



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

T No. 9536 of 2001

IN THE MATTER OF an application by the Construction, Forestry, Mining and Energy Union, Tasmanian Branch to vary the Building Trades Award

Re: Tool Allowance

COMMISSIONER ABEY

HOBART, 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 10.45am

COMMISSIONER: I'll take appearances, please.

MR B. BODKIN: If the commission pleases, I appear for the CFMEU, Tasmania Branch, in all of these matters, BODKIN.

5 COMMISSIONER: Thank you, Mr Bodkin.

MR R. FLANAGAN: If it pleases the commission, FLANAGAN R., for the Australian Workers' Union, Tasmania Branch.

COMMISSIONER: Thank you, Mr Flanagan.

10 **MR T.J. EDWARDS:** If it please the commission, my appearances will be slightly more eclectic than those that proceeded me. My name is EDWARDS T.J.

In matter T9531 I appear for the Retail Traders Association of Tasmania, the Master Builders Association of Tasmania and the Tasmanian Chamber of Commerce and Industry.

15 In matter T9532 I appear for the Tasmanian Sawmillers Industrial Association, the Master Builders Association of Tasmania and the Tasmanian Chamber of Commerce and Industry.

In T9533 I appear for the TCCI and the MBAT, if I can start using the initials it might make this a bit quicker.

20 In T9520 I appear for TCCI and MBAT.

In T9536 I appear for the TCCI and the MBAT. If it please the commission.

COMMISSIONER: Thank you, Mr Edwards.

25 **MR EDWARDS:** I have provided authorities to your associate in respect of those organisations that don't employ me.

COMMISSIONER: I have sighted those, Mr Edwards.

30 **MR EDWARDS:** Thank you. They do contain some extraneous material which will come up as part of the case as well but I don't go to that now. I simply rely on that part of each of those that provides authority for me to appear.

COMMISSIONER: Certainly. Mr Long, are you an appearance or an interested spectator?

MR LONG: No, I'm just chauffeuring today, sir.

35 COMMISSIONER: I see. Thank you. I should indicate that it's my
intention to shortly adjourn into a private conference to see how we
can progress these matters because they are somewhat complex.
However, I would appreciate a brief comment from each of the parties
as to what their position is on the big picture issues, namely, the
40 scope and the content of the awards in question, just so I can get a
picture of where we might be heading, what if anything is contested,
and if there's any measure of agreement.

So, Mr Bodkin, perhaps if you could give me a broad brush approach.

MR BODKIN: I might be a little broader than that but without going
into the merit, I think I need to set down in some small detail as to the
45 reasons what the application is about and the reasons why.

Firstly, I think in relation to T9536, that's the tool allowance
application, Mr Edwards may have something to say about that first.

MR EDWARDS: Perhaps if I could deal with that briefly,
50 commissioner. I understand Mr Bodkin is at something of a
disadvantage on this matter.

My organisation was contacted yesterday by Mr Benson for the
CFMEU indicating that he wanted that matter adjourned today on the
basis that he required the opportunity to do further research before
pursuing the claim. We've indicated to Mr Benson that we have
55 absolutely no objection to that course being followed and your
associate advised us immediately prior to proceedings that the
commission had been advised of that wish by Mr Benson and therefore
I believe that matter is to be adjourned today. Certainly, that would be
our proposition following our discussions with Mr Benson.

60 COMMISSIONER: Just so I'm absolutely clear on that. We have a fax
from Mr Benson. T9535 is an application re the tool allowance in the
Building and Construction Industry Award and we have a fax
yesterday withdrawing that matter and T9536 is tool allowance
application in relation to the Building Trades Award.

65 MR EDWARDS: Perhaps if I can just clarify my submission,
commissioner, just to keep the record completely clear. That was in
respect to T9536, the matter reflecting the Building Trades Award.
That is that Mr Benson gave us to understand that he would be
seeking to have that matter adjourned today. Your associate is clearly
70 indicating to me by gesticulation from her seat that that hasn't been
conveyed to the commission, but that is the discussion that I had with
Mr Benson yesterday.

COMMISSIONER: So, T9536, we'll just stand that aside for the time
being?

75 MR EDWARDS: Unless Mr Bodkin has any alternate course.

MR BODKIN: No, that's okay by me, commissioner. The remarks I now make are confined to the other applications. Perhaps I could start by saying that the purpose of these applications is to complete an award rationalisation program which began in this industry in 1988. 80 In that year, various unions in Tasmania made applications for a new award to cover the building and construction industry and the applicants included the unions which now make up the CFMEU and the Australian Workers' Union. At that time there were a greater number of unions but with amalgamations on the unions side, you 85 basically now have the CFMEU and the AWU as the main award parties.

They were the applicants back in 1988 for a new award and that matter was heard by Commissioner Watling.

In 1988, commissioner, the Building Trades Award was the major 90 award in the building and construction industry. The scope clause of the Building Trades Award was, and I dare say still is, somewhat confusing.

COMMISSIONER: I confirm that, Mr Bodkin.

MR BODKIN: Yes. Back in 1988 the parties agreed before 95 Commissioner Watling that the Building Trades Award should be replaced by a new award with an expanded scope clause so as to cover the entire building and construction industry.

In a preliminary decision given on 3 May 1988 Commissioner Watling approved the terms of a new scope clause for the proposed new award. 100 There were further conferences and hearings and in 1990 the commissioner determined that he would make the new award and that it would be called the Building and Construction Industry Award because it would eventually cover the whole industry except for electrical, metal and plumbing trades.

105 Commissioner Watling decided at that stage that the award would be made in two stages. The first stage covering the building sector actually became operative in 1991. The second stage covering the civil construction sector was to be finalised at a later unspecified date.

110 It was intended that when the building and construction industry award was finalised the Building Trades Award would be converted to an off-site award and that it would have no application to on-site construction work. However, until that was done, the Building Trades Award would continue to operate alongside the new Building and Construction Industry Award on a temporary basis.

115 Commissioner, for various reasons, that temporary situation has persisted much to the confusion of those who seek to apply the correct award to particular work in the industry.

120 It was never intended that the Building Trades Award would continue
to operate alongside the Building and Construction Industry Award for
any great length of time with both awards applying to on-site
construction work, nor was it intended that the scope clause of the
former Roadmakers Award, now the Civil Construction and
125 Maintenance Award would be expanded to cover work which the
commission had earmarked for coverage by the Building and
Construction Industry Award

The failure of the parties to fully implement Commissioner Watling's
decision has resulted in a confusing mish mash of award cover in the
building and construction industry in this state. For example, the
scope clause of the Building Trades Award states that the award is
130 established in respect of the building and construction industry.

But the scope clause also states that the award shall have no
application to work covered by the Building and Construction Industry
Award. A person could reasonably ask, then what work is left for
coverage by the Building Trades Award or indeed, what industry does
135 the Building and Construction Industry Award cover. These are
legitimate questions.

It's only after very careful study of the terms of the two awards that
one would venture an answer to those questions.

140 Last year, commissioner, the confusion about award coverage was
manifested in a dispute involving the CFMEU and a company known
as Colony 47. The details of that dispute are not important for the
purpose of this hearing, however, the dispute led to the CFMEU
reviving discussions with the industry parties on the question of award
rationalisation.

145 Our discussions resulted in an agreement to develop purely off-site
award by removing on-site work from the scope of the Building Trades
Award. However, no agreement was reached on the rationalisation of
on-site award coverage.

150 Commissioner, the CFMEU believes that award rationalisation should
proceed in accordance with the decision of Commissioner Watling in
which it was determined that the Building and Construction Industry
Award would cover all on-site work, both building and civil, and that
the Building Trades Award would apply only to off-site work.

155 The logic of that decision remains valid today. The differences between
on-site and off-site work make separate award cover appropriate but
on the other hand the similarities between on-site building and civil
work make separate award cover for building and civil work far less
appropriate, particularly in a building and construction industry the
size of Tasmania's.

160 It's well known, commissioner, that many employers and employees
work in both the building and civil construction sectors. There is
considerable cross-over between the sectors.

It can happen that three awards, the Building Trades Award, the
Building and Construction Industry Award and the Civil Construction
165 and Maintenance Award can apply simultaneously on the same site.

For example - let me give you an example - the scope clause of the
Building Trades Award covers trade work on civil and mechanical
construction sites - trade workers such as carpenters.

The Building and Construction Industry Award covers building work
170 on civil construction sites. The Civil Construction and Maintenance
Award itself arguably applies to some building work such as buildings
at sports and entertainment complexes.

Now that situation came about in 1996 when the scope of the former
Roadworkers Award was expanded and the award was renamed the
175 Civil Construction and Maintenance Award.

As I say, it's unfortunate that the award parties in 1996 apparently
forgot about the previous decisions of Commissioner Watling to
rationalise awards in the industry and proceeded to do the opposite by
extending the Roadmakers Award into areas which were already
180 covered by the Building Trades and the Building and Construction
Industry Awards.

We say that there is simply no good reason why three overlapping
awards should cover the building and construction industry in
Tasmania.

185 A single on-site construction award and a single off-site construction
award would be far more efficient in our submission.

Now both the Australian Workers' Union and the CFMEU have an
interest in and are parties to the three existing awards, therefore we
say that no demarcation problems are likely to arise as a consequence
190 of finalising award rationalisation

Accordingly, commissioner, the CFMEU has made this application - or
these applications - with a view to implementing the proposals which
were actually agreed upon by the industry parties and approved by the
commission in 1990.

195 The application is consistent with the commission's Wage Fixing
Principles including principle 16 which requires that each award
should be reviewed to ensure, amongst other things, removal of
obsolete and inaccurate award provisions, consistent award
formatting, the updating of parties bound or award interest provisions.

200 The applications that came before Commissioner Watling in 1988 were
in fact made for the purpose of implementing the award review process
in these awards. We say it's well and truly time to bring the process to
a conclusion by fully implementing the commissioner's decisions.
205 Indeed the *State Wage Case* decision of 6 July 2000 stated: *The
commission may, if necessary, bring the review process to a conclusion
by arbitration.* That's at page 53 of the decision.

So we say that when regard is paid to what was actually decided by
Commissioner Watling, there is little or no scope for argument against
the present applications.

210 I would at this stage seek to tender copies of Commissioner Watling's
decisions and briefly take you to them.

COMMISSIONER: If we can just take these in order. We'll mark the
preliminary decision of 3 May **EXHIBIT C.1**. The decision of 28 May
we'll mark **EXHIBIT C.2** and the 26 October 1990 is **EXHIBIT C.3**.

215 MR BODKIN: If I could take you to C.1 first, commissioner. This is
the preliminary decision of Commissioner Watling given on 3 May
1988 and you can see that there are numerous employee organisations
for the applicants, and as I mentioned at the outset, that they have
now - well most of these organisations have now amalgamated so that
220 basically you have the CFMEU, the AWU, plus I suppose, the Clerks
were a party at that time, the TWU also.

The appearances are set out on the next page and on the third page -
perhaps if we could read from the top of the third page where it reads,
and I quote:

225 *These applications were lodged for the purpose of making a new
award of the Tasmanian Industrial Commission to be called the
"Building and Construction Industry Award".*

*The following employee organisations were the applicants in this
matter.*

230 COMMISSIONER: I'm just trying to find the spot.

MR BODKIN: Exhibit C.1 - the third page.

COMMISSIONER: Yes, okay.

MR EDWARDS: The first page after the appearances.

235 COMMISSIONER: Yes, I was just confused by, if you go over the next
page you've got a page 3 - it's the third page.

MR BODKIN: Yes, I'm a bit confused by that too, but it looks like
what I'm reading from is actually page 1 of the decision although it's
not marked as page 1.

COMMISSIONER: Anyway, I'm with you.

240 MR BODKIN: Yes. So it then sets out the parties and I continue:

There being no objections raised, the FAI Tasmania Branch, the Plumbers, the Master Builders' Association were granted leave to intervene along with the ASE after they withdrew their applications.

245 And at the top of the page marked page 2:

I informed the parties and the intervenors at the commencement of submissions that it was my intention to hear argument and hand down a written decision on the following preliminary matters:

250 (1) *Whether or not there should be a new award established called the "Building and Construction Industry Award".*

(2) *The proposed scope for the award.*

(3) *The parties and persons to be bound by the award.*

I will now deal with those issues in seriatim.

255 *There currently exists an award of the Commission called the "Building Trades Award". The scope of that award is as follows-*

- and the scope is set out.

Over to the top of the page marked 3.

260 *The construction and contents of this clause leaves a lot to be desired. From a cursory glance, it can be seen that a significant number of the crafts listed therein are not "trades" given the full industrial meaning of the word.*

265 *Indeed the Scope clause begs a number of questions in relation to, amongst other things, the position and standing of plumbers; certain work carried out by builders labourers; equipment operators; carters and drivers; and clerks, even though classifications appear in the body of the award for these categories of employees.*

270 *No person appearing at the hearing opposed either (a) the making of a new industry-based award or (b) its title.*

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

275 *This now leads me to the second aspect of the application, i.e. the Scope of the award.*

Section 33 of the Industrial Relations Act 1984 makes it clear that the Commission may make an award in respect of all or any private employees employed in an industry.

280 *The Act defines "industry" to mean "any industry, trade, business, undertaking; profession, calling, function, process, or work performed, carried on, or engaged in by a private employer".*

Therefore, if this is to be an industry award, the Scope clause must identify the industry of the employer.

285 *The agreed position of the parties was that the scope of the new award should be as follows -*

And then is set out a scope clause which I might just mention, commissioner. If you compare that with the current awards, 2(a) would represent the scope of the current Building and Construction Industry Award. 2(b) would represent part or most of the scope of the Civil
290 Construction and Maintenance Award. And (c) would represent the off-site component of the scope of the Building Trades Award.

So still on page 5 - the first new paragraph:

295 *I have noted the submissions of Mr Edwards, that, at some time in the near future, applications will be made seeking variations to the Mechanical Engineers Award and the Electrical Engineers Award to cover certain categories of employees employed in the construction industry.*

Notice was also given that that application will be made to amend the Scope clause appearing in the Plumbers Award -

300 So I don't think that's particularly relevant, but I take you to the final paragraph:

305 *In doing so, I wish to make it clear that this award is to be a private sector award and its establishment is not intended to cut across or replace work covered by the scope of other awards of the Commission.*

On the next page the commissioner deals with award interest. I don't take you to that. Indeed the matter was adjourned then for the parties to make their applications in relation to award interest.

310 Now the second position I'd like to take you to is in C.2 and that is the decision of Commissioner Watling given on 28 May, 1990 and the first page of the decision is the third page of the exhibit. If I could take you to the top of the page, and I quote:

315 *In its decision dated 3 May 1988, the Commission as currently constituted endorsed submissions for the making of a new award to be known as the 'Building and Construction Industry Award', along with a proposed 'Scope' clause identifying the industry of the employer.*

320 *This hearing is a resumption of those applications which gave rise to the previously-mentioned preliminary decision. However, in their opening submissions on this occasion, The Federated Clerks Union of Australia, Tasmanian Branch and The Transport Workers Union of Australia, Tasmania Branch sought and were granted leave to withdraw their applications -*

325 *Until now the parties have been reluctant to place any additional submissions which would enable the making of the new award to be finalised.*

Submissions were presented on the remaining applications by -

-and then it set out the various union parties plus the Master Builders and the TCI. Continuing:

330 *Because of changed circumstances, the parties requested the Commission to make the new Building and Construction Industry Award in stages which would initially see the finalisation of the building industry sector of the award before turning attention to the construction sector or weekly hire and maintenance employees.*
335

It was said that the setting aside of these sections to be heard at a later date, would enable further discussions to take place between the unions and the employers involved in the construction industry.

340 *I was also advised that the submissions presented by Mr Edwards, and highlighted in the preliminary decision dated 3 May 1988, remained the position of the applicants and the interveners in this matter.*

Those submissions were:

345 *"... applications will be made seeking variations to the Mechanical Engineers Award and the Electrical Engineers Award to cover certain categories of employees employed in the construction industry.*

Skipping a paragraph:

350 *Having given careful consideration to the matters before me, I hereby determine that:*

1. *An award be made called the 'Building and Construction Industry Award'.*
- 355 2. *On an interim basis only, the 'Scope' of the award be confined to that of the building industry.*
3. *Submissions relating to construction, weekly hire and maintenance be heard and determined at a later date.*

360 *My reasons for creating the 'Building and Construction Industry Award' are given in my preliminary decision dated 3 May 1988 and I see no useful purpose being sought by reiterating those reasons in this further decision.*

365 *I agree with the organisations making submissions in this matter that it would be more appropriate to deal with each of the sectors separately as the making of a new award such as this is highly complex and has the potential to create demarcation disputes.*

370 *There is also the need to consider the effect that this award would have on other awards of the Commission (namely, the Electrical Engineers; Mechanical Engineers and Plumbers Awards) when determining provisions for the construction side of the industry as well as any other consequential matters that may give rise to amendments being required to other awards of the Commission.*

The commissioner then goes into the question of award interest which I don't take you to, but at the top of page 5 he concludes by saying:

375 *After the question of award interest has been finalised, I will continue to hear submissions on the contents of the award as it relates to this interim 'Scope'.*

The Orders giving effect to this decision are attached and will be operative from 28 May 1990.

380 Attached to the exhibit is the actual order made by Commissioner Watling on 28 May.

385 Now finally I take you to the decision in C.3 and this is the decision given by Commissioner Watling on 26 October 1990. Now I'll skip the first three paragraphs and take you to the fourth paragraph on the first page of the decision. It reads:

For some time now, the parties to the Building Trades Award and the Plumbers Award have been negotiating an Award restructuring package.

The main aim and final objective of the discussions was to:

- 390 (a) *Establish a new award for the building and construction industry (excluding electrical, metals and plumbing).*
- (b) *Vary the Plumbers Award to encompass plumbers working in the building and construction industry under a single award.*
- 395 (c) *Eventually convert the current Building Trades Award into a building trades "off-site" award.*
- (d) *Remove clerks and carter/driver classification from the Building Trades Award and the Plumbers Award and place those classifications in (1) the newly established Clerical and Administrative Employees (Private Sector) Award in the case of Clerks and (2) the newly established Transport Workers General Award in the case of carters and drivers.*
- 400

He then deals with the second structural efficiency principle. I'll skip four paragraphs and take you to about point six on page 3 under the heading of, Ongoing Program. It reads:

405

As the making of the Building and Construction Industry Award and specifically the construction side of that Award has not been finalised, the following applications remain live. They are: T numbers so-and-so - and they will be used as the vehicle to complete the making of the Building and Construction Industry Award which I expect will commence within the first quarter of 1991.

410

As I mentioned, commissioner, for various reasons that situation has persisted.

415 COMMISSIONER: You got the last number right.

MR BODKIN: Yes, we got the last figure right. So that, I think, sets out the background to the matter and those are the reasons why the CFMEU has made these applications and we do believe the matter has in fact been decided in principle and it's really now simply a question of the mechanics of preparing documents.

420

The applications that have been filed basically in relation to the awards that would be made would be a Building and Construction Industry Award which would encompass the scope of part of the current Building Trades Award, the whole of the current Building and Construction Industry Award and the whole of the current Civil Construction and Maintenance Award.

425

The second award to be made would be an award known as the Building Trades (Off-Site) Award which, as the title suggests, would be confined to the off-site and mixed industries sectors.

430 So that's the background to the matter, commissioner.

COMMISSIONER: Thank you, Mr Bodkin, that was a very useful summary. Mr Flanagan?

MR FLANAGAN: Thank you, commissioner. Commissioner, in respect of the applications which are before you, I think our position
435 can be summarised in this way in relation to the proposed amalgamations of the award.

Firstly, it needs to be noted that a lot of things have changed since 1988 and we thank Mr Bodkin for his history lesson. It's relieved us of the necessity to contact state archives and see if they keep records
440 back for the last century.

But having said that -

MR BODKIN: My friend was born in the last century.

MR FLANAGAN: Commissioner we in fact would support the establishment and finalisation if in fact that's the right terminology of
445 an off-site building award. We would also support the finalisation again, if that's the right term, of an on-site building award. Now it may be that the term of that award, rather than building and construction should be building or at the most building construction. But the term building and construction, in our view, creates some confusion
450 because the Building Awards - and that's what they are - have no role in the construction industry.

Now in that context, the AWU would not support the establishment or the amalgamation of the Civil Construction and Maintenance Award into building industry awards.

We do not accept the proposition that there is a similarity between
455 building work and construction work. They are two distinct and discrete industries and in fact to demonstrate that, all that you need to do is go to the rules of the CFMEU and that name of that organisation itself is quite confusing. Perhaps if it was called the Building Timber and Black Coal Mining Union it would be a lot easier for everyone. But
460 anyway, that's their registered name. But if you go to the rules of the CFMEU you will see that they are structured in a way to make it clear that - and it reflects the organisations that formed to create the conglomerate - that they essentially cover building workers. They cover building labourers - not construction labourers. They cover building
465 tradesmen and they cover plant operators.

If you go to the rules of the AWU and you'll see there that the construction side of the industry in terms of the AWU which are in fact
470 picked up in the application at, I think, paragraph (c) civil construction and maintenance, that's the traditional work of the pre-amalgamated Australian Workers' Union and in our view that is a discrete and

separate industry. If you look at the rules of the organisation that's imminently clear.

475 Now obviously there's become a further overlap because of the amalgamation with the Australian Society of Carpenters and Joiners and the Australian Society of Engineers, but essentially there is a different industry. We don't accept the proposition that there is a similarity. And I think the conduct of the parties since 1991 has demonstrated that.

480 Now Mr Bodkin has referred to the fact that the scope of the then Roadmakers Award was varied in 1996 to move into areas which previously in the context of the old decisions which were referred to in the late eighties and early nineties, were at that time considered to be
485 more appropriately dealt with by one single award. Clearly the parties had formed the view, for whatever reason, that that was no longer the correct course of action. But we're not in a position to provide you with a copy of that decision today. Should the matter need to go on to further hearing we'll take you to that.

The work which is defined by the Roadmakers Award and its terms
490 has been further refined with the minimum rates adjustment process being applied. I believe it was 1999. In 2000 there was a considerable amount of refining done to the classification structure and what that process did was align very clearly - firstly it renamed the award from Roadmakers to Civil Construction and Maintenance. Secondly, the
495 classification structure was very clearly aligned to the federal Australian Workers Union Construction and Maintenance Award.

I think the federal situation is of paramount significance. We don't think it's coincidental that some 14 years after the discussions first took place about the matter that the CFMEU by fresh application now
500 seeks to revisit that issue. The facts are that the national office of both the Australian Workers' Union and the Construction, Forestry, Mining and Energy Union have literally spent millions of dollars debating this issue in the context of an application by the CFMEU to vary their rules to encroach upon the traditional work of the Australian Workers'
505 Union.

Now that whole issue was considered by Senior Deputy President Williams who granted the encroachment of the CFMEU into construction. That was appealed. A full bench of the federal commission quashed that and I'd seek to tender a copy of that
510 decision.

COMMISSIONER: **EXHIBIT A.1.**

MR FLANAGAN: Probably one of the most expensive decisions the Australian Workers' Union has ever been involved with - A.1, commissioner.

515 Now what A.1 does is make it clear that the rules of the Australian Workers' Union should not be incorporated into the rules of the CFMEU which is essentially what the CFMEU had attempted to do by expanding its constitutional rules.

520 So what we're saying to you is that this is not an issue which should be determined in the context of the State of Tasmania, it's an issue which should be determined nationally.

The now Civil Construction and Maintenance Award, with the support of all of the parties has been varied consistently since 1996 to align it to the federal AWU Construction and Maintenance Award. It's a very
525 distinct and discrete industry from the building industry and it needs to be clear through this process that that is a separate industry from the building industry and the Building Industry Award needs to be clear that it does not encroach upon construction.

530 So that's the position that we're in and that would be the approach we'd be taking for the applications which are before you. If it pleases.

COMMISSIONER: So you support an off-site and an on-site building award -

MR FLANAGAN: That's right.

535 COMMISSIONER: - but you oppose the incorporation of the Civil Award into the Building Award however named.

MR FLANAGAN: That's right. We say they are different industries and the structure of the Act is such that awards are only permitted to regulate the industry. They're not permitted to regulate multi industry.

540 COMMISSIONER: What do you say about the apparent agreement that was evident in 1988 - just things have changed?

MR FLANAGAN: Well, more than things have changed. The administration of the union back in 1988, I believe, was a secretary by the name of Butler. Mr Hanlon was his industrial officer. Since then we've had administration by Mr Hayes and we now have a secretary-elect, Mr Wakefield and the view of Mr Wakefield is that we do not wish
545 these awards to be amalgamated. It's a matter for him to decide what position the AWU takes in the twenty-first century. How far back do we go for Mr Wakefield to be bound? Do we go back to 1950? Do we go back to 1930 that many undertakings which have been given and if
550 you have a look indeed at the history of the relationship between those organisations which amalgamated to form the CFMEU, that being the BLF, the BWIU, the FEDFA, the BWIU and the FEDFA in particular had entered into demarcations arrangements with the Australian Workers' Union as a consequence of the de-registration of the Building Labourers Federation. Those arrangements remained in place for many
555 years until the CFMEU sought to unilaterally walk away from it.

So the fact that there was consent in 1988, in our view, does not bind us now. If it pleases the commission.

COMMISSIONER: Thank you, Mr Flanagan. Mr Edwards?

560 MR EDWARDS: I'm reluctant to rise and even have my name put on
the record of this matter, commissioner. I note in passing that I'm
probably the only constant other than Commissioner Watling in the
entirety of these matters having appeared in every one of the matters
565 that have been raised and I take some offence at the comments of my
friend, Mr Flanagan, suggesting that it was last century. I really don't
think that's quite conceivable as I was a very young person at the time.

Commissioner, our view on this is really quite simple and I suppose at
the end of the day it boils down to being not too dissimilar to that
that's being advised to you by the AWU. We certainly believe as we did
570 in 1988 and indeed many dates prior to that and subsequently, that
there ought to be a single award covering the off-site sector of the
building and construction industry.

I seem to recall the very last task I had with the old Tasmanian
Industrial Board system before being recruited to the TCI in 1981 was
575 to draft the award as it's basically currently configured on behalf of the
then Chairman of the Industrial Boards, Owen Pamplin, and
considerable disquiet was expressed by all parties at that time at the
inclusion of weekly hire and daily hire categories of worker in the same
award and the friction that would undoubtedly follow. History shows
580 that that was correct; that it has followed and still exists today.

I think also one of the first tasks I was assigned by the then supervisor
at the TCI was to try and fix the Building Trades Award. That
particular gentleman was by the name of Abey, I understand and I
regret to say -

585 COMMISSIONER: A very astute supervisor, as I recall.

MR EDWARDS: I regret to say, sir, I haven't yet achieved that end
but I hope to in my lifetime.

We do agree that there should be a single weekly hire based off-site
award. We do not agree with the proposal that's before you by the
590 CFMEU today however.

There are a number of issues that we will take with the draft that's
been provided, not the least of which is the change of the name of the
award because that has far more serious ramifications than an idle
glance would at first project, including that the award is named in the
595 schedule to the regulations - the Industrial Relations Regulations
which in turn implement that section of the Act which extends the
scope of this award beyond the industry that it actually covers by its

scope clause into a broad range of other industries, generically I think described this morning by Mr Bodkin probably as mixed industry.

600 Indeed, that is so, but a change in name has far more serious ramifications than simply changing the name. It perhaps changes the coverage for a significant number of employers under this award. So we wouldn't be agreeing to the change of name.

COMMISSIONER: For either award?

605 MR EDWARDS: Well, the other award is currently known as the Building and Construction Industry Award. I heard what Mr Flanagan had to say. I suppose the question of the title of that award would be best disposed of once the content has been resolved. You did ask in your preliminary comments, sir, for us to look at the bigger picture
610 issues and I'm going to try and confine myself to those. To me the bigger picture issues for that award would see the award as its currently configured with the scope clause that it has which is the building industry.

The TCCI has advised Mr Bodkin during the discussion processes
615 leading to today that we don't necessarily agree to the incorporation of civil construction issues into this award, even though our position in 1988/1990 and probably a million and one dates from then till now has been slightly at odds with that at various times. I think it is appropriate that the demark issue that Mr Flanagan has identified be
620 properly resolved.

The reason that Commissioner Watling partially went back on his 1988 ruling was because of the demarcation issues which is clearly identified by exhibit C.2 that then existed. They were predominantly
625 between the then BWIU and a number of other unions which eventually formed to become the CFMEU as it is today and the AWU and their inability to reach an agreement over civil construction issues which is why that particular aspect was excised from the award by Commissioner Watling at that time and it was done that way as being the only possible way forward.

630 What Mr Bodkin hasn't done is indicate to the commission that in 1988 following the reasons for a preliminary decision document that is before you as exhibit C.1, there were appeals lodged by all of those organisations which eventually did form the CFMEU against the decision of Commissioner Watling and the only basis upon which that
635 appeal could be settled without the matter going to full arbitration was by negotiations between all of the parties, including the employer organisations, where an agreement was reached between us to encourage Commissioner Watling to in fact do exactly what he did in 1990, and that is, to retract back to the building industry leaving aside
640 the construction or civil construction area.

I mean you can talk about the history of this award until the cows come home and I don't want to bore everyone by doing that. This could go on for ever if we go down that path.

645 It's sufficient to say for the record that the issues that bedevilled the parties then, according to Mr Flanagan's submission this morning, continue to bedevil the parties. Nothing much has changed. There's a lot that has changed that Mr Flanagan and Mr Bodkin have both said, but the essential elements still have not changed, and that is, you have two unions covering two discrete - or perhaps discrete - I perhaps
650 shouldn't go down there - but two areas of what some would say is a common industry and others would say are two industries.

The awards of this commission currently says its two industries. We probably favour that course.

655 In preparation for this morning's proceedings, I instructed the staff at the TCCI to print out for me our membership lists that receive each of these awards to try and see whether the cross-over that Mr Bodkin has referred to is real, because my mind suggested to me that it probably was. I was wrong. There is no cross-over. Each of those awards' membership mailing lists is totally discrete to itself. There is no
660 company that is mentioned on any more than one of those lists.

Now I will admit surprise, but nevertheless that is a fact and I'm quite prepared to disclose those lists to the commission but only to the commission should it become necessary to demonstrate the point further as we progress.

665 There are a couple of other issues I'd like to touch on moving away from the two major applications, if I can use that term, that are before you. There are a number of other minor or less serious applications that are before you that Mr Bodkin didn't address specifically but I understand he was giving a generic overview of the backgrounds. In
670 particular, I just wish to touch on T9531 and T9532 and would say that basically T9533 is of only passing interest to the TCCI because it involves the interest a union has in this award and I understand that union is not currently registered in this commission. As a consequence I have no objection to T9533.

675 I would, however, when we go to the issue proper be objecting to applications T9531 and T9532. In providing to your associate immediately prior to today's proceedings authorities to appear, I asked each of those organisations to give me very quickly an indication that they have members bound by the relevant award. Both have done that
680 and they are in the documents that are before you, commissioner. Obviously I don't wish at this stage to disclose those names to the trade union parties to the award. The normal procedure in situations such as this is, and it is normally the opposite way around with unions demonstrating interest and not showing employers their

685 membership lists. But we invariably don't get to sight those and we
would request that a similar procedure apply at this time.

But it does indicate that both of the organisations claim to have
members covered by the award that perform work covered within the
scope of the award. So we would be objecting to those matters when
690 they are argued before you and I understand that Mr Bodkin hasn't
sought to do that this morning at this stage restricting himself to the
big picture stuff that you asked him to do and that's not a criticism,
it's simply a statement of fact.

I can also advise that I am instructed by the Master Builders
695 Association that their position in this particular matter is identical to
that of the TCCI and to that end they've given me an open instruction
to represent them in these proceedings. Unfortunately Mr Atkins
couldn't be here but he did say and asked me to convey to the
commission firstly his apology for not being here, and secondly, that
700 they fully accept and endorse the position that TCCI have adopted.

Now there are a number of drafting related issues that arise in respect
of both of these awards that we would seek to deal with further, but
until we can resolve the bigger picture of what industries or industry
sectors or segments are to be covered by the award, I don't wish to go
705 too far down that path. So I think that's probably an opportune time
for me to stop otherwise I'm going to get myself into hot water.

Having said that, there are a number of things that have happened
between the date of the decisions that Mr Bodkin's put forward and
today's date and they include applications made by unions that
710 subsequently became part of the CFMEU and it was the FEDFA in this
particular instance who made application to amend what is now the
Civil Construction and Maintenance Award to incorporate provisions
identical to those applicable to the Building and Construction Industry
Award. Those representations by the FEDFA met fairly stoic opposition
715 and failed at the end of the day but that's indicative that this
particular fight for coverage areas in the building industry continues
today and has continued through the entirety of the period from 1988
till now.

For that reason, whilst the history lesson that Mr Bodkin has given
720 has been useful and reminded me of some old acquaintances, none of
whom are currently with us in an industrial relations sense,
nevertheless it was simply a lesson that the more things change the
more they stay the same, sir. If it pleases.

COMMISSIONER: Thank you, Mr Edwards.

725 MR BODKIN: Commissioner, there's just a couple of small points
that I think I should on the record respond to before we go into the
conference. Dealing here with the big picture, the whole problem with
what's just fallen from the AWU and the TCI is that what happened in

730 1990 and 1991 and 1988 was that the commission, this commission made a decision. Now, it's not particularly relevant at this stage as to whether Mr Butler was the secretary of the AWU and Mr Wakefield now is and whether other individuals were secretaries of the predecessors of the CFMEU. It's entirely irrelevant.

735 What is relevant is that the commission having heard the parties and the parties at that time agreed, but nonetheless, the commission made a considered decision and that's quite obvious from the reasons that are in the decisions that I've handed up. The commission made the decision that a certain thing would happen and if, in 1991, and that was the date of the last decision I took you to, the commission had
740 decided that the building and civil sectors were sufficiently related as to warrant a single award, indeed they were not the separate industries that Mr Flanagan is trying to make out that they are.

745 The commission, in 1991, made that decision and it's up to the other side to show how that situation has changed since 1991. If the building and construction industry since 1991 has now become two separate industries, the building industry and the civil construction industry, when did that occur and how did it happen? The onus is on the AWU and the employers to demonstrate that. That's one of their problems. It's not just a matter of saying, someone else was the branch
750 secretary and that Mr Edwards now has different instructions than what he had in those earlier proceedings. That's the first point I make.

755 The second point is this, that Mr Flanagan suggested that the CFMEU walked away, those were his words, from a demarcation agreement or demarcation agreements, I suppose, because the only one he could be referring to in the State of Tasmania was an agreement between the state registered BLF and the Australian Workers' Union. The federal demarcation agreements only applied in the states of New South Wales, Victoria and the ACT. That's the states where the BLF were
760 deregistered federally and state-wise.

765 The problem with his submission there is, Senior Deputy President Williams in the rules case that he's referred to made a finding that both the AWU and the CFMEU walked away from their agreements and that would include the BLF agreement. That aspect of his decision was not appealed against by the AWU and was not upset by the full bench decision in the print that he's handed up. That's the recent full bench decision which overturned Senior Deputy President Williams' decision.

770 That was never an issue. It's a matter of public record that the commission has found and it hasn't been disturbed, that both the AWU and the CFMEU decided the demarcation agreements no longer applied and I might just mention that that full bench decision that's been handed up is itself going to be the subject of an appeal to the federal courts. So, these things have a habit of going on and on.

775 This whole demarcation issue is simply a red herring in this matter
because at the moment you have the CFMEU and the AWU parties to
the Civil Construction Award. Both organisations have an interest so it
completely escapes me how some new demarcation issue arises simply
by incorporating that award into the Building and Construction
780 Industry Award as originally decided. It's a completely different
situation that applies in the federal sphere. There is a federal AWU
Construction Maintenance Award which the AWU is a party, there's
the federal National Building and Construction Industry Award to
which the CFMEU is a party. The AWU has limited responsibility to
785 that federal award only in respect to public sector employers of
carpenters.

So these demarcation matters are being raised but they simply have
no merit in the question of whether award rationalisation should be
completed in accordance with Commissioner Watling's decision.

790 Mr Edwards has raised the matter of the title of the proposed off-site
award. He says, if you change the name that has implications for the
award referred to in the regulations. That is correct. Another way of
getting around that is to have the regulations changed. That may not
be such a difficult thing but whatever the name of the off-site award is,
795 it's not a big issue. It's not a question, as Mr Edwards said, of two
unions covering two industries. You've got two unions that are parties
to two awards covering two sectors of the industry and if Mr Flanagan
wants to say that whatever happens federally is paramount, well he
needs to remember that what happened in 1990 and 1991 in this
800 state, in those circumstances the federal situation was not paramount
because there was no corresponding proposal at that time to
amalgamate, say, the AW Construction and Maintenance Award into
the National Building and Construction Industry Award, even though a
full bench of the federal commission at that time suggested that that
805 should take place.

As for the final comments by Mr Edwards about him having this
morning looked at his membership print-out and having decided that
there's no cross-over, if that was meant to be tendered as evidence, I
object evidence from the bar table. If the TCI want to run a case, that
810 there is no cross-over, well, they're going to have to prove that and if it
comes to the question of satisfying this commission, it'll come down to
evidence both from the CFMEU and from the other side but certainly
we don't accept and we say the commission should not accept from the
bar table a bald statement that according to the award mail-out of the
815 TCI that there's no cross-over. If that's to be proffered as evidence,
then we want to be able to examine that evidence but that's some time
down the track, obviously.

This application has nothing to do about a fight - Mr Edwards said, a
fight for coverage. It's not a fight for coverage. How can you fight for
820 coverage when the CFMEU is already a party to the civil award. It's
simply a sensible application to rationalise the awards. So, having said

825 that, commissioner, obviously the parties are some distance apart and we would have no difficulty with the commission perhaps chairing a conference of the parties to see how this matter is going to be progressed.

COMMISSIONER: Thank you, Mr Bodkin. Just before we do that, if I can take you to C.2, on page 2, the paragraph in the middle:

830 *Because of changed circumstances, the parties requested the Commission to make the new Building and Construction Industry Award in stages which would initially see the finalisation of the building industry sector of the award before turning attention to the construction sector or weekly hire and maintenance employees.*

835 You make the point about the then commissioner's earlier decision. What am I to read into that particular paragraph as to the standing of the earlier decision?

MR BODKIN: What are you to read into it? I don't think there's any mystery about it, commissioner. The parties simply requested that the commission proceed in stages and really, I suppose -

840 COMMISSIONER: It talks about changed circumstances. I don't want to take this too far.

845 MR BODKIN: Whatever those changed circumstances were, but all the parties were requesting there was not that the award, for ever and a day, be confined to the building sector. They were simply saying that rather than insert the scope clause that Commissioner Watling determined in his first decision, that's the scope clause covering building and civil, rather than putting that into the award and making the award immediately cover both building and civil, it would be done in stages, the first stage being civil in the Building and Construction Industry Award and the second stage would be done later and that's reiterated in C.3, where the commission on page 3 of that decision refers to - he calls it the ongoing program - that's the subheading on page 3, where he says that the existing applications would remain live in fact and that they would be used as the vehicle to complete the making of the Building and Construction Industry Award.

855 Well, the CFMEU has not - I suppose we could have asked for those matters to be relisted but as a matter of convenience, we've made fresh applications but I don't think you can read too much into that.

860 COMMISSIONER: Right. Okay. Thank you, Mr Bodkin. Clearly, there's broad agreement for the creation of an off-site award and for the creation of an on-site award. There is disagreement as to the scope of the on-site award and we're yet to seriously look at the scope of the off-site award but there is clear agreement and if I can give an indication of my own thinking, the current arrangements are totally

865 unsatisfactory and I'm absolutely determined that this issue will be
settled and clarified well before the year 2011, which is an
extrapolation on the last process.

I am determined that we do work our way through this and get an
outcome which is clear to all the parties because overlap and lack of
870 clarity is never helpful.

At this stage, I propose that we adjourn into conference, so the hearing
stands adjourned for the moment.

INTO CONFERENCE 11.50am

NO FURTHER PROCEEDINGS RECORDED