



TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T No. 8838 of 2000

IN THE MATTER OF an application by
The Australian Workers' Union,
Tasmania Branch for an interpretation
of the Farming and Fruit Growing
Award

Re: Clause 2 - Scope

PRESIDENT LEARY

HOBART, 11 June 2002
Continued from 29 April 2002

TRANSCRIPT OF PROCEEDINGS

Unedited

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

HEARING RECOMMENCED 2.20pm

PRESIDENT: Are there any changes or additional appearances since the matter was last heard?

5 **MR D. DURKIN:** If it please the commission, DURKIN, D., appearing for Westlake Bulk Spreading and Westlake Bulk Fertilisers, two separate companies.

PRESIDENT: Thank you. Mr Flanagan?

10 MR FLANAGAN: Thank you, president. President, the application before you today seeks the determination of whether or not the work of spreading fertiliser and seed mixture is work covered by the Farming and Fruit Growing Award.

President, I seek to tender some extracts of the *Industrial Relations Act* 1984 which are relevant to the proceedings before you.

PRESIDENT: EXHIBIT AWU.1.

15 MR FLANAGAN: I believe there's already some exhibits on the file.

PRESIDENT: Oh, are there. I can never find the exhibit list in these files, where is it? We'll mark it, **EXHIBIT AWU.3**. I'm not too sure whether we've got one or two.

20 MR FLANAGAN: That should be safe. President, in terms of AWU.3, the first relevant section is section 33(1) which states:

33. (1) *The Commission may make an award in respect of –*

(a) all or any private employees employed in an industry; or –

And then it goes on in subsection (3) to say:

25 **(3)** *The Commission, in making an award under this section, shall specify the industry to which the award applies.*

The critical component there is that when the commission makes an award it identifies the scope of the industry which is covered by the award.

On the next page, section 38, provides that:

30 **38.** *An award has effect according to its terms and, unless and to the extent that those terms expressly provide otherwise, the award extends to and binds –*

(a) in the case of an award referred to in [section 33\(1\)](#) –

Which is what we're dealing with here today:

(i) *all private employees employed in positions or classifications mentioned in the award in the industry or occupation to which the award applies; and*

5 (ii) *all private employers employing those private employees; or*

The relevant point to be made there is that the award must identify a classification or occupation for the work in question. So, the two point which the union will be seeking to demonstrate to the commission today is that the Farming and Fruit Growing Award establishes within its scope the work of spreading fertiliser and seed mixture and that the relevant classification is a mechanical plant operator and we'll take you to that during the course of the proceedings this afternoon.

15 The other relevant consideration, president, are the principles which are established by this commission in T30 of 1985, a decision of the then president of the commission, which outlines the key components which the parties have regard for when an application is made for an interpretation and in the union's view, the relevant principles which flow from that case are the president's observation in principle 1, principle 4 and principle 6, and I'll take you to those.

20 The first principle which flows from that decision is that the construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts. It is futile to attempt such an exercise in any other way.

25 Consistent with that and since the matter was last before the commission, we have in fact been able to arrive at an agreed statement of facts which I'll provide you with this afternoon.

The next principle which is relevant is principle 4, which states:

30 An award must be interpreted according to the words actually used even if it appears that the exact words used do not achieve what was intended, the words used can only have attributed to them their true meaning.

We say that when considering the words in the award, it is clear that they cover the scope of the work which we're talking about in these proceedings today.

The third principle which is relevant is principle 6, which states:

35 Where genuine ambiguity exists resort may be had to the judgment accompanying award as an aid to discover its true meaning.

What we say, president, is that there is no ambiguity within the words which are actually used in the award and therefore the guiding principle must be the

words which are actually used rather than looking to any extraneous material. Now, if I can provide the commission with a copy of the agreed statement of facts.

PRESIDENT: **EXHIBIT AWU.4.**

5 MR FLANAGAN: If I just take you through those agreed statement of facts, president. The first is, that Mr Westlake conducted the business of spreading
fertiliser under the trading name of Westlake Bulk Spreading. Fertiliser cannot
be purchased directly from the manufacturer. The fertiliser can only be
10 purchased through a distributor such as Roberts, Websters and Tasag. The
business had two principal activities, those being the handling and spreading of
fertiliser and measuring seed and fertiliser and spreading the mixture. The
income of the business was derived from two principal sources.

The client to the business would pay the business in the case of spreading
15 fertiliser on a per ton spread basis. In the case of spreading fertiliser seed
mixture, on a per acre spread basis.

The business operated five items of machinery, those being two tractor
spreaders, two truck spreaders and a loader. The clients to the business were
principally farmers and the activity of the business was to spread the fertiliser
or fertiliser/seed mixture on the farm, using the machinery referred to above.
20 At no stage did Westlake's actually own the fertiliser or the fertiliser/seed
mixture.

They're the agreed facts in respect of the matter, president. That then takes us
to the award and I'd seek to tender a copy of the Farming and Fruit Growing
Award.

25 PRESIDENT: I have a copy.

MR FLANAGAN: This might assist you, if I may.

PRESIDENT: Why, is it a special copy of the award?

MR FLANAGAN: It is, it's been highlighted to make it easier for everyone.

PRESIDENT: But it is the same as my copy?

30 MR FLANAGAN: It is the same, yes.

PRESIDENT: All right. **AWU.5**, seeing it's a special copy and it's
highlighted.

MR FLANAGAN: Thank you, president. President, if I can firstly take you
35 to the second page, clause 2, scope. You'll see that the award is established in
respect of the industry of farming and/or fruit growing and without limiting the
generality of the afore going, shall include – I've highlighted two different

colours there to reinforce the point, president, that what you deal with firstly in this definition is the fact that the award applies to the industry for farming and/or fruit growing. That, in our view, is the primary definition.

The secondary definition highlighted in the pink here, is, shall include:

5 (a) *the preparation, sowing, raising, harvesting, -*

Of crops and:

 (b) *livestock farming-*

In (d):

10 (d) *seed farming and/or silviculture where such work is performed
in conjunction with the activities specified in subclauses (a), (b)
and (c) of this clause;*

15 That's the secondary definition, if you like. The two different classes of persons which are picked up by the industry as provided for in the Act which is outlined in this award. So, I think the next point, president, is to reinforce the fact that the work includes, where it says, shall include, actually has the effect of extending the definition rather than it being a part of the primary definition.

In support of that I'd seek to tender a copy of a decision by *Gray, J*, in 1998 between *Saunders v Park Homes*.

PRESIDENT: EXHIBIT AWU.6.

20 MR FLANAGAN: If I can take you to the second page of that decision, you'll see it highlighted in the left-hand column, the statement by his honour where it says:

25 It will be noted that the definition of construction work is of a 'means and includes' type. The proper approach to such a definition is to determine the ordinary and natural meaning of the words which it is said, the expression concerned means and to regard the inclusion as extending that ordinary and natural meaning.

30 So, where it says, includes, that extends the scope of the award. So, in our submissions, that is an authority which is binding on the commission, given that it's from the federal court and specifically deals with what is intended by the word, includes.

35 As I've indicated, president, clause 2(a) applies to the preparation, sowing, raising and harvesting of crops. The industries are identified by reference of activities undertaken in relation to a particular commodity, namely, crops. Those activities are identified in production sequence as preparation, sowing, raising, harvesting, preparation for packing and packing.

I'd seek to provide the commission with some dictionary definitions.

PRESIDENT: I'll mark the bundle of documents, **EXHIBIT AWU.7**.

MR FLANAGAN: There's actually one that's missed, I'm afraid. It belongs with it but somehow it seems we've not made it.

5 PRESIDENT: That'll be part of AWU.7.

MR FLANAGAN: Thank you.

MR FLANAGAN: If I can take you to AWU.7, the dictionary is the 1982 edition of the Macquarie Dictionary, president. If I can take you to firstly to the definition on the third page of the extracts which defines fertiliser as: *any material used to fertilise the soil*. Then the following page: *prepare; to make ready or put in due condition for something*.

On the next page the word, sow: *To scatter seed over land, earth for growth. To scatter (seed) over (land, earth, etc.) for the purpose of growth*. So sowing is to scatter for the purpose of growth.

15 On the following page, crop, which is: *A supply produced*. And they're the relevant definitions for now.

So accordingly, the activity of preparing the soil by fertiliser, and sowing by spreading the seed mixture, is in the union's view clearly work within the scope of clause 2(a) being part of the production process of producing a crop.

20 Clause 2(b) applies to livestock farming including grazing of livestock and again like clause 2(a), clause 2(b) identifies the activity of the production of livestock, that being the management, breeding and rearing and grazing. The most important point about grazing is, nothing to manage, nothing to breed and nothing to raise, president, and that's an important point.

25 Subclause (d) of clause 2 then goes on to incorporate seed farming where such work is performed in conjunction with the activities specified in subclause (a) and subclause (b) of this clause. Thus, whether the work is performed for agricultural purposes, if I can use that term loosely as identified in 2(a), or for livestock or pastoral purposes as identified in clause 2(b), that work falls
30 within the scope.

The next issue, president, is the issue of classification and if I can take you back to AWU.5, if I can take you to page 9 which is the second yellow tab, you'll see a *Mechanical Plant Operator – Level 1 means an employee who is required to operate mechanical plant equipment or a harvesting machine*. This
35 level does not apply to employees of employers who use the employer's machinery for the planting and harvesting of the employer's crop.

5 So in other words, if you're employed by the farmer, you're not going to be employed as a mechanical plant operator, but, if you're employed by a contractor to come onto the farm and operate machinery, then that occupation will apply and thus the critical component being the last qualification where it says *use the employer's machinery for the planting and harvesting of the employer's crop.*

10 Now it's common ground between the parties that the work here involved the use of machinery to plant fertiliser and in the agreed statement of facts we identify the machinery, that being two tractor spreaders, two truck spreaders and a loader. And that was the method by which the fertiliser and the seed mixture were applied and it's also recognised in the fourth dot point how the employer in this case was paid, but more to the point, it's inherent in the agreed statement of fact, particularly at the last dot point, that at no stage was the fertiliser or seed mixture actually owned by the employer, it was owned by the client.

15 So in those circumstances we submit that the work in question clearly falls within the definition of a Mechanical Plant Operator – Level 1, thus –

PRESIDENT: Who is the employer that we're talking about there?

MR FLANAGAN: The employee.

20 PRESIDENT: No, no, this level does not apply to employees of employers who use the employer's machinery. Who is the employer we're talking about?

MR FLANAGAN: In the context of that, if you owned – there's a number of different arrangements that we say this award attempts to cater for. First, you've got the farmer who owns his own land and seeks to grow agricultural products on that land or to graze. That's one category. And they're the people that fit within the primary definition that I referred to earlier.

25 The second category are those people that either share farm with the farmer or are contractors, so if we can break that second group into share farmers and the way that will work is that the share farmer and the land owner will enter into an arrangement whereby the share farmer will contribute to what is being put on the land, whether it's for agricultural or grazing purposes and will receive a dividend from that produce. So that's your share farmer.

30 The third category is simply the contractor that comes in, is contracted by the land owner to put a crop into the ground and then receives payment for that. Now when this award talks about the employer, what it's doing is distinguishing between the land owner who puts the crop into the ground. That's one group and it's saying, this doesn't apply to that particular category. This level does not apply to employees of the employer who use the employer's machinery for planting and harvesting the employer's crop. That's clearly the land owner; where it's his own employee planting his own crop.

PRESIDENT: So when we're talking about the employer there, we're talking about a farmer rather than a contractor.

MR FLANAGAN: That's correct.

PRESIDENT: That's what I was trying to clarify.

5 MR FLANAGAN: Yes.

PRESIDENT: Okay.

MR FLANAGAN: And so in the circumstances of this particular matter, Westlake Bulk Spreading was a contractor, therefore by definition that classification applies to the work which was being performed.

10 PRESIDENT: But it could be argued it doesn't really say that. It depends on who you say is the employer, doesn't it.

MR FLANAGAN: Well, what we say is, Westlake Bulk Spreading – as trading name I presume –

PRESIDENT: I'm sorry?

15 MR FLANAGAN: As a trading name – was in fact the employer.

PRESIDENT: Yes.

MR FLANAGAN: I'm not aware that there's any argument that that wasn't the employer, but the definition also says: *means an employee who is required to operate mechanical plant equipment or a harvesting machine*. And the
20 the mechanical plant equipment which was being used was a loader, trucks and spreaders. So in our view it was quite clear that that's the occupation.

PRESIDENT: But why couldn't that last phrase – or that last sentence – mean that it doesn't apply to employees of contractors who used the contractor's machinery?

25 MR FLANAGAN: If the employee was engaged by a contractor –

PRESIDENT: Yes.

MR FLANAGAN: - and that contractor planted their own crop as in a share farmer, then that's correct.

PRESIDENT: I see.

30 MR FLANAGAN: It wouldn't apply.

PRESIDENT: Yes. Okay. I understand what you're saying now.

MR FLANAGAN: So the connection –

PRESIDENT: Yes, it was the last part – the employer's crop.

MR FLANAGAN: That's right. Yes. So it's quite deliberate –

PRESIDENT: It's a bit badly worded.

5 MR FLANAGAN: Well, it actually, with respect, in our submission –

PRESIDENT: It's not.

MR FLANAGAN: - reflects the nature of the different –

PRESIDENT: Yes.

10 MR FLANAGAN: - groups that are operating out there in the farming community and those words specifically seek to address the complexities of that arrangement, but to do so in a simplified form of language.

PRESIDENT: Yes.

MR FLANAGAN: So whilst it's –

15 PRESIDENT: Yes – I'd prefer to look at things in positives rather than negatives; that's where I usually end up having difficulty.

MR FLANAGAN: Yes, we can accept that, president.

PRESIDENT: I'm old.

20 MR FLANAGAN: We're all getting older. So, president, in our submissions, what we've clearly got here is, we've got the worker spreading fertiliser and seed mixture, covered by the scope of the award, in particular the secondary definition of that award and we clearly have an occupation which covers the work being performed, so in those circumstances, the commission ought to determine that the Farming and Fruit Growing Award applies to the work of spreading fertiliser and seed mixture. If it pleases the commission.

25 PRESIDENT: All right, thank you. Mr Durkin?

30 MR DURKIN: Thank you, president. The agreed facts, president, are slightly different to those that were outlined by my friend, but nothing much turns on it so I don't at this point aim to break that up into yes's and no's, but basically we have a common agreement that principally, Westlake Spreading and Westlake Bulk Fertilisers, two individual businesses, were principally involved in the one exercise of taking grain from bulk stores and delivering that to the farm and at no stage did they own the fertiliser; the fertiliser was either owned by the seller – example, Roberts – one of the large suppliers, and the owner, if wasn't them, would have been the farmer. There's no disagreement on that.

PRESIDENT: No. But they were involved in the preparation, sowing, raising, harvesting, et cetera – Roberts.

MR DURKIN: I'll come to that, president.

PRESIDENT: All right.

5 MR DURKIN: So basically I think my friend and I both agree that nothing much turns on the points of difference with respect to the agreed statement of facts.

I'd like to begin though by saying, president, that an employer in a situation such as this – or in any situation – is duty bound to determine the issue of an appropriate award that may or may not cover them. We may or may not agree that there are very few award-free people left in the country, that is, classified employees, however the onus is on the employer and we agree as to determine once the contract of employment has been entered into is determine whether or not there's a minimum rates or a paid rates award for that matter if there are any left floating around that may apply to them.

PRESIDENT: There shouldn't be.

MR DURKIN: Make it the ..(inaudible).. appendix.

PRESIDENT: Mm.

MR DURKIN: So if you were to go through this exercise on behalf of Westlake Spreading, the exercise would be: is there an award that encompasses what it is they do. We would maintain that Westlake Spreading was in the business of the storage and distribution of fertiliser, not in the business of farming. So if you were Mr Westlake and you went to look for an award you would find the Fertiliser Award and under the state system – because that's where we ended up – we're not respondent federally, we're not a member of an association and we haven't actually purchased a business that may have been respondent so we fall clearly into the state –

PRESIDENT: Mm.

MR DURKIN: - and the first thing that strikes you is that this commission made an award, T5756 of 1995, upon application by the Australian Workers' Union for an award to be made for the industry of fertiliser, and it has within it a scope which says basically, this award is established in respect of the industry of the manufacture and/or distribution of fertiliser.

Now it just so happens there are no conditions, there are no wages, there are no classifications within that award, but it is actually an award of the commission.

PRESIDENT: It must be very attractive.

MR DURKIN: It would be open for an employer, we would maintain, president, for that employer to say, well, I've fulfilled my obligation, I've determined there is an industry and an award that applies to me but it just so happens there are no minimum rates that would apply to me.

5 PRESIDENT: Why are there rates or conditions?

MR DURKIN: I think possibly, president – and we could only speculate – that possibly they never came back to the table to finish the job that was started. But by determining the scope effectively there is an award and we would argue that it would be open for the employer to say there is an award; it
10 just so happens that the award does not determine any minimum rates that we –

PRESIDENT: Could you not argue that then there is not an award?

MR DURKIN: Well, the trouble is, president, it's very hard to deny the existence of an award when the commission is telling you there is one.

PRESIDENT: Well, it could be argued that there is, that there's an award
15 title. The reason I'm questioning this is not the first one of these that I've found.

MR DURKIN: Probably, president, we would rely on the fact that if – you know, it's established law that if there is any doubt and that that doubt was reasonably open to the employer at that point in time, being a lay person he would have to have been given the benefit of the doubt.

20 PRESIDENT: Well, being a lay person and he picked up an award that had no conditions or wages in it, what would he have applied?

MR DURKIN: Well, he's not bound to go beyond that point, president, he's merely fulfilled his obligation that to determine – he's determined his contract of employment; he's settled that; he looked to see whether or not there was an
25 award that applied to him – there was; there was an industry declared –

PRESIDENT: There was a title of an award.

MR DURKIN: Title to the award.

PRESIDENT: With an industry cover.

MR DURKIN: And he really wasn't duty bound to go and search out another
30 award that may be closely associated to it such that it's not upon him – the onus is not upon him to determine an award or find an alternative award – that's a matter for the regulations and the regulation does fulfil that function in the event that there is no award.

35 And obviously, president, our submission is that we would rely on that as our primary argument, however if we're wrong in that I would now go to the actual

submission that's been made by my friend in relation to the scope clause on the Farming and Fruit Growing Award.

5 Now there really is only one way to look at this, that is, that if the scope doesn't cover particular circumstances of Westlake Bulk Spreading, then there is no need to then go to the classification and search out a classification within the award.

10 My friend and I both agree that the issue is a twofold issue. Firstly, that the primary argument of the applicant in this matter is that the section in the exhibit number 5, president, not in yellow, but in pink – the primary argument is that that's the relevant section within the scope clause that he principally relies on. Failing that, he wants to rely on the issue that it was just farming – that is, in yellow. So if I fail in relation to the specifics, I'll go to the general.

15 If I can deal with the general first, if I may, and I'd refer to the exhibit 7, that is, the Macquarie Dictionary – the exhibit that's been provided by my friend in relation to the word farming upon which he wishes to rely – in yellow, and on page 647 of that exhibit which I think it's the second – third page in or the second page in.

PRESIDENT: Yes.

20 MR DURKIN: Farming deals with: *the business of operating a farm*. And I don't think it's been suggested that Westlake Spreading actually operated the farm so therefore the argument that if I fail on the second I can go back to the first would fail on that basis alone; that obviously Westlake Spreading wasn't in the business of farming. But one could rely on that because the specifics that follow are simply an aid to the general definition of farming and/or fruit
25 growing. So in other words, they shall include – and we take those words to mean, but not limited by. We'd concede that. So the second argument of the second argument, that is, the idea that – sorry, of the first argument – and our second argument is, that the general would fail and the specific also would fail because if you go to the pink: *shall include: the preparation, sowing, raising, harvesting . . . of crops*.
30

Now the difficulty here is that Westlake Spreading performed two functions. It performed the function of spreading fertiliser on pasture which we will maintain is not a crop and it also performed the function of putting fertiliser on crops. An example of that would be rape, barley, which we would concede is a
35 crop for the purposes of this award, although my friend may have a different view on a crop being a lot more specific than that.

But however we would be prepared to concede that the barley, the rape, are crops for the purposes of defining a crop, but a crop is certainly not pasture.

40 When you go to the definition of a crop in the exhibit that's been provided by my friend under exhibit 7, we don't believe that that's of much assistance - *the cultivated produce of the ground*.

Now when you look up the definition of 'cultivate' – and unfortunately I don't have a copy of the Macquarie Dictionary, but I do have the Collins Concise Dictionary and when you look at 'cultivate': *to prepare the land for the growth of crops*. So cultivate really doesn't assist us but when you go to the definition of a crop under the Collins Dictionary it talks *about the produce of cultivated plants, especially cereals, vegetables and fruit*.

So in summary, president, the arguments fail both from the primary point of view of farming being attached to the farmer, and secondly, if failing that we wish to rely on the second part, the more specific where it attempts to define the concept of farming and fruit growing; that it fails on the basis that we're not talking about crops *per se* when we're talking about pasture, but we are when we're talking about rape and barley, et cetera.

The principles laid down by the commission are well established and they certainly echo those that can be found in the Mills and Sorell, Federal Industrial Law, Fifth Edition – and I don't wish to go back over those. That yes, the commission is bound to simply find what the words are and what they mean in their ordinary natural significance. They're Mills and Sorell's terminology, but not much different from those of the president. And we would agree that the award has to be read as whole and it's an established principle that if there is any doubt the benefit must be given to the employer.

PRESIDENT: But your first position is that there is an award. Is it just called the Fertiliser Award? That's the title of it?

MR DURKIN: Yes, president. Fertiliser Industry Award, with a scope: basically that this award is established in respect of the industry of the manufacture and/or distribution of fertiliser.

PRESIDENT: Does that have a year on it?

MR DURKIN: Yes, it does, president. From 2 October 1995.

PRESIDENT: All right. But that's all that exists for that award?

MR DURKIN: That's correct.

PRESIDENT: So that's your first position; that that's the award, that's all that the employer had to establish – that that's the award that covers it -

MR DURKIN: That's correct.

PRESIDENT: - the industry.

MR DURKIN: It has a title, it has scope and it has a date of operation, so it must exist in some form.

PRESIDENT: So where would you get the rates of pay and conditions from then, on the basis that there's nothing in the award.

5 MR DURKIN: No, well, basically the principles that we maintain are well established are that the first step is to enter into a contract of service between the two parties and then at the moment that comes into being – into existence – the very moment it comes in there are common rule awards that may place minimums on that arrangement in part or in whole. So it may or it may not. We would maintain in this case the commissioner has chosen not to place restrictions on the contract and that there are no minimum wages or conditions.

10 PRESIDENT: I'd certainly like to know why, but that's another argument.

MR DURKIN: Basically what we have, president, we have two applications running here that we have to - following this, we possibly may have to go back to the first application and look at it again – well, we certainly will based on your decision – but –

15 PRESIDENT: That's a claim for underpayment, as I understand it.

MR DURKIN: That's correct.

PRESIDENT: Yes. I don't know how you'd ever establish that under the Fertiliser Industry Award.

MR DURKIN: Well, president, with respect to that –

20 PRESIDENT: In its current form.

MR DURKIN: - there is no claim because you can't rely on the *quasi* statute of a common rule, you must simply rely on contract to pursue a claim and therefore the commission, with respect, wouldn't have jurisdiction in that case.

25 So principally we're saying there is an award, it's chosen not to quote minimums and I don't believe the commission then ought look for a substitute without good reason. If it does, it will see a scope clause in the Farming and Fruit Growing Award that restricts farming to the business of a farmer using the same definition that's been provided by the applicant in this matter, and that if we have to go to crops, it becomes a circular argument; that a crop is something you cultivate. If you look at cultivate, it talks about a crop and I don't believe that's what being argued is that a crop is pasture and I can't speak for my friend, but my understanding is that he would maintain that the general farming would pick up pasture on the basis that it's general farming, but we would maintain his definition locks him out of being able to rely on that.

35 May it please the commission.

PRESIDENT: All right, I understand what you're saying. Ms Roney, would you want to put something?

MS RONEY: Yes, please. President, as you know we're intervening on this matter, but we'd just like to put our side of the story forward and bring a couple of points of interest to the commission that might help the president make her decision in this matter.

5 Firstly, we'd like to point out that this is an isolated case with Westlake Bulk Fertilising and Spreading and there are many other companies – fertiliser spreading companies – that actually this will affect if the decision is that it is put in the state Farming and Fruit Growing Award.

10 Now that runs extensively into forestry, so therefore we will be crossing over another award as in the Silviculture Award because that actually does cover fertiliser spreading and a lot of our members and a lot of the contractors that are out there working for our members actually do both. They are actually doing forestry fertilising as well as farm fertilising.

PRESIDENT: So what awards cover them in your view?

15 MS RONEY: Well, they have been for quite some time award-free and the Silviculture Award has actually roped-in most of the – I shouldn't roped-in –

PRESIDENT: Yes, I'm familiar with that one.

MS RONEY: - but brought them into the ones that are doing a lot – or the biggest percentage of forestry, but they do still do a lot of farm work. So that's
20 –

PRESIDENT: But the people doing the farm work, you say, are award-free?

MS RONEY: No, no.

PRESIDENT: No?

MS RONEY: They were all award-free -

25 PRESIDENT: Yes.

MS RONEY: - until just recently when the fertilising of the forestry part went into the Silviculture Award.

PRESIDENT: Right. So most of them are now picked up by that award, are they?

30 MS RONEY: Yes. Yes. Now just getting back to the scope, I'd just like to bring to your attention that - I mean at no time does it actually mention fertiliser in here and not all farmers use fertiliser. And the other thing is that in the parties and persons bound it does actually only refer to employers and employees, and again contractors are not picked up.

And if you'd like to go over to the definitions, in Level 1, 2, and 3, there is no mention there of fertiliser at all. I mean it says, growing, pruning, picking, grading, et cetera, but there's no mention there of the fertiliser.

5 The biggest concern I have is that most of these people that are bringing
fertiliser to the property of the farmer, going home, they are part-time truck
drivers as well as fertilisers. We have got no coverage in the award for truck
drivers, and then the other biggest problem that we see is that, are you going to
put pilots so they are covered in this award too. A majority of our fertilising,
10 spraying, is now done by pilots by plane spreading, and if we start bringing
these things into the award, then we are going to paying pilots \$13.84 an hour
to spread fertiliser.

PRESIDENT: ..(inaudible)..

MR FLANAGAN: Won't get many.

PRESIDENT: I don't know whether an aeroplane -

15 MS RONEY: Which isn't going to be appropriate, I don't think. And the
other thing is that again when they're referring to contractors, it gets a bit dicey
there, I mean especially with things like poppies. The companies actually bring
someone in, they plant them, they sow them, they fertilise them, they harvest
them and they do everything and they are not covered by the state Farming and
20 Fruit Growing Award. So they're in a real sense contractors and they are doing
fertilising and that as well and it is part and parcel of their contract.

So, yes, number one, we don't want to go crossing over other awards that are
partially covering although probably not to the best of the ability that these
people are covered. They are covered, a lot of them, by other another award
25 and if the commission could bear in mind that the truck drivers are a sole part –
or a big part. They do a lot of truck driving, these fertilisers, which is actually
what their job is; they pick it up, they deliver it - they're driving a truck. They
bring it to the property; sometimes the farmers spread it themselves, sometimes
they do. So in actual fact, they're sitting there driving a truck while it is
30 spreading out the back of their machine; they're not actually doing anything
else and there are awards that cover truck driving as well and it's not covered in
the state Farming and Fruit Growing Award. So if the commission pleases,
that's what we'd like to present.

PRESIDENT: All right. Thank you. Mr Flanagan?

35 MR FLANAGAN: Thank you, president. Perhaps if I can just seek some
clarification from Ms Roney in relation to that last comment. Does the TFGA
accept that the Transport Award applies to farms? Is that what's being said?

MS RONEY: No, president, we don't. What we're saying is that truck
drivers, if they're on the farm, truck drivers driving the farmer's vehicle, then

that is truck driving within the scope of farming if they're delivering goods and whatever.

PRESIDENT: Well, the TWU is respondent to this award as well.

MS RONEY: Sorry?

5 PRESIDENT: The TWU is a respondent to –

MS RONEY: Is a respondent to this award – yes.

PRESIDENT: Yes.

10 MS RONEY: Yes, that's correct. But what we're saying is, a contractor as in Westlake, is driving – it's part of their job and it is not in the presence of farming – not in the actual duty of farming.

PRESIDENT: So they're truck drivers, not farm employees. Is that what you're saying?

15 MS RONEY: Yes, they're going, they're picking up the fertiliser, they're delivering it, so they're driving there, they're driving back and then they're actually driving and spreading the fertiliser. If you ask the majority of them what they were doing it for, they probably wouldn't be able to tell you. All they know is that they have to spread the fertiliser, so they're actually drivers as such.

20 MR FLANAGAN: Thank you. Perhaps if I can deal firstly with the submissions by Mr Durkin. The first point that he makes is that there is an award which exists in title and scope known as the Fertilisers Award and the scope of that award applies to the manufacture and distribution of fertiliser.

25 Now I think the point was made that there's no rates or conditions of employment within that award and, president, you've asked why. There are in fact – I don't actually have a copy of that award, I have to tell you that.

PRESIDENT: The Fertilisers Award.

MR FLANAGAN: The Fertiliser Award.

PRESIDENT: There wouldn't be much to have would there?

30 MR FLANAGAN: No, not by the sounds of it. But, the process in terms of making an award in the context of the *Industrial Relations Act 1984* is a three stage process. Firstly, the award is established in relation to title and scope. It's the first step. That identifies simply the name and the industry it seeks to regulate.

35 The second step is to identify the parties bound and it's to be noted that there are no parties bound within that award.

The third step is to identify terms and conditions of employment. Now those two second steps clearly haven't occurred but the critical thing is the actual words used within that award, and what Mr Durkin has told us the words are, manufacture, and I don't believe there would be any assertion that the term 'manufacture' is intended to cover the work of spreading fertiliser on a farm or spreading seed mixture which includes fertiliser on a farm. So it's not manufacturing.

The second issue is distribution. That award would have to be considered within the context of the industry and in our view the term 'distribution' does not apply to the work of spreading fertiliser or seed on a farm. It's to be understood that there's two lots of spreading occurring here, if I can call it that – or sowing which is the more traditional term. There's the spreading of fertiliser and there's the spreading of seed mixture. So it's not just the one component which is being spread.

Now spreading is not distribution. Distribution occurs, for example, in the context of Tasmania and in the context of Hobart, when the fertiliser manufactured at the Impact plant at Risdon is transported to their depots throughout the state. Within those depots there are people that receive and handle the fertiliser. Now that, in our view, is what is meant by the word 'distribution'. If it's the transport, receiving, and handling of a fertiliser. Once you go beyond that point and you go on to the farm, you're no longer working within the context of the Fertiliser Award, you're working within the context of the Farming and Fruit Growing Award.

It's not asserted, for example, by the TFGA that the Fertiliser Award applies to persons engaged in fertilising on the farm, if I can call it that, when the farm is a forest. It's been clearly acknowledged that the Silviculture and Afforestation Award applies to fertilising trees in forests. So there is no difference in our view between the situation where you have the Silviculture and Afforestation Award where people doing fertilising on the ground, on the land, are paid under that award as is appropriate and people doing that work on farms are, as is suggested by the employer, covered by some award which deals with distribution.

We're talking about workers spreading in one case fertiliser and in the other case seed mixture on land for the purpose of growth.

Now the relevant expression in the farming community is the word 'sow' and in the extracts of definitions which I have handed up, the supplementary AWU.7 – the single sheet, if I can call it that – has the definition of 'seed' and it says: *Seed – the propagative part of a plant, esp as preserved for growing a new crop . . .*

Now we've recognised that part of the functions which were being performed was the function of spreading seed mixture. That was seed combined with

fertiliser which is then spread on the farm. So consistent with clause 2(a) which defines sowing, it's clearly picked up there.

5 But I think really what's occurring is employers are saying, well, we have these other awards which are out there which should apply. In the case of Mr Durkin, he says, well, the first thing that you have to do is establish a contract of employment. You then look to what regulates that employment and that's true, there's no argument with that. But what he then says is, well, because you have this Fertiliser Award, clearly the Farming and Fruit Growing don't apply, but he hangs his submission on the proposition that distribution is sowing and
10 distribution is not sowing. Sowing is defined in AWU.7 on page 1647 as: *to scatter seed over land, earth, etc., for growth*. That's 1647 at the top. So it's not distribution, it's sowing. Spreading, scattering – it's the same thing. You're sowing it for growth. Whether that growth is for an orange tree or for pasture is not the point. The point is that the activity is sowing and in the context of this award, sowing for a crop you're in, you're covered by the award.
15

Now in the AWU.6 which I provided to you, on the second page if I can take you to the first paragraph and in particular under the heading Federal, the fourth line down, halfway across there it starts with the word 'Finally'.

20 *Finally, the possibility that particular work may fall within the terms of another federal award is not determinative of the construction of the award. It would be wrong to assume that the Australian Conciliation and Arbitration Commission makes awards in some monolithic and systematic fashion so that all awards fit neatly together like the pieces of a jigsaw puzzle. Because employers and employer organisations may be parties to more than one award, overlap may occur from time to time.*
25

Let me say, we don't accept the Fertiliser Award applies but if we did, if we said well, okay, there's another award there, then what we are confronted with is two awards which overlap.

30 Now, Mr Durkin has put it to you that where there is any doubt about an award, then that doubt should be resolved in the employer's benefit, but that's not what the state Act requires.

If you can bear with me for just a moment, president, there's a specific provision within the state Act which is section 53 – and I'm not able to provide you with an extract of it – but section 53 of the state Act says:
35

40 *Where an employee performs 2 or more classes of work to which different awards apply, he shall, in respect of all matters (other than wages rates or piecework rates) in respect of which different provisions are contained in those awards, be deemed to be employed under such of those provisions as confer on him the greatest benefits.*

5 So what that confers on the employee is the greatest benefit. If you were to accept Mr Durkin's submission that there is an overlapping award with Farming and Fruit Growing, and given that the Farming and Fruit Growing has better conditions than the Fertiliser Award because it has none, then under section 53 the employee has the benefit of receiving the conditions of employment under the Farming and Fruit Growing Award.

10 Mr Durkin has also put it to you, president, that if one goes to AWU.7, in particular the definition of 'farming', he says that when you look at that – which is the third page – page 647 – *farming – the business of operating a farm*. That's the first definition. But if one goes down to the fourth definition you'll see, president, that it's also defined as *of, for, or pertaining to farms: farming skills*.

15 So to suggest that by definition the primary part of the definition – the first part which talks about farming excludes this work in our submission is not correct. It is within that part – the primary part of the definition, the work which is being performed. But what he's missed, he says to you well, look, the first part, the primary definition, is the general definition and the second part is the specific definition.

20 Now we've used the term primary definition and secondary definition but what he's missed is two words and they're at the end of the first sentence, and that is that: *without limiting the generality of the foregoing, shall include: . . .* and by virtue of the decision which I've taken you to, by Justice Gray in the federal court, it's clear that the words shall include, ..(inaudible).. So it's not part of the general, it's in addition to the ..(inaudible)..

25 PRESIDENT: Provided you satisfy the first part.

MR FLANAGAN: No.

PRESIDENT: No?

30 MR FLANAGAN: With respect, president, what we're saying is, the first part defines farming as an area which is covered by the award. The definition is then further extended – so additional work is taken on board by the words 'shall include', in particular the word 'include' and that's what comes out of that determination by Justice Gray; that it's in addition to, not dependent upon the first part of the definition. So that there's two distinct groups which are picked up by the scope of the award.

35 He's also suggested – and I think I've taken you to the definition of 'seed' haven't I?

PRESIDENT: Yes.

MR FLANAGAN: Yes. There was some discussion about the application for underpayment of wages but it's really not the matter which is before the commission this afternoon.

5 PRESIDENT: Good. That's the application that's generated this application, is it not?

MR FLANAGAN: It is, yes. But the first thing which needs to be determined is whether or not this award applies to the work in question, that being the spreading of fertiliser and the spreading of seed mixture.

10 If I can then go to the submission put by the TFGA. We've discussed the role of the Silviculture Award and it would be inconsistent to say, as we've said, that the Silviculture Award applies to people spreading fertiliser in forests but the Farming Award doesn't apply to people spreading fertiliser on farms.

15 They've suggested – I think in effect that the people that are not covered by the Silviculture Award are award-free. I think that seems to be the essence of their proposition and we reject that. The Fertiliser Award does not apply to the manufacture, distribution and sowing fertiliser, it only applies to the manufacture and distribution of fertiliser.

20 It was also asserted that there were a number of people out there that are currently award-free, such as poppy contractors. We reject that proposition. If poppy contractors have their own employees, then in our view the terms of the Farming and Fruit Growing Award apply if in fact those persons are not regulated by the federal Pastoral Industry Award.

25 Now, the final point, I think, that was put to you is that if you were to accept our argument that where people spread seed and spread fertiliser, if they're covered by the Farming and Fruit Growing Award, that would mean that other people like truck drivers, but more particularly pilots, would arguably be covered by this award.

30 What we would say, president, is that that may or may not be the case. What would need to be considered is the individual circumstances in the particular situation of the pilot or of the truck driver. It may be that the truck drivers are covered – it may not – but it won't be determined by this application whether that's the case, it will be determined by its own merits in its own circumstances if there was a person in that situation.

35 So what we say, president, is that there is no substance to the objections which are raised by the employer, we simply have a situation here where we have work which is covered by the Farming and Fruit Growing Award and that that determination ought to be made by the commission. If it pleases the commission.

PRESIDENT: All right. Thank you for your submissions, I'll reserve my decision and the commission in this jurisdiction adjourns *sine die* and resumes at 4:30 in the other jurisdiction. Thank you.

HEARING ADJOURNED SINE DIE 4.25pm