obviously did that work. Part of the demolition they used another division of Hazell Bros - the earthmoving division - using excavators to pull down and knock down some of the building. Once that was cleaned up it had Sutcliffe  
225 Earthmoving in there to do some of the excavation work, some of the clean up work and Van Ek Construction came in for the pile driving and that virtually got it in readiness for construction although they're still doing some base excavation and foundation work there at the moment.

230 Do you know how tall that car park building will be or how many levels there will be?..... Ten levels, I think.

You mentioned Van Ek and Sutcliffe as subcontractors, have you come across either of those companies on other sites?..... Yes, I've come across Sutcliffe on sites. Sutcliffe was recently on the Woolstore.

235 That's a hotel?..... That's a hotel. A hotel site of about \$13million job I think. I have come across Sutcliffe around other sites. I don't always put everything right in the memory bank.

And what type of sites would they be?..... Building construction sites. I have, not that I actually visit the jobs that much, but I have  
240 come across him on road works up around Bridgewater.

And Van Ek, have you come across Van Ek elsewhere?..... Van Ek also did the pile driving on the Woolstore job - the hotel job there. He's currently on doing a bridge or an overpass at Don in the north of the state, and he did a fair bit of the bridge work on Leighton's road works  
245 job at Westbury/Hagley.

When was that?..... That job has probably got about another three months to go, but the bridge work is basically finished so he's probably finished up on the bridge work sometime within the last, I would say, four or five months; but he would have been on there for around about  
250 12 months.

Now I understand that you took some photos at Market Place at the car park, what, approximately a month ago was it?..... Around about a month ago, yes.

There are three photos. I've only got one set for some reason. Perhaps  
255 if Mr Flanagan could just look at them before they're handed up. Sir, I tender those photos.

COMMISSIONER: We'll mark them - **EXHIBIT C.5-1, EXHIBIT C.5-2, EXHIBIT C.5-3.**

MR BODKIN: Now there has been a considerable amount of work  
260 done since those photos were taken?..... Yes, probably not as much as Hansen and Yuncken would have liked. Their tower crane has been held up in Melbourne because of a couple of deaths in Melbourne and there's a full audit on the cranes and a ban on any crane erection and disassembling. But there has been some work  
265 done, but mostly done by Stephen Little Formwork or Stephen Little Constructions.

Now we might move on to the next site which I think was St Ann's in Davey Street. Could you tell the commissioner what work has been carried out on that site? What's the nature of the work?..... St  
270 Ann's is a nursing home and Fairbrothers are the principal contractor there and St Ann's are upgrading the nursing home. I believe it's something like about 100 rooms there at the moment. They're gradually demolishing the old area and rebuilding the thing - make it a

275 bit bigger, but it's still only going to be about 100 rooms. It's only a  
partial demolition at the moment because I imagine that they will have  
a partial rebuild as well and just be able to move the people from their  
current accommodation across to the new accommodation before they  
demolish that and finish the building. I believe it is going to take about  
18 months - or it's an 18 month time frame on the project. Demolition  
280 is being carried out by Hazell Bros - once again Hazell Bros Civil  
Construction and there is excavation work of course going on for just  
levelling the area off, trenching for the footings, and I would imagine  
for the plumbing as well; electrical cables underground I would  
imagine on that site, and that excavation is being carried out by Hazell  
285 Bros Earthmoving Division and the earthmoving division was also  
involved in the demolition and Hazell's Civil Construction are also  
involved in the excavation as far as providing labourers and the  
foreman for the job.

290 Now there is one historic building that's going to remain on that site,  
as I understand it?..... That's right.

Is that going to be refurbished?..... That will be refurbished, yes.

295 Who is the principal contractor on that project?..... Fairbrothers  
are the principal contractor. They will be doing - Fairbrothers are  
unlike the other bigger builders in the state in so much as they  
directly employ just about everybody on the job up to the building  
stage anyway, so they'll be doing the refurbishment in there. They've  
also got some of their carpenters and labourers on the job at the  
moment assisting with the excavation and the preparation for the steel  
work - or doing the steel work in preparation for the concrete pours.

300 Now you've taken some photos of that project a few weeks ago - 9 and  
9a?..... Yes.

COMMISSIONER: **EXHIBIT C.6-1** and **EXHIBIT C.6-2.**

MR BODKIN: Now, Mr White, you've said that you have a  
responsibility for the construction division statewide; could you tell the  
305 commission how does the work we've seen today, how does that  
compare with work in the building and construction industry  
generally?..... It's pretty common. All new building sites obviously  
have to have excavations, have to have footings, trenches for drains,  
plumbing and not too much of that - well, I haven't seen any of that,  
310 that's been excavated by the old pick and shovel method, so there's  
always some sort of plant on there - even on smaller jobs they'll have  
something on there - some small excavator and on some of the  
refurbishments around the place, it depends to the extent of the  
refurbishment of course, but they'll have civil construction contractors  
315 on those sites as well. One big job done in Hobart just recently - the  
Savoy Hotel - they got a small excavator down there to excavate out for  
a swimming pool in the basement. So to me it's very common.

320 So you've mentioned a number of companies that you've seen on building sites and other sites, do you visit civil sites specifically?..... The larger civil jobs, yes, the ABT Railway and the job I mentioned before with Leightons on the Westbury/Hagley bypass, the Don interchange with Van Ek, some of the bigger jobs but not generally.

325 What was the Don interchange with Van Ek?..... It's a bridge over the Bass Highway.

330 What about employees who are members of the CFMEU, do they stick with the same contractor? What are their work patterns?..... For example, Ron Carthew's blokes are with him usually on the long-term basis, the same with Hazell's and they work wherever the work is, whether it's out on a road, a farm dam or on a building construction site. My knowledge of the employees there is that they - I said, they go wherever the work is. They're not specialists in working on building construction or on areas of civil construction. They operate their plant. Digging the trench on a civil construction site I don't suppose is any  
335 different to digging a trench on a road construction or digging a farm dam or whatever. Generally, the labourers will - most of them like their men to be able to operate at least some sort of machine even if it's only a Bobcat. There's usually labouring work to be done on a road job anyway. It's the same blokes. The employers have told me that. Their  
340 men are not specialists in one area as far as the area where there's building construction or civil construction. I have seen the men out on those jobs and I can say, I don't necessarily visit those jobs but you drive around the state and you do come past them, you stop and talk to them but it's not an area I usually cover.

345 Those larger sites that you mentioned, the civil sites that you have mentioned where you've actually visited and spoken to employees and presumably looked at the work, to your observation when the civil work is done on a civil site, is it done any differently to when it's done on a building site?..... No, not to my observations. It can be a  
350 different type of work. The Westbury/Hagley bypass, Voss Construction, one of the - what we term as the four major builders in the state, Van Ek did most of the bridgework there but Voss Construction had a contractor do a few of the bridges as well. The carpenters they used out there are the same carpenters you see on the  
355 building construction sites. So, even though they're building something a bit different, they're still using their carpentry skills to do the form work for the bridge.

360 When you visit a building and construction site no matter what the nature of it is, I take it that you would ascertain which award or agreement applies?..... Yes.

Is it a straightforward task to work out which award applies for particular work?..... Most of the jobs I go to it's pretty straightforward. They've either got an enterprise agreement with us or

365 they're respondent to the National Building Construction Industry Award. If they're not, they're covered by the state - that's where it gets complicated, either the Building Trades Award or the Building Construction Industry Award. They fit into one of those two.

370 Is it complicated to work out which one applies of those state awards?..... The scope of the awards pretty well mirror each other so one of them applies. You usually go with the Building Construction Industry Award but as far as any work going on on the site, they're certainly covered by the Building Industry Awards.

375 Within this commission, have you had any occasion where the question has arisen as to which award applies?..... I did on one occasion, yes.

380 Could you briefly tell the commission?..... That was with a plasterer who hadn't been paid by a house builder. It was Commissioner Shelley. I put the dispute notice in under the state Building Construction Industry Award and Commissioner Shelley, as we started the hearing, asked me whether I had the right award or whether it should have been the Building Trades Award. My response was, I'm pretty sure I've got the right award and we proceeded under that award.

385 Was it finally determined which award applied?..... It was settled in conference.

I've got no further questions.

COMMISSIONER: Thank you. Mr Flanagan?

390 MR FLANAGAN: Thank you, commissioner. Just a few quick questions, Mr White. If we can just deal with that last issue which was raised by Mr Bodkin, in terms of awards which apply to the work at hand. Is it the case that in the matter that Commissioner Shelley was dealing with, was there any suggestion that the Civil Construction and Maintenance Award applied?..... No, none whatsoever.

395 Was the debate, if I can put it that way, restricted to whether or not it was the Building and Construction Award or the Building Trades Award?..... Yes.

400 If I can just take you back to your earlier evidence, you've said that at Hungry Jacks the principal for that job, for the Bellerive Cricket Ground and the Aquatic Centre was Bells. Could you tell us if the CFMEU has an enterprise agreement with Bells?..... Yes, we do.

Could you tell us if that's registered in the federal jurisdiction or the state jurisdiction?..... In the federal.

405 You've said that at the Hungry Jacks job, that Stephen Little was engaged as the formwork contractor. Can you tell us if Stephen Little has an enterprise agreement with the CFMEU?..... Yes, he does.

Is that registered in the federal jurisdiction?..... Yes.

410 You said that at the Bellerive Cricket Ground, Ron Carthew was involved in the excavation, landscaping and agricultural draining. Does Mr Carthew have an enterprise agreement with the CFMEU?..... No.

Do you know how he pays his employees, in terms of whether it's under the federal award or the state award?..... Under the federal award, I believe.

415 Which federal award are you referring to?..... The Civil Construction and Maintenance Award?..... Yes.

You've said that J&K Constructions were also involved at the Bellerive Cricket Ground. Do they have an enterprise agreement with the CFMEU?..... Yes.

420 Is that registered - ?..... Federally, yes. Sorry, I should have let you finish the question.

425 You're right. If we can talk then about the car park at Market Place. You've said that the demolition of the building was done by Hazell Bros Civil and also some work was done by Hazell Bros Earthmoving and we also talk about the role of both Hazell Brothers Earthmoving and Hazell Bros Civil in the context of St Ann's Rest Home. If we can deal with Hazell Bros Civil, does the CFMEU have an enterprise agreement with them?..... No.

430 Are you aware of which award is applied to their employees?..... The National Building Construction Industry Award. If I can just go back, I think I may have given you an answer I'm not real sure was correct. I think Ron Carthew has got some of his men under the National Building Construction Industry Award as well. I think he operates under both.

435 Thanks for clarifying that. And Hazell Bros Earthmoving, do you have an enterprise agreement with them?..... No.

Which award do they employ your people under?..... The National Building Construction Industry Award.

440 At the car park at Market Place there was some pile driving which was done by Van Ek. Could you tell us if CFMEU has an enterprise agreement with Van Ek?..... Yes, we do.

Could you tell us where that is registered, federal or state?.....  
Federal.

I've no further questions, commissioner.

COMMISSIONER: Mr Bodkin, do you have any re-examination?

445 MR BODKIN: No.

COMMISSIONER: You're excused, Mr White.

**WITNESS WITHDRAWN**

COMMISSIONER: Mr Flanagan, I think you foreshadowed an application to adjourn these proceedings. I do have in front of me a letter from Mr Edwards of the TCCI which I think the parties have a  
450 copy of. I'll mark that **EXHIBIT TCCI.1**. Mr Flanagan?

MR FLANAGAN: Thank you, commissioner. In seeking the adjournment of these proceedings, there's a number of exhibits I'd like to tender. If I can perhaps first provide the commission with an extract of the state Building and Construction Industry Award and the state  
455 Civil Construction and Maintenance Award.

COMMISSIONER: Mark the Civil Construction and Maintenance Award as **EXHIBIT A.2** and the Building and Construction Industry Award as **EXHIBIT A.3**. Thank you.

MR FLANAGAN: You'll see from A.2 that that is an extract of the Civil  
460 Construction and Maintenance Award and you'll see that in Clause 2 - Scope, it identifies the type of work which is regulated by this award. If I can take you to page 4 of that document to the heading, Construction and maintenance worker grade 3 shall mean, and in particular, I'd ask you to place the number 6 next to the term, Concrete finisher.

465 COMMISSIONER: Number 6?

MR FLANAGAN: Yes. I'd ask you to place a 4 next to the following occupation, Foundation shaftsman.

COMMISSIONER: Yes.

MR FLANAGAN: A 3 next to the next occupation, Hoist or winch  
470 driver.

COMMISSIONER: Yes.

MR FLANAGAN: If I can take you down three more classifications to the classification, Powder monkey, and ask that you place a 2 there. If you go down another two classifications to Scaffolder, I'd ask you to  
475 place a 1 next to that and go down a further two classifications to Steel Fixer and place the number 5 next to that. I'd also ask you to note that

that is under a group of employees classed as Construction and maintenance worker grade 3.

480 The significance of that is, they all carry the same rate of pay and therefore have the same skills relativity, if I can put it that way.

485 If I can take you to A.3 and ask the commission to go to page 3 of that document to - you'll see the heading there is, Labourers Classification. If I can take you to group 2 and if we just compare the occupations which are contained in those awards, you'll see that group 2, whilst it's group 2 in the Building and Construction Industry Award, whilst it's more narrow in terms of the occupations it covers, it's the same group of employees which are contained within the Construction and maintenance worker group 3 structure of the Civil Construction and Maintenance Award.

490 You'll see that number 1 - Scaffolder is likewise in the Construction and maintenance grade 3; Powder Monkey, Hoist or Winch Driver, Foundation Shaftsmen, Steelfixer including Tack Welder, and Concrete Finisher are all occupations within that Construction and maintenance worker grade 3.

495 Both awards in fact regulate occupations which occur in both industries. So in civil construction, there are foundation shaftsmen - in building construction there are foundation shaftsmen. And you will note that they're labouring occupations and that's a very important fact in this matter.

500 Now the CFMEU, as the commission would be aware, is an amalgamation of a number of organisations as is the AWU. Relevant to the proceedings before you this afternoon, the CFMEU Construction Division has within it the organisations formerly known as the Building Workers' Industrial Union, the Builders Labourers Federation  
505 - as it was short titled, the Federated Engine Drivers' and Firemen's Association, the Painters, the Plasterers and a few others. But the issue of who represents the interests of labourers in commercial building sites and on civil construction sites is one which has been contentious for many years and has received considerable attention  
510 from both the unions themselves and from this tribunal up to and including the High Court on many occasions.

Now I'd seek to tender to two demarcation agreements, if I may.

COMMISSIONER: We'll mark the document dated 8 December 1986 **EXHIBIT A.4**. And we'll mark the other document **EXHIBIT A.5**.

515 MR FLANAGAN: Now if I can just deal briefly with A.4, you'll see, commissioner, that A.4 reduces in writing the agreement between the Australian Workers' Union, the then Building Workers' Industrial Union and the Federated Engine Drivers' and Firemen's Association of Australia. The agreement which was reached with them in the context

520 of the federal government determining to deregister the then Builders  
Labourers Federation, and what A.4 does in a great deal of specific  
detail, is identify which labouring work could be performed by  
members of the Australian Workers' Union and which labouring work  
would be performed by the then FEDFA and BWIU.

525 You'll also see that attached to the original agreement is a further  
agreement which was designed to clarify the meaning of the first  
agreement and that second agreement was signed on 10 March 1992  
and goes into further particulars about that demarcation of the  
labouring work.

530 Now the purpose of that agreement was to minimise disruption to  
industry because of demarcation disputes about union coverage in the  
building industry and in the civil construction industry.

A.5 likewise was entered into between the AWU. Unlike the states of  
New South Wales and Victoria where the Builders Labourers  
535 Federation had been deregistered, in the states of South Australia,  
Tasmania, Queensland and Western Australia, the Builders Labourers  
Federation, by its various titles, entered into a memorandum of  
agreement with the Australian Workers' Union. Again, whilst the  
catalyst for this agreement was not the deregistration of the BLF, the  
540 objective of the agreement was to minimise disruption to industrial  
relations as a consequence of the coverage of various unions.

And you'll see in A.5, which is the agreement which has effect for the  
State of Tasmania, if you go to point 4 you'll see that the parties have  
545 agreed very specifically on civil construction and mechanical  
engineering construction projects what the demarcation arrangements  
would be, and it very clearly identifies in 4:

*(a) labourers on buildings and/or structures which are for the  
purpose of housing mechanical and/or electrical plant shall  
be members of the AWU.*

550 *(b) labourers engaged on building amenities blocks, office  
blocks, workshops and warehouses which are separate  
from buildings and/or structures as defined in (a) shall be  
members of the BLF.*

555 So that's just an example, if I can put it that way as is borne out by  
the award classification structures themselves. Whilst at first blush  
they appear to be the same, the traditional representation and  
coverage of those occupations has been different. The BLF - now  
CFMEU - has very clearly for a long period of time represented certain  
classes of labourers in commercial building sites just as the AWU has  
560 very clearly represented the industrial interests of labourers on civil  
construction sites.

Now those agreements go back some 10 years and a great deal of water has travelled under the bridge since then. Unfortunately as the commission is aware, I believe A.1 is a document which - is that the document that the commission has?

COMMISSIONER: No, A.1 is a short document - a six page one.

MR FLANAGAN: Well, if I can tender a copy of a decision from the full bench of the Australian Industrial Relations Commission, at the cost of about \$1million, the full bench of the Australian Industrial Relations - that was for the AWU, commissioner, I'm not sure of the cost to the CFMEU or employer associations that participated - but in any event this decision was an appeal against an earlier ruling by Senior Deputy President Williams which had had the effect of giving the CFMEU dual coverage of labouring classifications in the civil construction industry - ..[inaudible].. mechanical engineering industry - those industries which have traditionally been represented by the AWU - whereas the rules of the BLF, BWIU, FEDFA, had been amalgamated and were very specific, particularly the builders labourers aspects of their rules made it clear that the labouring occupations that they covered were in the main restricted to commercial buildings. The effect of the ruling by the senior deputy president was to overturn the historical arrangement so that the CFMEU was free to wander, if you like, into the traditional area represented by the AWU.

COMMISSIONER: Before you go on, we'll mark that **EXHIBIT A.6**.

MR FLANAGAN: I'll leave the commission to go through A.6 at its own leisure but it simply is the ruling by the full bench which overturned Senior Deputy President Williams' decision and has in place the current arrangement which was a reversion to the status quo so that the CFMEU under its current constitutional rule is not able to embroil labourers in a civil construction and maintenance area.

However, that is not the end of the matter and I'd seek to tender a further document.

COMMISSIONER: We'll mark the letter from McClellands Solicitors, dated 5 September 2001 - that will be **EXHIBIT A.7**.

MR FLANAGAN: If I can take the commission to the second page of A.7, you'll notice that the heading is, CFMEU Eligibility Rule Change [Construction Industry] Matter S.170 of 2001 In The High Court Of Australia, and what this correspondence does is discuss with the national secretary of the AWU the fact that the CFMEU have in fact made an appeal from the decision of the full bench of the Industrial Relations Commission to the High Court of Australia. The High Court of Australia, with the consent of the AWU, will refer that matter to the federal court and that the federal court will consider the substance of the matters which are being appealed.

610 So that what we have, if I can put it this way, is a very clear situation where the Federal Court of Australia via the appeal by the CFMEU to the High Court will further consider what has already been considered by an individual senior deputy president and the full bench of the Australian Industrial Relations Commission in relation to whether or not the CFMEU should have the right to enrol persons engaged in civil construction and maintenance in labouring areas. So that issue is very clearly before the federal court.

615 Now in our submissions there is at this point in time a very clear delineation between what represents those labourers who are entitled to be represented by the AWU in this state and the labourers who are entitled to be represented by the CFMEU. And the mechanism, the device, which is available at the moment is the fact that we have on the one hand the Building and Construction Industry Award which  
620 applies to labourers on commercial building sites and on the other hand we have the Civil Construction and Maintenance Award which applies to labourers on civil construction and maintenance - the AWU award.

625 So there is a mechanism which is currently available to us which very clearly defines what our rights are. So in seeking the adjournment, we do it on two bases. Firstly, that before the Federal Court of Australia at the moment is the issue of the rights of the CFMEU to enrol persons in civil construction. That is the issue which is at the heart of the proceedings which are before you today.

630 The application does not seek to pass to employees any benefit whatsoever. The application seeks simply to maintain the current employment arrangements, but what it does, if the matter were to move forward and to be accepted by the commission, is that it muddies the water in terms of demarcation.

635 So what we say is that it would be against the public interest for this commission to use its resources on considering this issue at a time when the Federal Court of Australia is also considering it.

640 So on the basis of public interest, the commission ought to adjourn the matter which is before you, and further than that, what we would say is this: that following proceedings which were before you in relation to this matter recently, I'm instructed that there were discussions between the federal office of the Australian Workers' Union and the Construction, Forestry, Mining and Energy Union and those discussions led to an acceptance that the state branches of the unions  
645 would be free to enter into arrangements to resolve the issues which we were concerned about and in particular that both unions would accept the proposition that the state branches were free to look at arrangements which would ensure that people would only be enrolled within each union's current constitutional rules.

650 Subsequent to those discussions at the national level, the state  
secretary of the AWU, Mr Wakefield and his counterpart in the  
CFMEU, Mr Benson, entered into discussions about that with a view,  
and reached agreement verbally, as I understand it and am instructed  
- reached agreement verbally that the traditional areas of coverage  
655 would be reduced to writing and that the parties would file with this  
commission a demarcation agreement.

Further to those discussions between Mr Benson and Mr Wakefield, I  
had discussions with Mr Benson on Thursday of last week and it was  
at that point in time Mr Benson indicated that they would not be  
660 prepared to enter into any written arrangements in relation to this  
matter.

Given that the CFMEU is not even prepared to enter into a written  
arrangement to say that it will do no more than comply with its own  
constitutional rules, we would say that that should send a very clear  
665 message to this commission about the legitimacy and the validity of  
the AWU's concern that the application which is before you has more  
to do with demarcation, has more to do with the agenda of the national  
office of the CFMEU than the application has to do with industrial  
regulation of employees.

670 So, what we would say and urge the commission to do in those  
circumstances is to adjourn the application which is presently before  
you in the public interest to allow the federal court of Australia to  
consider the matters which are before them by way of the CFMEU  
appeal and that when a determination is known by the federal court,  
675 then this matter should be relisted for discussion about what further  
programming ought or ought not occur.

Having said that, you'll note, commissioner, in the third paragraph of  
the correspondence in TCCI.1 it states:

680 *For its part TCCI believe that it would be appropriate for the  
question of the merger of the Building and Construction Industry  
Award and the Civil Construction and Maintenance Award to be  
deferred until such time as the High Court matter has been  
completed. We note in this regard that the dual award citation  
continues to exist at a federal level and we believe the current  
685 application is akin to the "tail wagging the dog". In this context we  
note the long standing nexus situations that have existed in  
respect to both the state awards with their respective federal  
counterpart.*

I think the message which is coming through very clearly from the  
690 TCCI is a recognition that at least in terms of the Civil Construction  
and Maintenance Award, it is very much a roping-in award of the  
federal award. In the case of the Building and Construction Industry  
Award, the state award likewise, in our view, is very much a roping-in  
award of the federal, a parent award.

695 The evidence of Mr White here this afternoon is very clear, that by far  
the substantial majority of those persons which we observed in the  
inspections today are covered by federal awards. So, it would be wrong  
in our view and I think the TCCI makes this point, it would be wrong  
700 that the roping-in counterpart awards, the tail, were to move in a  
manner which is different to what has been occurring federally for a  
hundred years or thereabouts and that dog, if we can call them that,  
have not been joined.

If the CFMEU believe that the awards in the civil construction industry  
and the commercial building industry ought to be amalgamated then  
705 the place, in our view, for that to occur is in the federal commission  
first, not the state commission.

In those circumstances, we'd say that the TCCI from what they have  
said are also of the same view, that it would be in the public interest  
that this matter be adjourned to allow the proceedings in the federal  
710 court to be determined and then in the context of that environment we  
can determine what needs to occur or the commission can determine  
what needs to occur with these applications. If it pleases the  
commission.

COMMISSIONER: Mr Flanagan, with your federal award - the name  
715 escapes me at the moment -

MR FLANAGAN: The AWU Construction and Maintenance Award.

COMMISSIONER: It's still called that?

MR FLANAGAN: Yes.

COMMISSIONER: It's been called that for a long time?

720 MR FLANAGAN: Yes.

COMMISSIONER: Is the CFMEU a party to that award?

MR FLANAGAN: No.

COMMISSIONER: Is the AWU a party to the National Building  
Trades Construction Award?

725 MR FLANAGAN: In a limited sense in respect of off-site joineries, as I  
understand it.

COMMISSIONER: So there is a difference. I'm not sure what turns  
on it, but there is a difference between the state and the federal?

730 MR FLANAGAN: I think, for example, if we can look at it this way,  
the National Building and Construction Industry Award covers  
employees engaged as tradesmen, I think, but they could tell us better  
than that but certainly labourers and plant operators. The AWU

Construction and Maintenance Award deals with labourers and plant operators. Because the CFMEU at the federal level already have an award which covers plant operators, then there is no need for them to be party to the AWU C&M. I think that's the way it works. Whereas in the state jurisdiction by virtue of the FEDFA rules covering plant and the structure of the state Act in the context of industry awards, unlike other states where there is a specific FEDFA Plant Operators Award and an AWU Construction Labourers Award, in this state the Labourers Award and the Plant Operators Award are in the one, which is the Civil Construction and Maintenance Award.

Again, that is counterpart to the federal AWU Construction and Maintenance Award. So the only difference between the two awards is the different structure in the context of the requirement in this jurisdiction that you don't have occupational-based awards.

COMMISSIONER: It's also clear from your submission that in the field there is a fairly good understanding about who covers what. The evidence is also that many of these contractors drift in and out of the civil area and sometimes they're working on civil works associated with a building project and sometimes purely on civil works. Don't answer this if you don't want to, but what happens to the membership arrangements in those circumstances - is it first in best dressed, or what?

MR FLANAGAN: Well, our concern is that if we have an amalgamation or merger of the awards, which is proposed, then that will make it very difficult. At the moment we can clearly say that's a civil construction site therefore it's an AWU foundation shaftsman or, this is a commercial building site, therefore it's a CFMEU foundation shaftsman but if you put both the foundation shaftsmen in the one award how will that distinction be drawn.

COMMISSIONER: Yes. Mr Bodkin?

MR BODKIN: The answer to that question you just posed to my friend is, if he looks at the draft award he'll see that there's a classification grouping for builders' labourers and a classification grouping for civil construction labourers. That's how you determine where they fit in.

If I can just clarify one point. The commission asked what involvement the AWU had in the National Building and Construction Industry Award. The AWU is a respondent there in a very limited way, as Mr Flanagan has pointed out. They are entitled to cover under that award tradesmen carpenters employed in the public sector. Under their registered rules they can't cover building tradespersons employed in the public sector, it's only in the government sector. So, that's a very limited -

COMMISSIONER: In the private sector, you mean?

MR BODKIN: The AWU has joint coverage with the CFMEU in relation to carpenters in the public sector which would be instrumentalities et cetera and the history of that is the old amalgamated Society of Carpenters and Joiners. In reality, the differences between the state award pattern of coverage and the federal are quite significant and it goes to the resposdency.

As you are aware both the AWU and the CFMEU are parties to both of the state awards whereas in the federal arena the AWU has the Construction Maintenance Award and the CFMEU has the National Building Award with the AWU there in that very limited role. So, there is a significant difference there.

Perhaps I should start with the TCCI.1, which is an application effectively for an adjournment basically on two grounds. The first one is mentioned in the third paragraph where it's alleged that the current application is akin to the "tail wagging the dog". Of course, that's not the case at all.

The tail wagging the dog would be an argument to be run in the federal commission if this application succeeded and the CFMEU went to the federal commission for some undisclosed reason which I wouldn't understand and then asked that the AWU Construction and Maintenance Award and the National Building and Construction Award be merged.

Now, jurisdictionally, that's an impossibility in the federal system because of the concept of industrial disputes generated by paper logs in the federal system. It's not a question of the tail wagging the dog at all. We're not saying to any tribunal that if this application is granted therefore something should follow in the federal system. It's not an issue at all. So, that ground can be disposed of.

The second ground apparently is: "the gravity of the Ansett Airlines situation". That's mentioned in the fourth paragraph. That's simply not a ground for an adjournment of these proceedings at all. The TCCI has resources and if particular individuals aren't available for these proceedings, well other arrangements need to be made by the TCCI but that is no reason for adjourning these proceedings.

I next want to deal with the letter to yourself from Mr Wakefield dated 14 September which foreshadowed this application made by Mr Flanagan today. My criticism of that letter and indeed the submissions that flow from it are that there's a gross misrepresentation been made to the commission as to what took place in discussions between the CFMEU and the AWU.

The simple fact is that you'll recall that when the matter was last before you an adjournment was sought by the AWU on the basis that only Mr Wood could handle the matter for the AWU and so at considerable inconvenience, I know to myself and possibly to other

parties, the matter was adjourned. The AWU got an adjournment on the basis that only Mr Wood could handle the case. Here we are today and where is Mr Wood? It's extraordinary, commissioner. Where is he? There's no explanation of it as to why he isn't here, that the person  
825 who was the reason why the adjournment was granted and of course you'll recall, we couldn't adjourn to a date that suited the commission or the CFMEU, it had to be a date that suited Mr Wood so it's today and he's not here.

Subsequent to that last hearing, Mr Wood contacted me and said, we  
830 feel that there is a basis for a joint position by the AWU and the CFMEU. We're just a bit worried. The AWU is a bit worried about whether the CFMEU - this is really some sort of a move on our members, would it be possible for the branch secretaries in Tasmania to work out some position because hitherto, there've been no serious  
835 demarcation disputes between the two organisations. I said, yes. But I made it quite plain and Mr Wood understood, that the CFMEU was not in a position to execute an agreement in writing but that the handshake deals that traditionally take place on individual jobs would continue through the branch secretaries. It was made quite plain there  
840 could be no written agreement and no execution of that and yet, we have this letter from Mr Wakefield saying - it strongly suggests that the CFMEU made a deal at federal level that the branches could make a written agreement and then somehow the federal organisation of the CFMEU has reneged on that.

845 This is simply not true and if Mr Wood was here, well he could possibly be in a position to say what was actually discussed between himself and myself. But I can inform the commission that it was made quite clear that there could be no written agreements. And why is that? Well, of course the answer is in the two of the exhibits handed  
850 up by my friend, Mr Flanagan.

He's handed up two former demarcation agreements in A.4 and A.5. Well, A.4 is irrelevant because when you go to A.4 you'll find that it's an agreement made in 1986 which is confined to New South Wales, Victoria and the Australian Capital Territory. That's specifically spelt  
855 out in A.4.

The same applies for the 1992 agreement that's attached to A.4 which in paragraph 3 says:

*This agreement applies only to the States of New South Wales, Victoria and the Australian Capital Territory.*

860 So I don't know what the relevance of A.4 is. Well, it has no relevance to the matter before you.

The relevant one is A.5 which was an agreement made in 1987 between the federal AWU and the state registered BLFs in South Australia, Queensland, Tasmania and Western Australia. And that's in

865 A.5. And when you go to that you'll see that it applies - it refers to  
labourers. None of these agreements have anything to do with plant  
operators incidentally. They're confined to labouring classifications. It  
was a demarcation agreement applied to labourers.

870 What happened to that agreement was in 1997 the CFMEU formally  
withdrew from those agreements in writing.

875 One of the issues between the parties in the proceedings before the full  
bench of the Australian Commission, and indeed will be ventilated  
before the Federal Court is whether this 1987 agreement and indeed  
the 1986 agreement which is not relevant to Tasmania, but whether  
those agreements are extant - whether they still apply - because the  
AWU before the full bench argued even though the CFMEU withdrew  
those agreements are still binding on the parties - they still apply. So  
that was a matter that was argued.

880 Senior Deputy President Williams found that they don't apply. The full  
bench - and this is in the exhibit handed up by my friend which I  
think is A.6 - the document he's invited you to read - but it's not  
necessary to read that - but if you go to page 135 you'll see at  
paragraph 208 that there's a number of provisions about which the  
full bench -

885 COMMISSIONER: Sorry, which?

MR BODKIN: Page 135.

COMMISSIONER: Yes.

MR BODKIN: Paragraph 208.

COMMISSIONER: Yes.

890 MR BODKIN: A number of issues arising which the full bench has  
expressed no view including at (b) and (c):

*(b) whether any or all of the demarcation agreements are  
extant; and*

*(c) whether the CFMEU is a party to any or all of them; and*

895 *(d) whether there is a basis for satisfaction that the alteration of  
the CFMEU's eligibility rules would contravene any [of those  
agreements].*

And (e) is in similar terms.

900 So here we have the full bench which overturned the rule changes  
said, well, we've overturned it on certain grounds but we haven't  
considered, we haven't made a decision on whether the demarcation  
agreements continue to apply.

905 The CFMEU in its application to the High Court which is going to be  
remitted to the federal court has said, that and many other issues  
should be sent back to the Australian Commission, to the full bench,  
to determine those very issues. So, the question of whether there's a  
demarcation agreement or not is a matter that is live before the federal  
court and if the CFMEU succeeds in having it sent back to the  
commission it will be live before the commission.

910 In those circumstances, commissioner, how could we enter into an  
agreement in Tasmania when there's disagreement and it's before the  
court as to whether there is an agreement or not. Maybe 1987 still  
applies. We're not in any position to execute a new agreement and the  
915 AWU knows that and yet they're trying to twist it around now and  
saying, the CFMEU is not willing to enter into some new demarcation  
agreement in Tasmania, therefore warning bells should be ringing  
about this application to vary the awards which in fact have nothing to  
do with eligibility rules.

920 The relevant thing about exhibits A.2 and A.3 which have just been  
handed up by my friend, the relevant issues there are, go to the Parties  
Bound clause. If you go to the Parties Bound clauses of both the civil  
and building awards in Tasmania you will find that both the AWU and  
the CFMEU are parties. So, it completely escapes me, commissioner,  
925 as to how something that's proceeding in the federal court and  
ultimately back to the federal commission, it escapes me how the  
proposed variation is going to be affected by that because irrespective  
of the outcome before the federal court or the federal commission, the  
situation in Tasmania award-wise won't change. We are a party to the  
civil award. We are a party to the building award. How does that  
930 change, irrespective of the outcome of the proceedings in the federal  
court.

This simply hasn't been explained by Mr Flanagan and nor is there an  
explanation. The answer is, there's no change. While we're on the  
subject of the voluminous decision of the federal commission, if you go  
935 to page 131, you'll find the summary of conclusions starting at  
paragraph 202. All of the issues they're dealing with there go to  
questions of eligibility, questions of convenience to belong. There's  
nothing there to do with award coverage. There's nothing before the  
federal commission or before the federal court that relates to the terms  
940 and conditions of an industrial award. It's confined to the eligibility  
rule. No award change is going to have any impact upon that and vice  
versa.

945 The other thing I take you to in that decision is to page 136 under the  
heading of, A final word, at paragraph 212, where the full bench of the  
commission finished up by saying:

*This enormous case must have cost each union a fortune. And, as  
this decision shows, the end is not in sight.*

Never were truer words spoken. The end is not in sight. Effectively what you have before you is an application to defer the review of the awards in Tasmania and the restructuring of the awards indefinitely. The end is not in sight.

The simple fact is, commissioner, that the proposed award variations do not purport to demarcate any work whatsoever but there's no demarcation provision in the award and whether we continue to have a separate civil award and a separate building award or whether we combine the two, the scope of the two, the demarcation arrangements are not going to change. There is simply no - the variations do not alter the existing representational rights of either organisation. Both unions are joint parties to the existing awards.

The effective amalgamation of the civil and building awards in Tasmania has no potential to alter the existing balance between the two unions. The question of whether the Tasmanian awards should be amalgamated is not a matter that's before the federal court. There is no award matter that is before the federal court or before the federal commission. The matters that are before this commission, that is to say, the content of an industrial award or awards, are not related to any matter that's before the federal court. They're not even related.

The AWU has simply not demonstrated how a refusal to adjourn this matter would prejudice the AWU or result in some injustice to the AWU. They would have to establish that. They would have to establish that in order to gain this adjournment the AWU needs to establish that there is some prejudice to the AWU but all Mr Flanagan has said is, it would muddy the waters in relation to demarcation matters in this state - muddy the waters. Regardless of what that means, how does that prejudice the AWU.

An adjournment on the other hand would prejudice and result in an injustice to the applicant and the reason I say that is because of the obvious long delay that can be expected in the completion of the federal court proceedings because as I said, commissioner, what's before the federal court now is effectively an application by the CFMEU to have the matter referred back to the Australian Commission to do the job we say they should have done in the first place and make decisions on all those matters that they didn't make a decision including the one about whether the demarcation agreements continue to apply or not.

The potential delay is quite clear from exhibit A.7, which my friend just handed up, a letter from their solicitors, McClellands, because on page 3 of the letter, in the fourth paragraph, the AWU's solicitors correctly identify what's going on in the federal court where they say:

*It is possible that the Federal Court will find that only the second decision was incorrect and that the matter should be referred*

*back to a Full Bench of the AIRC for the second decision to be redetermined.*

995 You've seen the comments of the full bench. This matter has cost huge  
amounts of money and the end is not in sight. So, if the matter is  
referred back to the commission, the end is probably still not in sight.  
There's a long way to go. We're probably looking at least 12 to 18  
months litigation in the federal commission over a matter, incidentally,  
1000 to do with rules and eligibility, not over an award matter. This would  
be a gross injustice to the CFMEU if this commission were to adjourn  
this application and when we face the prospect of such a long delay.

One should bear in mind that the original AIRC proceedings  
commenced in 1997. The matter number of that case is D2004 of  
1997. It could be 2007 before the question of eligibility of civil  
1005 construction labourers is finally determined. In the meantime, what  
happens to the award review process in the building and construction  
industry in Tasmania? Are we supposed to wait for that.

Section 21 of the state *Industrial Relations Act* empowers the  
commission to:

1010 - *do all such things as are necessary or expedient for the  
expeditious and just hearing and determination of that matter.*

Those are the words in the Act - the expeditious and just hearing of a  
matter. Now, it certainly would not be expeditious if you were to grant  
this application for an adjournment because the end simply would not  
1015 be in sight. It would not be just. At least the CFMEU is trying to do  
something about award restructuring in this industry, to tidy up the  
whole mess that the awards have fallen into and now parties are trying  
to frustrate that using these spurious grounds that there is some  
matter going on in the federal court.

1020 Mention was made by my friend of the evidence of Mr White in relation  
to the federal agreements that apply to a number of companies whose  
work we inspected today but you will also recall that Mr White's  
evidence was that the arrangements we saw today are typical of the  
way the work is carried out in Tasmania. So, in that sense, it doesn't  
1025 matter whether the companies we saw today were under federal  
awards, federal agreements or whatever. The fact that a company may  
apply a federal award does not necessarily mean that it's bound by the  
award or is a named respondent to the award.

1030 The fact that the company has a federally registered EBA does not  
answer the question of which award covered that company before the  
EBA was made because under the federal Act both federal and state  
awards can be used as the safety net. So, you can have a company  
covered by a state award and a union do a federal EBA and the state  
award is the safety net.

1035 We can't just freeze the industry to a particular point in time and say,  
well, as at such and such a day in September 2001, A company,  
company B, company C were covered by federal awards and company  
C and D by state awards and others - because the situation changes.  
1040 The industry changes. New players come in, old players go out. The  
relevant issue before the commission is, what is the pattern of work on  
building and construction sites in Tasmania. Is there an interchange of  
employees between building and civil sites. Is there an interchange of  
companies and clearly there is, whether some companies at the  
1045 present time are under the federal system and others are under the  
state.

It's pretty clear that basically parties follow the National Building and  
Construction Industry Award but that does not necessarily mean that  
they're bound by the award. And of course we have new players  
coming in all along who are not - they can't be roped into the federal  
1050 award as the federal Act stands at the moment anyway, section  
111AAA, makes it virtually impossible but what is important about  
today's inspections is, it demonstrated the nature of work in the  
industry and the pattern of contracting in the industry.

The fact that some are under federal agreements and federal awards is  
1055 really immaterial and certainly doesn't assist my friend in his  
application for an adjournment.

My friend has said that before the federal court is the issue of the right  
to the CFMEU to enrol labourers on civil construction. That's right.  
That's the issue before the federal court. That's not the issue before  
1060 you because if grant the application that's before you now, that does  
nothing to alter the eligibility or the enrolment rights of the CFMEU or  
the representational rights. Demarcation and eligibility are not at the  
heart of the matter before you.

The heart of the matter before you is award review, award  
1065 restructuring and simplification and to come forward and make a  
submission that if you grant the application it would muddy the water  
in terms of demarcation, that's simply not a public interest argument  
at all. There's no evidence and you can't be satisfied, commissioner,  
that granting the application would have any effect upon demarcation  
1070 issues, almost solely because both unions are parties to the current  
awards.

I want to finish my submission by taking you to a couple of authorities  
on this question of adjournments and what are the relevant principles  
and there are two or three I'd like to take you to. The first one is from  
1075 the High Court of Australia in *Haset Sali v SPC Limited and Anor*. I  
have the austlii copy. It's reported in 116 ALR at 625. I hand up a copy  
of the austlii version of that judgment.

COMMISSIONER: **EXHIBIT C.7.** It's a decision of the High Court  
given on 7 September 1993 and if I can take you to the decision of

1080 Justices Brennan, Deane and McHugh you'll see under the heading of  
Judge 1, it says:

1085 *Special leave to appeal was granted in this case to determine  
whether the refusal to grant the appellant an adjournment of an  
appeal pending in the Full Court of the Supreme Court of Victoria  
resulted in a miscarriage of justice. In our opinion, the refusal did  
not amount to a miscarriage of justice. Nor did the Full Court fall  
into error in refusing to adjourn the hearing of the appeal.*

1090 So, the issue here is clearly to do with adjournments and whether  
there's an injustice, or a miscarriage of justice would have occurred.  
But I take you past the factual background to page 4 which deals with  
the principles and at paragraph 10 on page 4 the judgment states:

1095 *In Maxwell v Keun the English Court of Appeal held that,  
although an appellate court will be slow to interfere with the  
discretion of a trial judge to refuse an adjournment, it will do so if  
the refusal will result in a denial of justice to the applicant and  
the adjournment will not result in any injustice to any other party.  
That proposition has since become firmly established and has  
been applied by appellate courts on many occasions.*

Then examples are given.

1100 The three matters there I draw your attention to in that quote. The  
first is, the reference to a discretion. Clearly, it's whether the  
commission or anybody judicial or tribunal grants an adjournment, is  
a matter of discretion. It talks about a denial of justice to the  
applicant, that is, the applicant for an adjournment. So, the question  
1105 is if the tribunal refused an adjournment would that result in a denial  
of justice to the applicant for the adjournment?

Clearly, on the material that's been put before you, there's been no  
case made out that there would a denial of justice to either the AWU or  
TCCI if you refuse the adjournment. That's one side of the scale.

1110 It goes further and says and the adjournment will not result in any  
injustice to any other party. Of course I pointed out, commissioner,  
that to grant the adjournment would be an injustice for the CFMEU  
because the end is not in sight. The end of the federal court  
proceedings and the AIRC proceedings are not in sight. So that  
1115 effectively, to grant an adjournment today would effectively kill off this  
application. Let's face it, that's what it's all about. They're trying to kill  
it off today because we're looking at eighteen months, two years, who  
knows, before the Australian commission ultimately finalises this and  
then that decision may be appealed again.

1120 It would be a gross injustice to the CFMEU and no injustice to the  
AWU. They haven't even tried to make out a ground that there would  
be some injustice if you refused the adjournment.

If I could take you to paragraph 11. The High Court says:

1125 *In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties.*

Those are matters to be taken into account. The resources of this commission, whether you can be messed around with these applications for an adjournment because I put it quite firmly, you have been messed around by Mr Wood. Mr Wood was the only one who could do the AWU case. You gave them effectively a month's adjournment. Mr Wood doesn't turn up when the matter comes on and then they go on to talk about the interests of the parties. Well, clearly, the interests of the CFMEU, the applicant in this matter, would be prejudiced by an adjournment and in the final two lines of that paragraph 11, they refer to *the public interest in achieving the most efficient use of court resources*. It's not efficient to be having these adjournments which would go on into the never never and in fact, as I said, would effectively kill off this application.

The next decision I want to take you is a decision of a Full Bench of the Australian commission given on 30 September 1994 and I'll hand up a couple of copies of that.

1145 COMMISSIONER: **EXHIBIT C.8.**

MR BODKIN: This is print L5614, it's a decision of Senior Deputy President Riordan, Justice Munro and Commissioner Frawley given on 30 September 1994 and from the head notes you can see it concerns, adjournment - matters pending before High Court and Industrial Relations Court - and the application for the adjournment was refused. If I could take you to the second paragraph under the reasons for decision, to the penultimate paragraph. It sets out - this was an application by the State of Victoria represented by Dr Jessup QC for an adjournment pending the outcome of matters before the High Court and Federal Court. It says in the second paragraph, about half-way through:

1160 *Dr Jessup QC on behalf of the prime respondent to the application, the State of Victoria, has applied for the matter to be adjourned indefinitely to await the outcome of two sets of proceedings in which decision has been reserved before the High Court and the Industrial Relations Court of Australia respectively.*

If I could take you over to page 2, half-way down that page, it reads:

1165 *The main ground proposed by Dr Jessup for our now adjourning these proceedings is that the Commission's jurisdiction to deal with the merits of the matter, or to deal with the dispute at all,*

*cannot be assured until such time as there has been a decision handed down in each of the two judicial review proceedings to which he referred.*

1170 Of course it went to jurisdictional matters, a very important point. Whether the jurisdiction of the federal commission to deal with it would be upheld by the High Court and Federal Court or not - skipping a sentence, it then says:

1175 *The matter before the Industrial Relations Court pertains directly to the dispute sought to be settled by the award proposed in this matter.*

So unlike the proceedings before you now, the matter before the commission then went directly to the matter before the court and then in the next paragraph it says:

1180 *We do not consider that it would be either against the public interest, or, as Dr Jessup submitted, "unseemly", for the Commission to hear and determine so far as practicable the present application before it.*

On the next page, page 3, I take you to the final paragraph, which reads:

1185 *Our exercise of the discretion to refuse an adjournment is influenced particularly by the consideration that there may yet be substantial delays associated with the delivery of the Court's judgments.*

1190 The comment I make there, commissioner, is that there are certainly going to be substantial delays if you adjourn this application. They go on to say:

*There is an element of novelty raised by the content of the award sought -*

1195 Well, I suggest, there's no novelty in the award sought in these proceedings, but then they say:

*- but there are also aspects of the AEU's application which may be characterised as relatively routine industrial issues.*

1200 The same applies in the matter before you. The terms and conditions of an award are routine industrial issues. No-one can say it's a novelty because this commission has already determined that there will be one building and construction industry award. There's nothing new about that concept. There's a decision of Commissioner Watling to that effect. This decision goes on to say:

1205            *The AEU has invested substantial time and resources in complying with our directions for bringing the matter to this stage of hearing. We believe it would be inappropriate now, and for what could be an indefinite period, to withhold access to the exercise of the dispute settling function associated with the hearing of the merits of the matter.*

1210            *Accordingly we refuse the application for adjournment.*

Commissioner, I would suggest that that line of reasoning appropriately applies in the matter before you, particularly when regard is paid to the provisions of the *Industrial Relations Act 1984* which refers to the expeditious and just resolution of matters before  
1215 the commission.

There's one final decision I might take you to. I hadn't intended to use it because I didn't think this matter would come up the way it did but it comes from the submissions of TCCI that because they've got more important things to do with Ansett we can't be here today, so give us  
1220 an adjournment, which is effectively their application. It's a decision of the full bench of the Australian commission, print R5242. I have only one copy but I'll refer to it. It's a decision of Justice Boulton, Senior Deputy President Harrison and Commissioner Holmes on 27 May 1999 which concerned an appeal by the Textile, Clothing and Footwear  
1225 Union against a decision and directions made by Commissioner Merryman.

One of the matters there was the failure of the union to have any representative at the particular hearing when the commissioner proceeded to determine the matter. It states at paragraph 12 of this  
1230 decision:

*It is well established that the Commission is under an obligation to observe the principles of natural justice in its proceedings. It is also well established that the requirements of natural justice may vary according to the nature and circumstances of the proceedings in question.*  
1235

They then go on at paragraph 13 to deal with the circumstances of this matter and it would appear that the union simply didn't turn up. Apparently, they weren't sure whether the secretary had been properly advised but at paragraph 15 the decision reads as follows:

1240            *It is a matter for judgment in the circumstances of a particular case whether it would be unfair to proceed with the hearing of a matter in the absence of one party and thus to deny that party the opportunity to be represented in the proceedings. What is required is fairness both to the parties seeking to prosecute a matter in the Commission and to the opposing party as well as consideration of the Commission's statutory responsibilities in proceeding expeditiously with the hearing of matters. In our view,*  
1245

1250 *it would be open to a member of the Commission in such  
circumstances as those before the Commissioner to proceed with  
the hearing of a matter in the absence of one party, that party  
having been given due notice of the proceedings and an  
opportunity to attend.*

1255 Clearly, the TCCI have been given due notice and they've had an  
opportunity to attend and in fact did attend the inspections this  
morning and had two representatives there at various stages but there  
would be no denial of natural justice under these circumstances if you  
proceeded with this application tomorrow and the TCCI didn't turn up.  
1260 If they think Ansett is more important, well, that's a valued judgment  
that they make but it would be grossly unfair to the applicant in these  
proceedings to adjourn under those circumstances.

1265 In conclusion, commissioner, the applicants for the adjournment have  
not established any link or any proper relationship between the  
matters that are before the federal court and the matters that are  
before you and clearly they are not related. The outcome of those  
proceedings in the federal court and ultimately the federal commission  
have no bearing upon the matter before you and it's the CFMEU's  
strong submission that this case should proceed tomorrow to  
finalisation as was originally set down after the AWU having obtained  
1270 one adjournment at least and there should be no further delays. This  
matter should proceed to finalisation. Those are my submissions.

COMMISSIONER: Mr Flanagan?

1275 MR FLANAGAN: Thank you, commissioner. Commissioner, if we can  
just go over some of the submissions that I've already made and some  
of the comments that Mr Bodkin has made. Until Thursday of last  
week my instructions are, that it was a very clear understanding of  
both Mr Wood and Mr Wakefield that this matter was to go forward by  
consent, that the AWU's concerns about demarcation issues would be  
resolved, that the CFMEU and the AWU would file a demarcation  
agreement with this commission and on that basis the award would  
1280 move forward by consent.

1285 Now the ..[inaudible].., if you like, the realisation on Thursday of last  
week have placed us in a difficult position. Yes, it is the AWU's desire  
that Mr Wood represent the union in these proceedings and we don't  
walk away from that. If there was an expectation that there would be  
an arbitrated situation, then Mr Wood would have been here. He acted  
on the basis, as I understand it, as Mr Wakefield understood it, that  
the matter was going to be resolved and therefore discovering on  
Thursday that the matter was not in fact a consent position has left us  
short footed, there's no doubt about that. But certainly, it was the  
1290 AWU's intention that given his role, and that is and has been,  
intimately involved in defending the attempts of the CFMEU to intrude  
into the AWU's traditional area of representation, given that position  
he has had, that in fact he would be at the fore in these proceedings.

1295 It's been put to you, and again it's the only evidence which is before  
you, but it's been put to you that the evidence today shows that there  
is some interchange between commercial building and civil  
construction. What you have seen today, with respect, commissioner,  
is very limited. The proposition that all commercial building companies  
1300 and all civil construction companies have an interchange is simply not  
the case. But we simply don't have the evidence before you to  
demonstrate that that is so.

So when it's said by the CFMEU that all they're talking about, all this  
is about is the award review process, quite frankly we don't cop it. If it  
was about the award review process, and that was the objective of the  
1305 CFMEU, then there is no reason why they cannot enter into a  
demarcation agreement with the AWU. There is no reason why such an  
agreement cannot have an escape clause pending the determination by  
the federal court or further consideration by the Australian Industrial  
Relations Commission. There is no reason why an agreement can't  
1310 have that.

Now Mr Bodkin relied heavily on the words from A.6 - those last words  
being:

*This enormous case must have cost each union a fortune. And, as  
this decision shows, the end is not in sight.*

1315 But what he didn't go on with is the rest of which was stated where the  
bench said:

*It has, in the past, been possible for the unions to reach  
agreement. We urge them to try and resolve their differences.*

And indeed for its part, the AWU is still prepared to enter into an  
1320 agreement to resolve the demarcation issues so that the award review  
issue can move forward. It is not our desire that that should be  
delayed, but in the absence of the agreement which the Australian  
Industrial Relations Commission Full Bench has referred to, they have  
left us in no position but to continue to attempt to defend our  
1325 coverage, and one of the mechanisms which does that is the different  
awards.

Now it's been put to you in C.7, Mr Bodkin quoted to you these words:

1330 *In determining whether to grant an adjournment, the judge of a  
busy court is entitled to consider the effect of an adjournment on  
court resources and the competing claims by litigants in other  
cases awaiting hearing in the court as well as the interest of  
parties.*

So one of the issues that you are to take into account according to this  
decision by the High Court of Australia - or full bench of the High  
1335 Court of Australia is the resources of the commission. And section 36

deals specifically with the public interest and also requires the commission to take into account any matters that it considers relevant.

1340 Now in our submission it would be an inappropriate use of this  
commission's resources to deal with this issue when there is so much  
litigation taking place between the AWU and the CFMEU over this  
whole proposition of whether or not the building industry and civil  
1345 construction are the one industry; whether there is in fact an  
interchange between the workforces and therefore whether or not the  
CFMEU should be entitled to enrol persons engaged in labouring  
activities in civil construction. That is all within the scope of what is  
being determined by the federal court. All of those issues raise their  
heads. Yes, they've manifested themselves here in the context of a new  
award or an amalgamation or merger of awards. Those issues are  
1350 being looked at by the courts, by the federal court, by a full bench of  
the Australian Industrial Relations Commission perhaps, depending  
on what flows from the federal court, but in our submissions, it is an  
inappropriate use of resources, it's against the public interest that this  
commission should rule on these matters when they're already being  
1355 dealt with in those other places.

I think the other issue that was raised by Mr Bodkin was the role or  
relevance of A.4 and A.5 in these proceedings. The only role or  
relevance was that it very clearly demonstrates to the commission that  
1360 the issue of demarcation over labourers in the building industry and  
labourers in the civil construction industry is an issue which has  
received a lot of attention - a lot of detailed attention - over the years.  
It's an issue which is still alive which is demonstrated by A.6 and that  
is all that they're intended to do; to identify the fact that there has  
been a lot of attention given to that and when we talk about concerns  
1365 about this application being motivated not by the desire to improve  
industrial regulation for employees, not by any other desire than to  
achieve some agenda of their own, then they are real concerns that we  
are expressing.

1370 So in those circumstances we would urge the commission to grant the  
adjournment.

MR BODKIN: My friend has raised one new point in his reply,  
commissioner, and that's this idea that Mr Wood would have been here  
if he'd thought that the matter would go ahead, and that's the first  
1375 explanation that's been offered so far as to why Mr Wood isn't here.  
But in that regard, if I could just take you to the High Court decision  
in C.7 - that's the decision *Haset Sali v SPC*. Something similar  
happened in that case, and if you go to page 5 to -

COMMISSIONER: Sorry, which number is it?

MR BODKIN: It's exhibit C.7.

1380 COMMISSIONER: C.7 - yes.

MR BODKIN: If you go to page 5 and to paragraph 15, something similar happened because if you go, say, to the sixth last line it reads:

*A junior counsel, who knew nothing about the appeal -*

1385 - well, Mr Flanagan in fact probably knows more about these matters than a lot of people, so he's not a junior counsel, but -

1390 *A junior counsel, who knew nothing about the appeal, had been briefed to apply for an adjournment. In the absence of an adequate explanation for the absence of counsel briefed in the appeal, Marks J was entitled to infer that the appellant had briefed counsel who could not be called on to conduct the appeal if the adjournment was refused.*

1395 And the High Court was quite critical of that. In other words, the idea there ought to be adjournment because the AWU has applied for an adjournment - Mr Wood apparently assumes that the application for an adjournment is going to be granted so he's not here. I mean that's just not on, commissioner. If he's not here that's bad luck. Mr Flanagan can proceed, and Mr Flanagan is a highly experienced advocate. If I'm not mistaken he's a legally qualified advocate and he is well in a position to proceed. But the fact that Mr Wood has chosen  
1400 not to turn up is no grounds for granting the application and the matter should proceed tomorrow.

COMMISSIONER: Having heard the parties, I wish to make a number of brief observations.

1405 The issue, as lodged by the CFMEU, in my view relates to the restructuring of several building industry and construction industry related awards.

1410 The issue before the federal court - or High Court and soon to be the federal court - on my understanding relates solely to the question of eligibility rules and nothing in relation to award restructuring. In my view these are not the same issues.

On what has been put to me today, I'm not satisfied that the AWU has made out a case that to proceed with the application would place the AWU in a position of prejudice. It follows that the application for an adjournment, as argued by the AWU this afternoon, is denied.

1415 In relation to the TCCI application, that also is denied, however I have some sympathy for the position that the TCCI finds themselves in, and I can indicate now that should this matter proceed to arbitration the TCCI will be given an opportunity either in writing to respond to the transcript or indeed on another day.

1420 I also hear what Mr Flanagan has said about the absence of the AWU  
federal advocate and I'm not ruling on that at the moment but I  
certainly would entertain an application similar to that of the TCCI  
should that be necessary. In other words, if this matter proceeds to  
arbitration tomorrow, which certainly appears to be the likely case,  
1425 then I would give the TCCI the opportunity to respond either on  
another day or in writing from the transcript with all the further rights  
of reply that flow from that.

And I can indicate that I would probably sympathetically hear a  
similar application from the AWU solely on the grounds that it was  
1430 apparent almost until the last minute that an agreement was likely  
and it apparently fell over at the last minute, and reading between the  
lines it may well have been that Mr Wood had made alternative  
arrangements on that basis. It's not something that I would encourage  
but I understand how it could happen.

1435 I would propose, given the quite comprehensive submissions that have  
been put forward this afternoon and the litigious nature of certainly  
the issue of award coverage and related matters to issue subsequently  
a decision outlining my reasons for this decision which I've just given  
in transcript.

1440 At one stage I thought that that might be available prior to  
commencing tomorrow, but frankly given the authorities that have  
been put forward, I couldn't do it justice in that time frame, so I don't  
propose to give that commitment.

Having said that, the commission will stand adjourned until 9:30  
1445 tomorrow morning. I would also ask the parties to consider once again  
whether every opportunity has been explored as to reaching an agreed  
settlement on this particular matter.

If there is some scope to further pursue that, then I'd be happy to do  
that in a conference situation before we get too far into it tomorrow,  
1450 but I'll be guided by the parties. I am conscious that not only has the  
federal rules matter been a very long drawn out matter, but so has the  
award issues before this commission going back to 1988. It's not only  
the issue of the cross-over between the civil construction and the  
building construction in the Civil Construction and Maintenance  
1455 Award and the Building and Construction Industry Award, there is  
also the third issue which is of extreme importance, not only for this  
commission but to employers and employees who try to operate under  
the correct award, that is, the question of the application of the  
Building Trades Award, particularly as it relates to off-site matters.

1460 So they are important issues which need to be resolved. In rejecting  
the application for the adjournment, I emphasise that in no way am I  
making any judgment as to what the possible outcome of the  
application may be. It's simply a procedural decision.

The commission stands adjourned.

1465 **HEARING ADJOURNED 5.25pm**

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