

DEPUTY PRESIDENT ROBINSON: Appearances, please.

MR C. BROWN: If the commission pleases, C. BROWN, appearing for the Health Services Union of Australia, Tasmanian No. 1 Branch.

DEPUTY PRESIDENT ROBINSON: Thank you.

5 **MR I. PATERSON:** If the commission pleases, IAN PATERSON, appearing for the Australian Municipal, Administrative, Clerical and Services Union, Tasmanian Branch.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr Paterson.

10 **MR M. WATSON:** May it please the commission, MARK WATSON. I appear on behalf of the Tasmanian Chamber of Commerce and Industry.

DEPUTY PRESIDENT ROBINSON: Thank you. Mr Brown, it's your application?

15 MR BROWN: Thank you, Mr Deputy President. Mr Deputy President, I suggest that I just make some initial submission which actually outlines the reasons why the HSUA lodged the application in the first place and then, subject to Mr Paterson and Mr Watson making any comments they want to make, perhaps I then suggest we adjourn into conference and perhaps outline the matter in a bit more detail.

20 Mr Deputy President, the HSUA sought this hearing under section 23(1) of the Industrial Relations Act 1984 and the application seeks to vary clause 2 Scope of the Community Services Award to include coverage of employees undertaking personal care work in non-institutional settings. The circumstances leading to this application are as follows:

25 On 7 November 1995 the commission issued the Community Services Award Order No. 2 of 1995, which effectively finalised the making of this award with the insertion of the classification structure and wage rates. The date of operation was the first full pay period on or after 1 July 1995.

30 At that time, it was the understanding of the HSUA and a number of other players within the industry, that organisations providing personal care services in non-institutional settings would be covered by the new award. This assumption was primarily based on a full bench decision of the commission dated 22 January 1992 in matters T2225 of 1989, T2311 of 1990 and T2691 of 1990 regarding the scope clause of the Community Services Award.

If I could just tender as an exhibit that full bench decision.

DEPUTY PRESIDENT ROBINSON: HSUA.1. Is that right - HSUA.1?

MR WATSON: Today it is.

35 DEPUTY PRESIDENT ROBINSON: I just like to keep up-to-date if I can.

MR BROWN: If you look on page 5 of this exhibit, Mr Deputy President, about half-way down with the paragraph commencing: In our opinion -

DEPUTY PRESIDENT ROBINSON: Yes.

MR BROWN: It states very clearly that:

In our opinion and having regard for the very diverse nature of the community services industry, exhibit ASWU.11 conforms with the thrust of what the bench intended.

It's the next part that is important:

5 *However, we do not intend to exclude personal carer from the proposed scope as we agree -*

10 Without going into the circumstances around why the bench actually made that comment at this point in time, it was quite clear, that the wording: We do not intend to exclude personal carer, from the proposed scope clause. With the finalisation of the award in November 1995 and the full bench decision on the inclusion of personal carers, the HSUA wrote to an employer - in this instance, Family Based Care South - in December 1995 requesting that they advise the union as to when they would be translating their personal care employees to the new award structure and providing those employees with any necessary back pay.

15 The union received a reply from this employer, indicating that the advice that they had received indicated that subclause (b) of clause 2 spoke of the Community Services Award, specifically excluded their personal care workers from inclusion under this award.

20 In discussions with the TCCI over this matter, it was felt that the best course of action would be to have the matter tested by the commission through a section 43(1) hearing under the act - an interpretation hearing. The HSUA lodged an application to this effect and the hearing took place before the President on 19 March 1996 in matter T6098 of 1996. If I could tender as an exhibit the President's decision in this matter.

DEPUTY PRESIDENT ROBINSON: Dated 1 April this year?

25 MR BROWN: 1 April, yes.

MR WATSON: That's our second April fool's decision.

DEPUTY PRESIDENT ROBINSON: HSUA.2.

30 MR BROWN: In his decision on this matter, the President found that in spite of the full bench decision of 22 January 1992 including personal carers in the scope clause of the Community Services Award, the President found that the personal carers employed by Family Based Care were in fact excluded from the scope clause of the Community Services Award and the reasons for the decision are there and I won't go into it at this stage.

35 DEPUTY PRESIDENT ROBINSON: I understand that he came to the conclusion that the words were clear and unambiguous and according to the rules of interpretation, that's as far as he should go.

MR BROWN: Certainly. According to the rules of interpretation, that was as far as he was able to go at that stage, yes.

40 The effect of this was to render, not only the personal care employees employed by Family Based Care South award-free but in fact all non-institutional based personal care workers were rendered award-free as a result of that decision.

Whilst I don't wish to focus on Family Based Care South as a particular employer - I was only simply using them as an example because there are a number of employers

that this decision has had an impact on - the effect for all of that particular category of worker was, as I said, to render them award-free. It is also worth noting that this particular area of employment is a growth area of employment and is one that is likely to grow considerably over the next few years.

5 Following the handing down of the President's decision in the scope clause matter, the HSUA, after some initial discussions with the TCCI and AMACSU, lodged the current application before the commission to vary the Community Services Award to ensure that personal carers falling outside of any award coverage will be included in the scope of the Community Services Award.

10 The application as it currently stands, Mr Deputy President, is not an agreed matter, although this does not necessarily mean that we are requesting the commission to deal with it by arbitration. I think more discussion needs to take place before we get to that stage.

15 It is the HSUA's view, and no doubt that of other parties in this matter, that matters dealing with scope clauses of awards should be considered fairly carefully to ensure that any decision made in this matter minimises the possibility of any unforeseen negative consequences in the future. Perhaps if we sort of looked at it carefully in the very first place, we wouldn't be here.

20 To that end and following any initial submissions that Mr Paterson or Mr Watson may wish to make, I am requesting that we adjourn into conference with you, Mr Deputy President, to discuss the parameters of the issue in a little more detail before deciding on what the best course of action is. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Mr Paterson, have you anything to add at this stage?

25 MR PATERSON: No, not much at this stage. I think, in conference, we can probably talk about some of the issues that go to intent and of the original scope and some of things that were taken into account then, but nothing to add to what Mr Brown has just said.

30 DEPUTY PRESIDENT ROBINSON: Mr Watson, anything you want to put on the record?

MR WATSON: Probably not at this stage, Mr Deputy President. Mr Brown and I have had a number of discussions about the matter and I think if we would be able to go into conference, that would be most useful at this stage.

DEPUTY PRESIDENT: Very well. We'll go off the record.

35 **OFF THE RECORD**

NO FURTHER PROCEEDINGS RECORDED