

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 5374 of 1995

IN THE MATTER OF an application by the
Tasmanian Chamber of Commerce and
Industry Limited for a hearing to vary the
Welfare and Voluntary Agencies Award

re exemption from nominated
superannuation funds for Self Help
Workshop

DEPUTY PRESIDENT ROBINSON

GEORGETOWN, 15 March 1995

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: Thank you very much. I'm not standing on formality too much. Could I take appearances for the record please.

5 **MR A. FLOOD:** Yes, Mr Deputy President. ANDREW FLOOD appearing for the Tasmanian Chamber of Commerce and Industry. And with me is **MR BARRY KINGSLEY**, manager of the Self Help Workshop.

DEPUTY PRESIDENT ROBINSON: Fine, thank you.

MS M. FAWDRY: Marcia Fawdry, if the commission pleases, for the Health Services Union of Australia, Tasmania No. 1 Branch.

10 DEPUTY PRESIDENT ROBINSON: Thank you. Is Self Help a generic name or is it a corporation?

MR FLOOD: It's an incorporated body, Self Help Workshop Incorporated.

DEPUTY PRESIDENT ROBINSON: Is it, oh fine, thank you. Could I ask, has there been any discussion between the parties involved in relation to this application?

15 MR FLOOD: There has been no discussion at all, Mr Deputy President. The reason being that none of the employees at the Self Help Workshop, at least to our knowledge, are members of the HSUA or, in fact, any other union.

DEPUTY PRESIDENT ROBINSON: But the HSUA is a party to this award.

MR FLOOD: They certainly are, yes.

DEPUTY PRESIDENT ROBINSON: They'd have an interest, a registered interest.

20 MR FLOOD: They do, yes.

DEPUTY PRESIDENT ROBINSON: Yes, I see. I see.

MS FAWDRY: If the commission pleases, there has been some dialogue between the Health Services Union and the TCCI.

MR FLOOD: Oh.

25 MS FAWDRY: Ros Harvey has spoken to Bill Fitzgerald and Paul Targett over the last 48 hours in relation to this issue.

MR FLOOD: I apologise. I'm unaware of that.

30 DEPUTY PRESIDENT ROBINSON: I see, yes. The commission, of course, always encourages parties to - the parties to an award to have discussions before they get here. It can often save time and be useful. Would you like to explain in a bit more detail, Mr Flood, the reason supporting the application to vary the award?

35 MR FLOOD: Yes, thank you. The Self Help Workshop, for quite some years now, has had in operation a superannuation arrangement whereby Self Help Workshop contributes 5 per cent of ordinary time earnings into the Mercantile Mutual Fund. That contribution is done on the basis that the employees also contribute 5 per cent. In other words, if the employees do not make the contribution, the employer will not contribute either.

Now as well as that, they have been paying 3 per cent, and because of Commonwealth taxation legislation, now 4 per cent into Tasplan, through the award. All of the

employees at Self Help Workshop have availed themselves of the arrangement with the 5 per cent superannuation.

DEPUTY PRESIDENT ROBINSON: Right.

MR FLOOD: They're all participating in that.

5 DEPUTY PRESIDENT ROBINSON: Right.

MR FLOOD: And they have found themselves in the position where they now have two separate occupational superannuation schemes in place.

DEPUTY PRESIDENT ROBINSON: Right. The 5 per cent scheme is not - doesn't involve Tasplan or -

10 MR FLOOD: No, it's a Mercantile Mutual scheme.

DEPUTY PRESIDENT ROBINSON: Right.

MR FLOOD: It's the one that we seek the exemption for.

DEPUTY PRESIDENT ROBINSON: Right.

15 MR FLOOD: Of course, this application does not seek to change the arrangement with the 5 per cent and the 4 per cent funds, merely enable them to be paid into the same fund. Employees are having some considerable difficulty with administration fees and, for example, one part-time employee has been paying 23 per cent of his contributions in administration fees because of the doubling up effect with the two different funds. So the application is merely to combine those two funds.

20 DEPUTY PRESIDENT ROBINSON: Right. And could you tell me, what was the process by which the employees were consulted and made the decision to support the award application?

25 MR FLOOD: The employees actually approached the employer, not - particular employees approach the employer and discuss the problem with the administration fees and the two different funds in general. The employer then approached us to see whether - approached the chamber to see whether anything could be done in regard to alleviating the problem. We decided that perhaps an exemption from the nominated fund, being Tasplan, would be the best way to approach it. And on that basis the employer then put it to each of the employees. They have indicated their wishes that 30 they would like to change funds. And after that wish was expressed we sought the exemption.

DEPUTY PRESIDENT ROBINSON: Yes. The act says in section 32(1), of course, that - (1B), I quote:

35 *In making or varying an award in relation to payment of contributions to a superannuation fund, the Commission must not refuse to make or vary that award if the superannuation fund -*

(a) is a complying superannuation fund; and

(b) is one which the Commission is satisfied meets the wishes of employees.

40 You'd be well aware of that. And that's the reason why I enquire as to whether or not the employees have made an informed decision to have the award changed and

whether or not they have been in a position to be able to make a comparison between the two existing award schemes, and the new one proposed.

5 MR FLOOD: Yes, Mr Deputy President, the decision made by each of the employees was an informed decision. We provided - we asked each of the superannuation funds to provide a statement on things such as administration, charges, roll overs and so on. If I could tender that now. This is a form signed by each of the employees.

DEPUTY PRESIDENT ROBINSON: Thank you. I'll mark 'Form 1 - Employees Acceptance', as exhibit TCCI.1. And the document headed 'Statutory Declaration', as TCCI.2.

10 MR FLOOD: Thank you. So TCCI.1, if I can run quickly through that.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FLOOD: As it states in the second paragraph:

15 Each of the employees was presented with a summary of the key information on each one, which included the returns on investment, administration charges, death and disability coverage and roll over provisions.

The form then goes on to indicate which employees wished to retain their present fund and which of the employees wished to contribute to the new fund, the new fund being the Mercantile Mutual Employer Sponsored Master Fund. As you can see from the document, no employees wished to retain their current fund and all employees chose
20 to contribute to the new fund.

DEPUTY PRESIDENT ROBINSON: Yes. What will happen to contributions which have already gone into Tasplan?

MR FLOOD: They will be rolled over into the Mercantile Mutual fund.

DEPUTY PRESIDENT ROBINSON: Will there be any exit fees or something involved?

25 MR FLOOD: Not with Tasplan, there isn't, no.

DEPUTY PRESIDENT ROBINSON: No.

MR FLOOD: No, the reason that they will be rolled over is, once again, to avoid the administration charges which are ongoing.

30 DEPUTY PRESIDENT ROBINSON: And the administration charges under Tasplan are higher than the new proposed scheme?

MR FLOOD: No, they're not. They are very similar. Perhaps if we can look at the appendix to the document TCCI.1. The first page of Appendix A details the administration fees with the Mercantile Mutual fund, which are 4-1/2 per cent of all contributions received each year, \$45 per year, and commission fees of 2.5 per cent
35 received on each policy.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FLOOD: Your Tasplan fund, it's worked out on a different basis rather than as a percentage basis. It's a flat monetary amount of 80 cents per week.

40 DEPUTY PRESIDENT ROBINSON: This information was placed before all employees?

MR FLOOD: All employees were provided with both pages of Appendix A prior to signing the document TCCI.1.

DEPUTY PRESIDENT ROBINSON: Yes.

5 MR FLOOD: So there was no duress placed on them. It was - both pages of the appendix were provided to them and they were then left to come back to the employer with their decision.

DEPUTY PRESIDENT ROBINSON: Right. I notice also, Mr Flood, that the existing provision in the Welfare and Voluntary Agency Award, which is clause 63 headed 'Occupational Superannuation' -

10 MR FLOOD: Mm.

DEPUTY PRESIDENT ROBINSON: - contains, of course, a number of provisions extending over several pages. But it deals with in 63(h), the question of exemptions. And it says that:

15 The Tasmanian Industrial Commission may grant exemptions from the use of Tasplan or HESTA to employers who provided occupational superannuation contributions into a fund which meets the guidelines of the Tasmanian Industrial Commission.

And it goes on to say that:

Employers intending to seek exemption in accordance with this provision shall notify the union of such intention no later than the 18th September 1989.

20 MR FLOOD: I can't dispute the wording in the award, Mr Deputy President. I can only say that I believe that that subclause was in the award when superannuation first became available. It was to enable employers who had an alternative scheme in place at the time to be granted exemption. In fact, the Mercantile Mutual scheme that the Self Help Workshop has in operation, they could have applied for exemption under
25 those provisions at the time. It actually escaped their notice. And yes, as I say, I can't dispute the wording, only that I would submit that it is out of date and completely irrelevant.

DEPUTY PRESIDENT ROBINSON: Well in a technical sense, it's not. No-one's made application to vary the award subsequently to -

30 MR FLOOD: Of course, it becomes impossible to seek exemption because of the operative date - sorry, because of the date required to speak with the union.

DEPUTY PRESIDENT ROBINSON: Well that's right. But one wonders whether or not that was the intention or inadvertent.

35 MR FLOOD: I would also submit, Mr Deputy President, that the Industrial Relations Act has had more recent amendments to it, to allow exemptions.

40 DEPUTY PRESIDENT ROBINSON: Certainly it does, but it does contain, you know, if not we are to be bound by the date by which exemptions had to be sought - if not, I mean, the fact is that the spirit of the provision says that there will be consultation with the union - and I note your comments that you say no-one is a member of the union. And I suppose you draw some strength by certain things which might have happened in another jurisdiction, but in this jurisdiction those with a registered interest in the award are parties to that award and it's never been challenged as to whether or not that can or cannot be - have an interest in the award as a whole. And so - and I say, the commission encourages - and you may have seen a circular letter

we think - I think the registrar sent out last year saying that it's appropriate for organisations - employer and employee to consult whenever they make an application to the commission and see whether or not they can make one another aware of the reasons for the application and essentially save any unnecessary time.

5 MR FLOOD: I take your point - which would take up the time unnecessarily at a - at a commission hearing. But however, I think I'm bound to draw to your attention both the provisions of the act and the provisions of the award itself if I'm to do my duty properly. Anything else you'd like to add Mr Flood?

10 MR FLOOD: Only that I'd like to tender some further documents in relation to the - pertaining to the fact that the Mercantile Mutual Employer Sponsored Master Fund is a complying fund.

DEPUTY PRESIDENT ROBINSON: Yes. Thank you. This one will be TCCI.3.

15 MR FLOOD: And perhaps if I can start at page 3 of that document which is a certificate or letter - whatever you like to call it - from the Insurance and Superannuation Commission -

DEPUTY PRESIDENT ROBINSON: Mm.

MR FLOOD: - stating that - that the Mercantile Mutual Life Employer Sponsored Superannuation Fund is a - is a complying fund - that it meets the relevant fund conditions set out in the Occupational Superannuation Standards Act 1987.

20 DEPUTY PRESIDENT ROBINSON: Yes.

MR FLOOD: You will notice of course that the certificate is for the Mercantile Mutual Life Employer Sponsored Superannuation Fund -

DEPUTY PRESIDENT ROBINSON: Yes.

MR FLOOD: - and not the Mercantile Mutual Employer Sponsored Master Fund.

25 DEPUTY PRESIDENT ROBINSON: Yes. But that's explained in another letter isn't it?

30 MR FLOOD: Yes, that is. Yes, that's of course caused me some concern so I wrote to Mercantile Mutual and on the first page of TCCI.3 is the reply from Greg Cohen, the Administration Manager, and he states that the Mercantile Mutual Employer Sponsored Master Fund is in fact the same fund as the Mercantile Mutual Life Employer Sponsored Superannuation Fund.

DEPUTY PRESIDENT ROBINSON: They just do those things to try and confuse us, do they?

MR FLOOD: That's exactly right. As he said, it was for marketing reasons that they changed. Perhaps the name was too long, I'd suggest.

35 DEPUTY PRESIDENT ROBINSON: Yes, yes, that might well be true. Might well be true. So you've sought to illustrate to us that you've complied with the requirements of section 32 of the act.

MR FLOOD: Of the act, and that is, that it - that the fund is a complying fund -

DEPUTY PRESIDENT ROBINSON: Yes.

MR FLOOD: - and that it is the employees wishes to have contributions made to that fund.

DEPUTY PRESIDENT ROBINSON: Yes. Could you tell me, are contributions of course still being made to - to the award fund at this time?

5 MR FLOOD: Today they are - yes.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FLOOD: Yes. There is 5% from the employer going into Mercantile Mutual and 4% going into Tasplan.

DEPUTY PRESIDENT ROBINSON: Yes, I understand.

10 MR FLOOD: And if our application is successful today, it will be 9% from the employer going into Mercantile Mutual.

DEPUTY PRESIDENT ROBINSON: I see, yes. Right.

MR FLOOD: Thank you very much.

DEPUTY PRESIDENT ROBINSON: Thank you. What's the response from Ms Fawdry?

15 MS FAWDRY: Thank you, commissioner. On behalf of the Health Services Union we would like to seek an adjournment in these proceedings on the following grounds: that we are not satisfied that the employees have received all of the information they require to make an informed decision. We put it to the commission that although there may have been some documents provided to the employees supposedly from HESTA and Tasplan, HESTA has not been invited - or could Mr Flood tell us whether HESTA
20 has been invited to actually speak to the employees?

MR FLOOD: None - no - the superannuation funds haven't been invited to speak to the employees. We merely wrote to the funds asking them to set out in an easy to read format the - the things such as administration fees and return.

25 MS FAWDRY: Thank you. I would like to tender to the commission that there obviously is some confusion in relation to the recognised fund in the award. I have with - for the commission a letter from Mr Michael Lane who is the manager of Tasplan.

DEPUTY PRESIDENT ROBINSON: I'll mark that exhibit HSUA.1.

30 MS FAWDRY: This letter as you can see is dated yesterday and was faxed through to myself in relation to their confusion when they were asked for information regarding their funds' fees. I refer you particularly to paragraph two and three:

35 *On 29 July 1994, we received a request from this employer to provide information on the Tasplan fund in order for employees to be able to make an informed choice as to any changes to their superannuation arrangements.*

40 *As the request implied HESTA was the alternatively proposed fund, the information required was provided on that basis. Given that HESTA is the alternative fund nominated under the WAVA Award, the Tasplan Trustees would be prepared to transfer Tasplan monies to HESTA without requiring any further information or approval from the employees concerned.*

However, it has now been advised -

- and now I'm going on to paragraph three -

DEPUTY PRESIDENT ROBINSON: Yes.

5 *- it has now been advised that a Mercantile Mutual is likely to be the alternative fund, and the Tasplan Trustees have advised that they would be seeking further information in relation to the Mercantile Mutual fund before a transfer was given any consideration.*

Would you like the rest read on transcript, commissioner, or -

DEPUTY PRESIDENT ROBINSON: Yes - oh well - none of us others have read it.

10 MS FAWDRY: Okay.

In normal circumstances where a transfer has been requested, such information is requested by the Tasplan Trustees in order to determine the effects it may have on the transferring members, and to advise members of such.

15 *We trust this information has clarified our situation, and please feel free to contact -*

- et cetera.

DEPUTY PRESIDENT ROBINSON: Right. Okay.

20 MS FAWDRY: Up until yesterday Tasplan was not aware that they were not going to - that HESTA was not going to be the fund to which a self help workshop was to transfer their funds.

25 The commission needs to be satisfied, as do the union - our union - that the employees are aware of all the issues. For example, are they aware of the benefits they may get from the funds? If so, is it the fund they are in - Tasplan - and the employers preferred fund - Mercantile Mutual - or is it a number of funds which would be preferable. In other words, have they been given enough information on the funds available? If not, they have the right to be advised. Are they aware of what the change to the fund may mean if they roll over from Tasplan to a new fund? Are they aware that the transfer to a new fund - that the transfer to a newer fund and leave has been paid into Tasplan in that fund? So transfer to a new fund and leave - what has been paid into Tasplan into that fund? In other words, have the employees been told of the substantial benefits of other funds other than Mercantile Mutual?

30 Our preferred option is to give the funds a say, that is, Tasplan and HESTA and Mercantile Mutual - give them the opportunity to prepare submissions for the consideration of employees over a 4-week period and then give them the opportunity to vote in a union management controlled ballot. This process has been used before, commissioner, at Douglas Parker when it went over to become the Tas Rehab - Rehab of Tasmania.

40 On those grounds, commissioner, we are not convinced that there has been adequate consultation nor enough information given to the employees for them to make an informed decision, and on that basis we seek an adjournment in these proceedings so that prescription of how this should be done can be proceeded with. Thank you.

DEPUTY PRESIDENT ROBINSON: I see. What's the response to that, Mr Flood? If the request is for an adjournment for the reasons explained that notwithstanding what you've put before the commission that the concern is that employees ought to be given a - the opportunity of having further information for their consideration so that they can make a truly informed decision.

I'm not going to prejudge whether they've had adequate information at this stage or not, but I have expressed a little bit of concern, I suppose that there hasn't - had not been any consultation because the - the fact employees are not member of a union doesn't - has - doesn't affect the situation that before the award can be varied there is the right of everybody with an interest in the award to have an input and indeed there might be other people out there who'd seek leave to intervene with an advertised hearing who might also have a view. However, how do you react to the request for a bit more time?

MR FLOOD: I don't believe it's necessary, Mr Deputy President. The information provided to the employees has been - obviously hasn't been complete. Superannuation is something that most of us don't understand, I think. It certainly hasn't been complete but it has certainly covered the most important matters and certainly the matters that will concern employees. The fact that in the document marked HSUA.1, the fact that Tasplan may have changed their information depending on which fund was to be the alternative does concern me because we - we requested from Tasplan all the information and set out what we wanted and I don't believe that that should change depending on which is to be the alternate fund.

DEPUTY PRESIDENT ROBINSON: No, but nevertheless the - what is expressed in that exhibit is one that must concern us all and I note that you say it is of concern that there might be some hitch in the roll over of funds.

MR FLOOD: Can I ask what is the further information that is requested - required?

MS FAWDRY:

MR FLOOD: Have you any understanding of - in the fourth paragraph? The Tasplan trustees have advised that they would be seeking further information in relation to the Mercantile Mutual fund?

MS FAWDRY: No, I'm not aware of that. I didn't - I didn't, as invited in the last paragraph, have time to ring the gentleman, but he has - is supporting the adjournment for reasons of his own and I would assume that they have an interest in this matter as well.

MR FLOOD: I can't profess to be an expert on superannuation, Mr Deputy President, but my understanding is that it is not within Tasplan's ability to - to withhold the contributions - that if - if the members wish to roll over into another fund then they have the right to do so. That's one of - I believe it's one of Tasplan's selling points is the ease of roll over and that there is no cost associated with that.

DEPUTY PRESIDENT ROBINSON: Yes. I see. Look -

MS FAWDRY: If I could just add something, commissioner.

DEPUTY PRESIDENT ROBINSON: Yes.

MS FAWDRY: I believe that, yes, it's obvious that the employees have been given some information but I draw your attention to the reason that this became an issue in the first place and that was that the TCCI says that the employees were concerned about the amount of administration costs that they were paying and they in fact

approached the employer to say we are not prepared to accept this. So it was at that point in time that the employees deferred to the employer to respond to that problem that they raised. Now the employer has responded in the simplest manner and that is to just take one out of the two unions - funds - that were currently being utilised.

5 DEPUTY PRESIDENT ROBINSON: Yes.

MS FAWDRY: What we're saying is - and the employees would obviously say, well that's great, you know, I don't have to pay 23% any more. What we're saying is, that it is at that point that this process of involving other funds to come in actually give the employees a true overview of what it is and what it means to them. So what I'm really saying is, that the employees would have been pleased with anything that would reduce the 23% administration costs and the scant amount of information that was given to them would not have - to them would have felt sufficient because they were getting their needs met.

DEPUTY PRESIDENT ROBINSON: Mm.

15 MS FAWDRY: Thank you.

MR FLOOD: The matter before you today, Mr Deputy President, isn't which fund the employers shall pay the 5% superannuation into. They've had that fund going for quite some years now and have developed quite a history with Mercantile Mutual It is to allow employees to have their 3% award superannuation paid into that same fund.

20 DEPUTY PRESIDENT ROBINSON: Yes. Yes look, I clearly understand the application and the comparatively recently amended act which says that if that is the employees' choice and that the fund to which they wish to contribute - have contributions made for the award clause is a complying fund, then that is it. But I think there is precedence - in fact I know there is precedence within the commission to just make sure that the employees have made an informed decision just as a patient might before they undertake some medical procedure. I think there is a duty for an explanation to be given to them in exactly what is proposed to happen to them in the theatre - what the risks are or what the benefits are before they sign the consent form and I would be prepared to grant a relatively short adjournment.

30 I don't want this matter to drag on for too long. I think it can clarify some of the issues which have been challenged - which have been raised - such as whether or not Tasplan has no choice but to roll over funds into another fund and so on. So I indicate that that - I will grant an adjournment and that doesn't go to the question of merit at all obviously and I think - and I don't intend to lay down a procedure to be followed by the various parties. I would hope that whatever is suggested from each end of the table is to the process that that can be agreed upon and sorted out between the parties. In the unlikely event that the parties strike a hitch as to what or what should not occur then obviously the commission would have to be involved and sort that problem out, but I rely upon the good sense of those involved to say, well okay, the commission has granted an adjournment to enable employees to be given further information and - and that the matter will come back on and if - if employees are still of the same opinion - and I don't there's any challenge to the fact that the fund is a complying fund, then of course the application to vary will be granted. If the employees have a change of mind well one would have to obviously have regard to that.

45 So if you like, we'll just go off record I think and set another date.

OFF THE RECORD

DEPUTY PRESIDENT ROBINSON: We're back on the record and it's just to allow the record to show, if it hasn't already, that I've decided to grant an adjournment of this

matter and we'll adjourn till 10.30 am on Tuesday the 4th April and that we'll send out notices accordingly.

Okay, so I'll close today's hearing.

HEARING ADJOURNED