AUSCRIPT AUSTRALASIA PTY LTD
ABN 72 110 028 825

Suite 25, Trafalgar Centre 108 Collins St HOBART Tas 7000
Tel:(03) 6224-8284 Fax:(03) 6224-8293

TRANSCRIPT OF PROCEEDINGS

O/N 1815

TASMANIAN INDUSTRIAL COMMISSION

COMMISSIONER T.J. ABEY

T No 11961 of 2005

METALLIFEROUS MINING AND PROCESSING AWARD

Application pursuant to the provisions of section 23(2)(b) of the Industrial Relations Act 1984 by the Australian Workers Union, Tasmania Branch to vary the above award re inserting a new clause in respect to portable long service leave

HOBART

9.30 AM, WEDNESDAY, 1 JUNE 2005

Continued from 15.3.05

HEARING COMMENCED **[9.38am]**

PN28

MR R. FLANAGAN: I appear for the Australian Workers Union, Tasmania branch, and with me is MR MIDSON.

PN29

MR W. FITZGERALD: I appear on behalf of Australian Mines and Metals Association.

PN30

MR M. WATSON: I appear on behalf of the Tasmanian Chamber of Commerce and Industry.

PN31

THE COMMISSIONER: Yes, thank you. Mr Flanagan, what is the position?

PN32

MR FLANAGAN: I think there are two things, Commissioner. Today, the purpose of the hearing is for the parties to put a submission to the Commission about the jurisdiction of the Commission to hear the application and Mr FitzGerald and Mr Watson will put their position first and we then will respond. But prior to doing that I seek leave to amend the application. On the last occasion that the matter was before you, I identified there were a number of errors in the schedule attached to the application, so I would simply seek to tender an amended schedule.

PN33

THE COMMISSIONER: Yes.

PN34

MR FLANAGAN: I have provided a copy of that to - - -

PN35

THE COMMISSIONER: You have no objection, Mr FitzGerald?

PN36

MR FITZGERALD: No, objection, no, sir.

PN37

THE COMMISSIONER: Mr Watson?

PN38

MR WATSON: No, Commissioner.

PN39

THE COMMISSIONER: Yes, leave is granted and the application will be amended accordingly.

PN40

MR FLANAGAN: Now, the fact of the matter is essentially to clarify the position in relation to subclause (b) contributions and also subclause (d) the relationship to the Long Service Leave Act for the Commission. So that is all the

amendment does, so in those circumstances, I will hand the matter over to Mr FitzGerald.

PN41

THE COMMISSIONER: Yes, Mr FitzGerald.

PN42

MR FITZGERALD: Thanks Commissioner. Yes, I will be fairly brief this morning and Mr Watson, who I have spoken with, will also be making some supporting submissions on behalf of employers generally. I think probably the easiest way, Commissioner, is that - I have been attempting for some time to actually get some response to a number of emails which our organisation has sent to the AWU relating to the jurisdiction argument which we put today and we were somewhat frustrated that we didn't receive responses. But we did receive one this morning, late as it may be, from the AWU so I might have to amend my submissions there.

PN43

I have those copies of the emails which I will produce as an exhibit and I have bundled them all together. If I could just leave those for the information of the Commission and ask that the Commission mark those as one exhibit. It is a number of miscellaneous emails and also responses by the AWU.

PN44

THE COMMISSIONER: I will mark those as a bundle of miscellaneous emails and I will mark it AMMA1.

EXHIBIT #AMMA1 BUNDLE OF MISCELLANEOUS EMAILS

PN45

MR FITZGERALD: Thank you. And what I also have, Commissioner, is some written submissions, which I will speak to. I am not going to read laboriously into the record and I will just highlight the major issues and if I can just produce those as well. I think Mr Watson has got a copy.

PN46

THE COMMISSIONER: I will mark this as written submissions and I will mark it AMMA2.

EXHIBIT #AMMA2 WRITTEN SUBMISSIONS

PN47

MR FITZGERALD: Thank you. These will be my submissions, Commissioner, but I just wanted to highlight some responses and also some responses to submissions that I got from the AWU, which I have no doubt will be also produced by the AWU this morning. You know, it is our submission generally as you will see by the written submission at AMMA2, but clearly we believe the

Commission has no grounds to hear this matter on two grounds. Essentially if I could summarise those.

PN48

The first ground being within section 3 of the Industrial Relations Act, the specific jurisdiction of the Commission in respect to an industrial matter is confined, as I am sure you would be aware Commissioner, and it includes those matters relating to long service leave disputes relating to - this is in an industrial matter in A(vi) and it refers to a dispute under the Long Service Leave Act of 1976 or the Public Service Act, the Long Service Leave Act, or State Employees Act of 1994. And as you would be aware, Commissioner, that is the way the Commission has handled this jurisdiction.

PN49

Since the amendment was made in 2000, only matters relating to disputes had come before this Commission and we say clearly that the intent and the expression within the Act is confined - must be read down to be only disputes and not entitlements which is what this application seeks to do. And the second ground which we say clearly this application is ultra vires the Commission - the jurisdiction of the Commission is under section 42, which I quote:

PN50

An award has effect subject to provisions ...(reads)... of the same subject matter.

PN51

You know, it clearly - there is a current obligation on employers in the mining sector as there are with other employers generally under the Long Service Leave Act of 1976. And that is to make accruals in accordance with that Act and, as you know, mining employees are treated more favourably than employees generally where they receive entitlement to long service leave of 13 weeks after 10 years of service rather than 15 years of service. Then we say that even though there is - and even in the submissions received by Mr Flanagan this morning, we say there is a clear conflict between that application and the current obligation.

PN52

Mr Flanagan asserts in his written submissions - no doubt he will speak to those later, that it is not dealing with the same subject matter. We say it is dealing with precisely the same subject matter and what it does effectively is convert an obligation on employers in the mining sector to accrue long service leave in accordance with the Long Service Leave Act of 1976 into an obligation to make payments into a scheme similar to the Tasbuild fund in the building industry. Now, we say that changes the obligation substantially.

PN53

Under the current obligation, an actual obligation doesn't realise until an employee reaches the 10 years or there is a five year period of service with those conditions relating to eligibility based on medical and domestic and other grounds and clearly that is a change. So that is the basis, the two grounds which we say the Commission makes jurisdiction on. I didn't want to go too much into the emails but we did receive a response this morning and I will go to that in a

minute. It may in fact be useful if that were submitted at this point because I will be referring to it, if Mr Flanagan is happy with that.

PN54

MR FLANAGAN: That is fine.

PN55

MR FITZGERALD: If Mr Flanagan could produce those submissions at this point that would be handy, I think.

PN56

THE COMMISSIONER: These are your submissions, Mr Flanagan, are they?

PN57

MR FLANAGAN: Part of them, Commissioner, I should also tender a copy of correspondence that the union provided to Mr FitzGerald.

PN58

MR FITZGERALD: It is already tendered, I think.

PN59

MR FLANAGAN: I don't think it is, it is a letter from - - -

PN60

MR FITZGERALD: Yes, yes it is in.

PN61

MR FLANAGAN: It is already in.

PN62

THE COMMISSIONER: I will call it AWU submissions and identified as AWU1.

EXHIBIT #AWU1 AWU SUBMISSIONS

PN63

MR FITZGERALD: Thank you, Commissioner. Look, I will just continue and I will be brief. It is significant that Mr Watson from the TCCI is supporting our position here today and clearly that can't be understated in that, you know, this application has obviously - if it were successful, has obviously implications for employers generally. And I think it is appropriate that Mr Watson present clear evidence arriving from the changes which were made in 2000 where the proscription relating to long service leave was removed and the provision in respect of the industrial matter - and the specific definition of industrial matter being confined to a dispute was introduced to allow matters of this kind to come before the Commission.

PN64

And no doubt you will recall, Commissioner, and I am sure the correspondence when it is produced will refresh your memory, but the Chamber of Commerce was heavily involved at that time and also the Legislative Council Select Committee - and there is a report from that Committee which Mr Watson will

also be produced and which, in fact, further reinforces our argument that the jurisdiction is specifically in respect to disputes only and specifically not in respect to entitlements.

PN65

I thought it was appropriate that Mr Watson produce that given he represents that organisation and I didn't want to interfere there, so that will come very shortly. You will recall, no doubt, Commissioner, that prior to the 2000 amendments, matters of long service leave disputes came to this Commission not via this current Act, the Industrial Relations Act of 1984, but by the Long Service Leave Act of 1976, and it was only Workplace Standards - although it may not have been called that at that time - Workplace Standards Tasmania who could bring those matters to the Commission but that was via the Long Service Leave Act of 1976.

PN66

So what actually happened is that, you know, the Government in their wisdom felt it was appropriate that matters of this kind can be brought by applicant parties and those representing applicant parties and as a result the Act was changed to remove that proscription but to include instead a provision relating to the Definition of Industrial Matter (vi), which clearly confines it to a dispute. Now, in using the legal principle of the specific overriding the general, we say that, unlike what Mr Flanagan says, and Mr Flanagan will say, and I will leave it for him to say, that the definition of industrial matter under the Act is one which means:

PN67

> *A matter pertaining to the relations of employers and employees and without limiting the generality of the quality includes.*

PN68

And he is saying that that preamble, in fact, allows the Commission to make - to allow this application to proceed without any jurisdictional bar. We say the specific - the legal principle of the specific overriding the general, we say that the specific jurisdiction in respect of long service leave is to find in (vi) which clearly refers to dispute only and therefore the issue of an entitlement which this application seeks to bring into this award which is one which is ultra vires to the jurisdiction of the Commission.

PN69

We understand that the reason why this matter has come to the Commission is that the AWU, and our organisations also being involved in this, have unsuccessfully lobbied the State Government to make some legislative changes along the same lines to impose obligations on the mining contractors. And again I don't make any mention of that too specifically here today because the issues here today are jurisdiction not merit, but it is a very messy process of just confining it to contractors, but we understand that the union have been unsuccessful in their attempts to lobby the Government and as a result have brought it to the Commission now.

PN70

We have been frustrated up until now to really ascertain the true position of the AWU in respect of this jurisdiction argument but we have got some today which we will respond to. But we really do put it in the frivolous category and we say it is a waste of the parties resources to have to respond to an application of this course, which in our view is self-evident. I didn't want to repeat too much the argument of section 42, but if the Commission did find jurisdiction and proceed to make an award in the terms of the application, the award would have absolutely no effect whatsoever, because as section 42 says:

PN71

It has got to be subject to any prevailing legislation.

PN72

And that is why, I think, the first of its kind - this application is the first of its kind. I have never seen in my experience - my 20-odd years experience, and I suppose it is more relevant in respect of the changes which were made in 2000, but the only matters which I am aware of and I can stand to be corrected, both in the public and private sector, Commissioner, are matters relating to disputes and those specific matters. And it is specifically defined in the Act relating to the entitlement of long service leave or payment instead of any such leave or the rate of orderly pay in which any such leave or payment is paid in respect of the employer or former employee.

PN73

And that is customarily the only matters which the Commission has handled, so I am unaware of any application. And I think the reason for that is self-evident, is the parties generally recognise that the Commission hasn't got jurisdiction to hear applications in respect to entitlements.

PN74

THE COMMISSIONER: It is not unusual, Mr FitzGerald, for the Commission to ratify agreements whether they be section 55 or Part IVA, which contain provisions relating to long service leave generally more favourable than the legislation. On your submission that would be beyond jurisdiction, is that right?

PN75

MR FITZGERALD: I will just think about that for a moment. Yes it would be, Commissioner, but I am aware of that and I suppose it is the Commission's practice which is their choice to do so, but unless any submissions are made by the parties - I mean, obviously they are consent matters and it is likely that those consent matters are to be endorsed by the Commission. In this case, clearly, we have a non-consent position.

PN76

And I am also aware of the provisions which I don't think really make - have any great legal effect where they simply restate that the provisions are under the Long Service Leave Act of 1976. Now, in accordance with section 42 that, in my view, is self-evident. I think that is absolutely unnecessary that some parties - I suppose, really just for the issue of fullness and completeness and a comprehensive statement to - so employees and employers are aware of their obligations, that is probably the reasons why they do that. But in strict legal

terms we would say, Commissioner, that the Commission really hasn't got the jurisdiction to endorse those - even though they may have done so in the past, to endorse those sorts of clauses.

PN77

I hope I haven't thrown the cat amongst the pigeons there but in any event I would have thought that in terms of enforceability, even though they may be unenforceable within this jurisdiction, there probably exists some common law enforceability of those provisions if it does present as terms and conditions on behalf of employees. The AWU have presented submissions here this morning and I will just refer - and look, I have only had a very brief time to respond and to absorb the context of these submissions. I received them, I think, at about a quarter to nine this morning, but nevertheless they are fairly brief and I think I was able to get to grips with them.

PN78

The argument which they put forward on the third page of their document and they refer to the High Court case in the Manufacturing Grocers case in respect to superannuation, I think - now what we would simply say is that it is simply not relevant to these circumstances, that case. We are talking about specific legislation which refers to an industrial matter and a specific reference to a dispute only. And also in the context of section 42 we see that as completely irrelevant.

PN79

So we really don't see the relevance of that case in the terms of these proceedings and the jurisdictional issue which we are raising today. Then they go on to say that section 42 - and I think they are just plainly wrong here. In point 1 under 42:

PN80

> *The union submits that as a benefit conferred on the employee arises from the operation of the fund (Manufacturing Grocers case) there is no conflict between the proposed variation to the award and any other Act of Parliament.*

PN81

Now, in our view that is just simply wrong. There is a clear and inescapable conflict between this application and the current obligations existing under the award. And I just repeat that, it changes the obligations which are on employers if the application was successful from one of accruing, which is currently under the current Long Service Leave Act, to one where a payment is made into a fund, in similar terms to the building industry and that is quite clearly a conflict, a different obligation and I think it is very trite for the union to say it is the same obligation, it is not.

PN82

It may equate to the same obligations in dollar terms. We heard from Mr Flanagan this morning just before the hearing, that the contribution - the amendment to the application related to, now a 2 per cent contribution and that equates to the mining industry obligation of 13 weeks after 10 years of service. But that again, as I say, translates into an actual obligation of payment where

those obligations don't exist at the moment. So clearly we say that, in respect of this application - and he also says under (a) - 2(a) that:

PN83

The Long Service Leave Act is not an exclusive code and recognises other schemes may operate.

PN84

Clearly, again that is simply wrong as well. The Long Service Leave Act of 1976 which covers employers in the private sector generally and specifically those in the mining sector, is an exclusive code. The long service leave under the construction industry regime is one which exists under a different piece of legislation, so it is wrong for Mr Flanagan to say that the long service leave is not an exclusive code. Clearly it is, it is one which is an exclusive code binding on employers and by their operation of section 42 the Commission simply can't proceed to hear it. Now, Commissioner, for all these reasons we ask that the Commission do not allow jurisdiction in the first instance and that would be in accordance with section 21(c)(iv), we urge the Commission to dismiss the matter for one of jurisdiction. If the Commission pleases.

PN85

THE COMMISSIONER: Yes, thank you, Mr FitzGerald. Mr Watson.

PN86

MR WATSON: Thank you, Commissioner. I will start by tabling three exhibits if I can, please.

PN87

THE COMMISSIONER: I will mark the correspondence from the Honourable Peter Patmore to the former chief executive of the TCCI as TCCI1.

EXHIBIT #TCCI1 CORRESPONDENCE FROM THE HON. PETER PATMORE TO THE FORMER CHIEF EXECUTIVE OF THE TCCI

PN88

THE COMMISSIONER: The report of the Legislative Council Select Committee will be TCCI2.

EXHIBIT #TCCI2 REPORT OF THE LEGISLATIVE COUNCIL SELECT COMMITTEE

PN89

THE COMMISSIONER: And the third document is an extract from - what is it an extract from, Mr Watson?

PN90

MR WATSON: The two pages there, Commissioner, the first page which it has up the top of it subclause (a), that has arisen, that is an extract from the Industrial

Relations Act prior to the amendment and the second page is the current provision.

PN91

THE COMMISSIONER: Right. I will mark that - we will call that extract from the Industrial Relations Act and it will be TCCI3.

EXHIBIT #TCCI3 EXTRACT FROM THE INDUSTRIAL RELATIONS ACT

PN92

MR WATSON: Thank you, Commissioner. First of all I would indicate that we would support the submissions of Mr FitzGerald, particularly the matters relating to the jurisdiction of the Commission relating to this particular application and specifically in relation to the submissions by Mr FitzGerald about the submissions from the AWU. I was actually provided with a copy of those this morning as well, probably a bit later than Mr FitzGerald, but for the purposes of expediency I don't believe that I would need to take further time to make submissions, simply support what Mr FitzGerald has said.

PN93

In relation to the first letter that I have tabled there, Commissioner, to the previous chief executive of the TCCI, if I can take you to the very first page of the letter - or sorry, the attachment. Now, the purpose of this letter was for the minister to, I suppose, continue the consultation process and advise in four organisations about the intent of the legislation. And that is why, if you have a look at the first page there, he has actually put in place what they intended to do. I mean, he has actually got "explanation" which is, I suppose, a bit of a layman's term explaining what the legislation was meant to do. So if you have a look down at the bottom half of the page, it has got there under the Amendments for Interpretation Subclause (b), and I will just read this in the transcript:

PN94

> *In subsection (1), amend the definition of industrial matter by inserting ...(reads)... and further amend the definition by deleting paragraph (d).*

PN95

Now, he goes on further to say, under the heading of "explanation", and this is the critical point in our view:

PN96

> *The purpose of these amendments is to enable ...(reads)... State Employer's Act 1994 and to the regulations.*

PN97

So, Commissioner, we say that clearly the minister, in promoting this legislation in his explanation there, was making a clear statement that the purpose of the amendment was to allow applications to come directly to the Commission as opposed to the previous situation where they would actually have to go through

the Workplace Standards Authority or the Secretary for Labour or however it was - whatever the terminology was at that time.

PN98

Now, if I can now take you to the Legislative Council report which is document TCCI2. Now what happened, Commissioner, was that, when the legislation was first tabled in the Upper House, the matter went off to a select committee to inquire and to investigate the legislation and to make a report to the Parliament and this is the document that came out of that legislative select committee. If I can take you to the first - I haven't actually attached the full report but the first page in the attachment is page 4 of that report. If I can take you down to the bottom of the page there under the heading Chapter 4, and just read into transcript the relevant passage there. It says, 4.1:

PN99

The amendment proposed by clause 15(b) be agreed to ...(reads)... in respect of the former employee.

PN100

And then if I can take you over the page, Commissioner, which is page 12 of the report and the Committee says at 2.6, and I quote:

PN101

The Committee agrees that a dispute relating to long service leave ...(reads)... be considered as an industrial matter.

PN102

The majority of evidence supported this amendment. Now, Commissioner, what happened after that was that that report was considered by the Government and their legislation was taken through the Lower House again and if I can take you to TCCI3, which is the exhibit of the Act prior to the amendment. Clearly, it said on that first page there:

PN103

That the entitlement to the granting of any amount ...(reads)... was not an industrial matter.

PN104

Then if we go to the second page, which is the current provision which I think you have been taken to already today, and I won't bother reading that but it is subclause (vi) and clearly the new subclause in the Act now is consistent with the minister's letter of 1999 as to his intent and it is also consistent with the Legislative Council Select Committee report in relation to what they had recommended in their report.

PN105

So I think, Commissioner, from our point of view it is very clear that the intention of the legislative amendment was to allow disputes to come directly to the Commission, nothing more than that. It is, in our view - I am sorry, I don't believe that there have been applications like this to the Commission prior to this particular application. Certainly, your comments about enterprise agreements, there have been enterprise agreements that have come to the Commission with long service leave provisions in them, but I think - I am fairly sure about this and

I will put this on the record, but I can recall Deputy President Watling actually saying, and I am sure it was actually in a hearing, that he was prepared to approve the agreement, but he made the comment that the long service leave provision was not actually enforceable. So it would only stand based on the good faith of parties to the agreement.

PN106

As far as Part IVA agreements are concerned, they are not necessarily confined to industrial matters so therefore we would say that there would be no bar to actually putting long service leave in a Part IVA agreement, but also make the comment that we are talking about consent arrangements for parties to agreements. A couple of other comments - - -

PN107

THE COMMISSIONER: That is a merit argument isn't it, rather than a jurisdictional argument?

PN108

MR WATSON: Well, I guess it is a merit argument to a certain extent, Commissioner, but I am just painting the picture of what you had raised before about the Commission with agreements and just making those distinctions between the two types.

PN109

THE COMMISSIONER: Thank you.

PN110

MR WATSON: In relation to section 42 of the Act, I would certainly support the submissions of Mr FitzGerald that if the award were to be varied in relation to what Mr Flanagan is asking for, the question would be, well, what effect did it actually have given that the Act would override the award in any case. Now, I am not going to make extensive submissions on that particular matter, but the Act is very clear - the Industrial Relations Act, that any Act of Parliament overrides the award dealing with the same subject matter, and I believe that the Long Service Leave Act is fairly all encompassing and certainly would override the award provision.

PN111

Just as a comment, it is interesting the absence of TTLC today. This clearly is an issue that I thought they would have had an interest in, so I am making no further comment other than that. I haven't discussed the matter with the TTLC but I just put that on the record for what it is worth. Commissioner, from our point of view in summary, as I have said, we support the submissions of Mr FitzGerald. We believe that we have tabled evidence to the extent that the legislation was only meant to be a dispute in relation to long service leave and certainly the form over the years has been that that is the case and that is the way the Commission has dealt with these matters, and we would ask that you dismiss the matter under section 21 for one of jurisdiction. If it pleases.

PN112

THE COMMISSIONER: Mr Watson, section 42, does that say, in your submission, that the Act prevails over an award to the extent of any inconsistency?

PN113

MR WATSON: Yes, that would be our submission, Commissioner, yes, that - yes, certainly. But we are talking about any Act of Parliament as opposed to simply the Industrial Relations Act, that would only be one of them, but things like Workers Comp Act, etcetera, etcetera.

PN114

THE COMMISSIONER: Yes, thanks Mr Watson. Mr Flanagan.

PN115

MR FLANAGAN: Thank you, Commissioner. Commissioner, you have been provided with - I think we have marked it AWU1, which outlines the basis on which the union says there is jurisdiction for the Commission to hear it. And it simply relies upon applying the ordinary meaning of the words used by the legislation having regard for what those words have been found to mean. Now, if you start with section 32, it very clearly says:

PN116

An award under this Act may contain provisions with respect to any industrial matter.

PN117

If we have a look at what an "award" means:

PN118

An award includes a variation of an award.

PN119

This is a variation of an award and satisfies that criteria. If you look down to the definition of "industrial matter" and this appears to be something that the employers rely upon. But what we say is that if you look to the definition of "industrial matter", and in particular the word they say means "any matter pertaining to the relations of employers and employees," this is a very broad jurisdiction which is conferred on the Commission. So broad, in fact, that the removal of the previous proscription as to long service leave, the prohibition on the Commission to consider that, so broad are the words "matters pertaining to the relations of employers and employees" that in fact the Commission is well within the jurisdiction to consider and approve industrial agreements which have within them provisions relating to long service leave, well within jurisdiction.

PN120

And in fact what we say as you will see in our submissions, that on page 3 we take the Commission to the Manufacturing Grocers case, now, I will provide the Commission with a copy of that, the Federated Clerks case and also a decision of this Commission, as presently constituted, which has recognised the broad nature of the definition of industrial matter. I will just relay to you a copy of those.

PN121

THE COMMISSIONER: Thank you. I won't mark these as exhibits as it is a decision of these Tribunals.

PN122

MR FLANAGAN: Now, the starting point of our submissions is - one, is the obligation of the Commission when it considers the application of the Act and words that are used within the Act. And what we say is that the recognised principle is the words must be given their clear and ordinary meaning and that you don't look to extrinsic material such as that which Mr Watson has taken you to, unless there is some ambiguity or vagueness in what was intended and that ambiguity and vagueness is ascertained by looking at the words which are used.

PN123

Now the words, "means any matter pertaining to a relationship of any employers and employees," as I said it was considered in both the Manufacturing Grocers case and the Federated Clerks case. Now, I have taken the Commission to the Federated Clerks case before and you would be familiar with the broad interpretation which has been placed on those words. In terms of the Manufacturing Grocers case, that also is a decision of the Full Court of the High Court of Australia. It also affirmed the very broad nature of the words pertaining to the relationships of the employer and employee.

PN124

The Manufacturing Grocers case has a specific relevance in these proceedings in that the matters which were considered by the High Court at that time are analogous to the issue which is before you at the moment. And fundamentally, as detailed in our written submissions, this is an application to provide a requirement on an employer, a certain class of employer to make payments into a fund on behalf of a certain class of employees, that is what this is an application about.

PN125

Now, in the case of the Manufacturing Grocers, I intend to take you to that decision. I think the starting point is on page 351, if I can take you to paragraph (d) on the left-hand side, the Court there says:

PN126

The words pertaining to, in the definition of industrial matters ...(reads)... refers to the relation of an employer as such with an employee as such.

PN127

And then there are a number of authorities which are quoted. And then further down that paragraph, the Court says:

PN128

For present purposes, it is sufficient to say ...(reads)... capable of being subject to an industrial dispute.

PN129

Well, it then goes on to

PN130

And that is sufficient for present purposes ...(reads)... for that reason are beyond power of the Commission.

PN131

So the Full Court has very clearly identified there what the words mean that are actually used in our State Act, albeit at the time they were words which were used under the then Conciliation and Arbitration Act of 1904, as I understand it.

PN132

Now, the second aspect of this decision which is relevant is on page 352, the following page, and what the Full Court says, if I can take you to it, to the first paragraph and the sixth line - the seventh line down, it says:

PN133

It is because the claims are in this limited form ...(reads)... that the claims have been made in a more elaborate form.

PN134

So what the High Court was talking about there was actual form of the application which was before it. And the form of the application which was before the High Court in this matter is identical to the form of the application which is before you today. The only thing which distinguishes it is, in that case it was in respect of superannuation, payment was made into a fund, administered by trustees for the purposes of superannuation, this is payment into a fund which is also administered by a trustee.

PN135

You know, the Court continued:

PN136

It may be observed generally that superannuation benefits are commonly regarded ...(reads)... although this will be a less important consideration if the benefits are portable.

PN137

So again, superannuation, like the provision which is before the Commission at the moment, is a portable benefit and if I take you to the third - to another part of the decision. It is on the right-hand side of this page 352 and it is four lines above paragraph (c). If you can find that spot, Commissioner.

PN138

THE COMMISSIONER: Those payments - - -

PN139

MR FLANAGAN: Those payments, that is right.

PN140

Those payments do not cease to be a remuneration ...(reads)... and the relationship has ended.

PN141

Now, in the case of the application which is before you, the relationship may not have ended but we say on a hearing of the evidence, in substantially the majority

of circumstances the relationship would have ended. But that is an issue for merit but I think it is normally a role for consideration in the context of these proceedings. The Full Court then continued on, at the bottom of the third-last sentence in this decision:

PN142

There is no reason why those payments should be seen in any other way ...(reads)... for the benefit of the employee.

PN143

And that is the nature and character of the application which is before you today. And then finally, in the context of this decision, further down the page on that page, at the end of paragraph (c), three lines up from paragraph (d), if I can put it that way, if you can find that spot.

PN144

THE COMMISSIONER: Yes.

PN145

MR FLANAGAN: It starts, under the claims made. Do you have that Commissioner?

THE COMMISSIONER: Are we still on page 352?

PN146

MR FLANAGAN: No, sorry, turn the page to page 353, I would presume. Anyway, it is the last page that is there actually, am I right?

PN147

THE COMMISSIONER: Yes.

PN148

MR FLANAGAN: Then the second paragraph on the page.

PN149

THE COMMISSIONER: Yes.

PN150

MR FLANAGAN: And three lines up from paragraph (d).

PN151

THE COMMISSIONER: Yes.

PN152

MR FLANAGAN: It starts:

PN153

Under the claim that was made, the entitlement of employees to the benefit ...(reads)... will not be required to extend beyond the time allowed by the Act.

PN154

Now, the point here is twofold. One, in this particular case there had been an argument by the employers that the award itself created an obligation and an

obligation which extended beyond the life of an award. In the context of this legislation an award was limited by life to a period of five years, although it continued after that. Now, we say firstly that what means and it has been considered by the High Court, is it is not the award that actually bestows the benefit on the employee it is actually the fund that the contributions are made - being made to. So the obligation the award creates is to be the contribution.

PN155

So the nature of what the award proposes to be is not in conflict with the Long Service Leave Act so - this is all about section 42 of course. What we say is, in fact, the award will have no inconsistency with the Long Service Leave Act at all. So the Manufacturing Grocers case is very much an authority, we would submit, that the application which is before you is an industrial matter for the purposes of the Act. Now, in terms of - you will see in our written submissions, on the issue of section 42, we have submitted as I have just outlined the nature and character of the benefit which is bestowed by the application.

PN156

So in the context of jurisdiction - and being asked to consider jurisdiction here not merit - in the context of jurisdiction, what we say to you is that the form of the application which is before you is an industrial matter for the purposes of the Act on a clear and ordinary reading of the Act and that is what applies having regard to the High Court authorities about what those words mean. That being the case, you don't then go to extrinsic material which purports to illuminate the intent of the Government at the time. Indeed, ordinarily, if extrinsic material is looked to by the Commissioners and what they will look to is not the type of material which is before you today but rather the second reading speech of the minister and I think it is worth noting that the employers have not sought to rely on that second reading speech.

PN157

So the bottom line is, the extrinsic material which is before you should be given very little weight. The real issue is what the words say, what do they mean, and as a consequence of reading those words and understanding their meaning, does that mean the Commission has jurisdiction to hear the application? So in terms of section 42 and there seems to be greater reliance by both Mr FitzGerald and Mr Watson on the fact that section 42 operates in some way to bar the proposed variation and it bars it, as I understand it, because they say, "Look, the nature of the obligation which is imposed by the award is directly inconsistent with the Long Service Leave Act, therefore the Long Service Leave Act will prevail and therefore the proposed form of variation to the award can have no application." That essentially seems to be the argument by the employer.

PN158

But what we say, and I know we have said it already, is that the form of the variation that we set to make is not in direct conflict with the Long Service Leave Act. Because there is no direct conflict between the award and the Act then the award provision will have application, and the award provision is simply a requirement to pay a contribution to a fund.

PN159

THE COMMISSIONER: Yes. Well, I don't want to interrupt your flow but I do have some questions to ask about the practical effect of the application. It is headed up Portable Long Service Leave.

PN160

MR FLANAGAN: Yes, that is right.

PN161

THE COMMISSIONER: As I see it, the application if granted would require employers to make contributions into a fund known as Tasbuild?

PN162

MR FLANAGAN: Some employers, yes that is right. But the only employers that would be compelled to make a contribution to the fund would be employers who are not the owners of the site at which the employees are engaged. Now, in a practical sense what that means is contractors.

PN163

THE COMMISSIONER: Yes.

PN164

MR FLANAGAN: That is what it means.

PN165

THE COMMISSIONER: Okay. So they are required to make contributions into Tasbuild?

PN166

MR FLANAGAN: Yes.

PN167

THE COMMISSIONER: What follows from that?

PN168

MR FLANAGAN: Tasbuild and - the union has had lengthy discussions with Tasbuild about this, Tasbuild's articles and Mr Watson may in fact be able to assist you in that, I understand he is currently a director of Tasbuild and I understand the Commissioner has had some previous experience with Tasbuild. But my understanding is the fund itself, which is established principally for the purposes of providing portable long service leave to employees in the building and construction industry, has a facility within its governance arrangements to establish a separate fund, a sub-fund if you like, into which contributions made on behalf of Metalliferous Mining Industry employees would be made.

PN169

That fund would sit separately to and be administered separately to the arrangements which are in place with the building and construction industry. And indeed the rules of access to that fund, the level of contributions to that fund would, in all probability, be amended to reflect the arrangements which are in place for long service leave amendment if it was mining.

PN170

So rather than portability being crystallised at seven years, as is the case with the building and construction industry, it will be five years in the case of the Metalliferous Mining. Rather than the contribution being, I think it is currently .7 per cent on behalf of employers and that arises because of the development over a number of years of surplus which is in fact reduced at the cost to that industry of long service leave, the contribution in the context of these employees made by the employer will be 2 per cent to reflect the different standard of 10 weeks after 13 years rather than 10 weeks after 15 years.

PN171

So in a practical sense, the obligation - the administration of the contributions would be done by way of deed of a separate fund which has been established, that is one component of it. The other practical component, and it is very important, is actually contained within AMMA1 and I need to take you to that, Commissioner. And it is correspondence by the union to Mr FitzGerald dated 13 May. Now, the relevance in terms of the practical application of the proposal which is before you is actually dealt with on the second page of the union's correspondence and what it talks about there specifically is the exemptions which are available to employers who have in place alternative long service leave arrangements. Now, we actually rely on the entirety of that correspondence to rebut the propositions that the employers have made in terms of section 42.

PN172

THE COMMISSIONER: Yes, I guess it may become clearer for me when I have had the opportunity to read this - - -

PN173

MR FLANAGAN: Yes.

PN174

THE COMMISSIONER: - - - correspondence and your full written submissions but it strikes me at the moment that the application as it is currently framed imposes an obligation on certain employers to make contributions into a fund known as Tasbuild - - -

PN175

MR FLANAGAN: Yes.

PN176

THE COMMISSIONER: - - - but it doesn't do anything else.

PN177

MR FLANAGAN: That is correct. Because what happens is the right to the benefits which arise in relation to a particular employee are determined by a trustee rather than any other authorities.

PN178

THE COMMISSIONER: So for the intent of your application to have full effect it would rely on further changes to the Tasbuild legislation - - -

PN179

MR FLANAGAN: No, not at all.

PN180

MR FLANAGAN: - - - and the Tasbuild trustee.

PN181

MR FLANAGAN: No. In fact what has happened is the union in consultation - or Tasbuild in consultation with the union, have drafted a deed for the Metalliferous Mining industry. Obviously it will only take effect if the award application is successful. So that it requires no amendment to the Act at all - - -

PN182

THE COMMISSIONER: No.

PN183

MR FLANAGAN: - - - and that process is one which has been put together by Tasbuild following advice from their people about how it should be approached.

PN184

THE COMMISSIONER: Right. So - and I don't want to get into the merit argument - - -

PN185

MR FLANAGAN: No.

PN186

THE COMMISSIONER: - - - but is it the intent of your application, if it is successful and anything that flows from that, is that employees of contractors would be on the same footing as employees of building contractors insofar as service in the Mining and Metalliferous industry is released?

PN187

MR FLANAGAN: Yes, that is the intention, Commissioner.

PN188

THE COMMISSIONER: So the contribution would be made on their behalf - - -

PN189

MR FLANAGAN: Yes.

PN190

THE COMMISSIONER: - - - and when they had accumulated the required amount of time in the industry, notwithstanding that it may be with several employers, then an entitlement would crystallise at that point, is that the intent?

PN191

MR FLANAGAN: That is the intent.

PN192

THE COMMISSIONER: Right. Okay. I am sorry, thank you.

PN193

MR FLANAGAN: No, no. So what we say in summary, Commissioner, is in the context of an error, that is something you would have to hear, you would need to identify whether there are circumstances which give rise to the necessity for

such provision. We say there are but we don't say that that is something that we will put to you today.

PN194

THE COMMISSIONER: No.

PN195

MR FLANAGAN: The question which arises from today is not whether there is merit to the application, it is whether as a matter of fact the legislation provides you with the jurisdiction and we say it does. And it has done so since that point in time when Parliament removed the previous prohibition and it was a general prohibition on the Commission that - and Mr Watson has taken this up and if I could take you to his exhibit which is TCCI3, the general prohibition was the entitlement to the granting of and the amount of payment in respect of long service leave, that was the prohibition, it was an all-encompassing prohibition.

PN196

Now the all-encompassing prohibition has been removed. In its place Parliament has taken great steps to specify that they wanted disputes in particular to be dealt with by this Commission by way of access of employees, that was one aspect of what they did. As was indicated, previously the only access to the Commission for a dispute related to long service leave was, in fact, by reference by Workplace Standards. So Parliament wanted to make it very clear that it no longer wanted that to be the only access to the Commission.

PN197

The other effect of what Parliament has done, and we say deliberately, is to give the Commission the capacity to consider the issue of long service leave generally to approve industrial agreements which provide for greater benefit than what the Act provides. And that is the effect of what the Parliament has done and the way that that is established is by a simple reading of the Act. Now that capacity has been there since the amendments were made in 2000. Now, the fact that no other organisation has sought to make an application of the nature of the one which is before you is, in our view, irrelevant.

PN198

The fact that there are no other unions or the Tasmanian Trades and Labour Council present is, in our submission, irrelevant. This is an application by the principal union in the metalliferous mining industry to advance the interest of employees in that industry, nothing more than that. The AWU is not an affiliate of the Tasmanian Trades and Labour Council, the AWU has not sought or requested the assistance of the Tasmanian Trades and Labour Council in these proceedings.

PN199

So we say that is also an irrelevant consideration and frankly, the suggestion that has been put to you by Mr Watson or and, indeed, by Mr FitzGerald - well, I think that - the proposition from Mr FitzGerald, as is usually the case, is that the application which is before you is in some way going to affect the industrial relations community in some broad sense if the Commission finds that there is jurisdiction. Well, we say - and indeed that position is supported by Mr Watson, we say that assertion again is an irrelevant consideration.

PN200

Firstly we say that in a practical sense it is not true because of all that, but in a real sense what is relevant is not whether there is a capacity to affect other industries because there is jurisdiction, and the issue is whether the jurisdiction is there or not. Now if there is jurisdiction and other industries believe that their circumstances are such as to necessitate a similar application, then those organisations will need to demonstrate on the merits to this Commission, whether or not such an application should be granted in the context of those industries. So it doesn't have this message, this significant impact, we submit, on industry generally, not at all.

PN201

Now, Mr FitzGerald also said that in response to the AWUs written submissions which are tendered as AWU1 and under the heading Section 42,the AWU says that long service leave is not an exclusive code and recognises other schemes may operate. Mr FitzGerald says that is not correct, the Long Service Leave Act is an exclusive code for the purposes - or for the reasons identified in our correspondence of April, you will see that, in fact, the Long Service Leave Act recognises other schemes may be in place. The Commission has approved in industrial agreements benefits in relation to long service leave which are more generous than the Act and in those circumstances it is clear that the Long Service Leave Act is not an exclusive code.

PN202

THE COMMISSIONER: By the same token, to my knowledge, the jurisdiction hasn't been challenged before in any of those agreement issues.

PN203

MR FLANAGAN: No, that is correct. I can think of one employer in this State, which engages 600 people, which is party to a section 55 agreement with the AWU which has a long service leave arrangement within it which is more generous than the Act. The effect of this is that employees can access their long service leave in any circumstances after 10 years rather than 15. So it is clearly not - what we would say is, the fact that the Commission has adopted the practice of registering the agreements which provide for long service leave clearly signals that there was a recognition when the Act changed in 2000 that the consequences, in the context of what an industrial matter is. It was clearly recognised by the Commission, by its practice.

PN204

Okay. And the other thing, the final point which is a point made by Mr Watson was in relation to section 42 and his assertion is essentially that an Act prevails over an award to the extent of an inconsistency. Now, as a matter of law, that is correct but that is not what section 42 says, subject - section 42 is expressed for an award to operate subject to provisions of another Act. Now, we say to you that the form of the variation that we are seeking is not subject to any other Act at all, and section 42 is therefore not an issue. If it pleases the Commission.

PN205

MR FLANAGAN: What do those words mean?

PN206

MR FLANAGAN: Well, if we required or had an award provision which said, long service leave will accrue at the rate of 13 weeks for every five years of service then we would have a problem, because that provision would be clearly in conflict with an Act of Parliament which says it accrues after 15 years service, there is a clear conflict. If we put a provision in the award that said we will have accident make-up pay, notwithstanding that it is prohibited under the definition of industrial matter, if we did and there was a conflict between that provision and the Workers Compensation Act, then it would have significance.

PN207

But in the context of this application, it has no significance because we are not creating an obligation which is in conflict with an Act of Parliament, we are creating a new obligation for contribution to a fund, that is what we are seeking to create. And that is an obligation the Commission has jurisdiction to hear that merit on. If it pleases the Commission.

PN208

THE COMMISSIONER: Mr FitzGerald or Mr Watson, as I understand the Acts Interpretation Act, it is only permissible to go to what I think they call extrinsic material when there is ambiguity as to what the words might mean.

PN209

MR FITZGERALD: Yes.

PN210

THE COMMISSIONER: Am I right on that?

PN211

MR FITZGERALD: I think you are right on that, Commissioner.

PN212

THE COMMISSIONER: I believe I am.

PN213

MR FITZGERALD: Yes.

PN214

THE COMMISSIONER: And if so, can you point me to the ambiguity?

PN215

MR FITZGERALD: The ambiguity between what the award - the application seeks - - -

PN216

THE COMMISSIONER: Well, the ambiguity on the actual words in the Act, where - what is the ambiguity in the definition of an industrial matter which means that I should go to the material that Mr Watson has relied upon, that is the Legislative Council Select Committee and the background notes that are provided by the minister at the time.

PN217

MR FITZGERALD: Yes, I would probably like just to confer with Mr Watson about that before we respond. Mr Watson will probably respond rather than myself.

PN218

MR WATSON: Perhaps if I can, Commissioner, given that I have tabled the documents. I suppose we would say that - and I would agree with you that the ambiguity issue is exactly as you put it. I suppose the first thing is that we have - firstly we have a disagreement between the parties as to what the words mean, so I suppose that gives ambiguity some status in the first place. But secondly, I think that the fact that - and that is why I have tabled the Act prior to the amendment and as the amendment is now - it is, in our view, slightly, there is some ambiguity there because of the fact that they took the matter out of what was not to have been an industrial matter before the Act was amended and have now put it in the positive, so in other words an industrial matter includes a dispute in relation to long service leave. We believe that if you simply take those words on their meaning then we would say that, I am not sure that Mr Flanagan's argument can succeed because it is simply a dispute in relation to long service leave, nothing more, nothing less.

PN219

But the ambiguity I think arises because there has been a change to the Act and it has taken it from what was specifically not including an industrial matter and put it in the positive in relation to a dispute which is, you know, under the heading of an industrial matter. So I guess that is all I have got to say about the ambiguity, but I think, Commissioner, that the fact that we have had an extended argument about what is an industrial matter under the Act, I would suggest probably creates some ambiguity.

PN220

MR FITZGERALD: Yes, I thank Mr Watson for that. It certainly was helpful. Commissioner, what - I have some difficulty with Mr Flanagan's submissions, particularly the last submission in respect to section 42 where he says that this application doesn't create any conflict, well that is clearly wrong. And I just don't want to harp on my previous submissions, as I indicated, the application if successful will create a direct conflict with what is currently the obligation for employers in the mining industry under the Long Service Leave Act of 1976 and that - and I just repeat that is that their obligation at the moment is simply to make accruals, make payments on the - where leave is sought after 10 years of service or five years of service on satisfying those conditions within the Act. Now, that is quite clearly a different obligation to what Mr Flanagan seeks by this application. So I don't quite - it is very trite for him to say that it is not in conflict, it is in direct conflict. And then we have this exchange with you about - - -

PN221

MR FLANAGAN: Commissioner, if I may interrupt Mr FitzGerald in mid-stream, but I wonder if we could just have a five minute break and then return.

PN222

THE COMMISSIONER: Yes. Yes, I understand.

PN223

MR FLANAGAN: Thank you.

SHORT ADJOURNMENT [10.53am]

RESUMED [10.59am]

PN224

THE COMMISSIONER: Yes, Mr FitzGerald.

PN225

MR FITZGERALD: Thanks. I will be brief. Yes, I was just saying that clearly it is very trite for Mr Flanagan to say that there is no conflict between this application and what there is currently under the - for employers in the mining sector, that being contractor employers which puts another legal difficulty, if I can put that into it, in terms of who is a contractor etcetera, but clearly there is. I mean, under the current Act the obligations do accrue and it may not, depending on the service of the employee, ever amount to an obligation to make any payments. And if an employee leaves at nine years service - to leave to go another job, on the face of it he will not - there will be no obligation on the employer. Whereas this application, if it was successful, creates an instant obligation.

PN226

Now, I was very interested in the discussion you had with Mr Flanagan about all this background goings on, if I can call it that, between Mr Flanagan's union and Tasbuild. Certainly the employers - I just make the point, the employers haven't been invited or involved in those discussions.

PN227

THE COMMISSIONER: Tasbuild do have employer representatives - - -

PN228

MR FITZGERALD: They do but there has been no direct representation to us or through the other directors, Mr Watson included, about this aspect. So clearly there has been private discussions and Mr Flanagan can - if it is a new point he can talk about that, but I agree with you that it creates an absolute practical nonsense. Unlike the construction industry where there is a specific Act and imposes specific obligations on when obligations are to be imposed, what we have here is, simply, if the application was successful, is an obligation to make contributions but what after that, nothing.

PN229

Do we then revert back to the Long Service Leave Act of 1976. Clearly there are inconsistencies in that dealing with the same subject matter, so I don't quite see how Mr Flanagan can say it is not dealing with the same subject matter, it is precisely the same subject matter, and creates a different obligation. Look, just in passing, it may not be relevant as Mr Flanagan says that either the TTLC or other

union parties are party here today and it probably doesn't go to the jurisdictional aspect but it is of interest that this award only created earlier this year, that obviously a matter which would, I suppose, keenly have some interest for the two other unions party to this award are not here or have never been party to these proceedings. So it is probably more significant that they are not here than Unions Tasmania.

PN230

The exhibits which Mr Flanagan produced in respect to - and I don't think he made any specific reference to the Adelaide Mushrooms case, but clearly that is something quite different to what is applying in these current circumstances where we have, in the context of the Industrial Relations Act, specific jurisdiction in respect to what matters - and long service leave matters the Commission can handle, and that is only in respect to a dispute. So what we simply say in respect of all those three exhibits, they don't have any relevance to these proceedings in the context of the Act which currently applies. They are my submissions in response.

PN231

THE COMMISSIONER: Thank you. Mr Watson.

PN232

MR WATSON: Thank you, Commissioner. Just a couple of brief points. I think Mr Flanagan was putting the submission that the industrial matter definition in the Act is all-encompassing and the provisions which flow from that first inter statement that talks about relations between employers and employees are, I suppose, a guide or something like that, well I don't agree with that. I think that the Act is fairly specific about what is an industrial matter. It does have those broad provisions in it which talk about relations between employers and employees but one would ask the question as to what the need for those other sub-definitions, if you like, are if it is just an all-encompassing definition. So we would say that, certainly if the legislation is set up to actually describe what is an industrial matter, under that broader heading.

PN233

In relation to Mr Flanagan's position on the second reading speech, quite correct, that we haven't tabled that document today, Commissioner, but if it is something which would assist you, I am certainly happy to make that available to the Commission and to Mr Flanagan and not make any submissions on it other than to just table it for the fact of what was actually said in that second reading speech, if you believe it would assist.

PN234

THE COMMISSIONER: Well, it is not for me to make the case. I mean, it may be useful information and if you do provide it, then obviously you should provide it to Mr Flanagan.

PN235

MR WATSON: Well, okay, well on that basis, Commissioner, I think what we would say is that we will provide that second reading speech of the minister and a copy to Mr Flanagan but we don't intend to make any submissions on it other than it would stand for itself.

PN236

THE COMMISSIONER: Yes, but having said that, if you do introduce it, then as a matter of procedural fairness Mr Flanagan would have the right to make submissions if he so choose.

PN237

MR WATSON: Okay. Well, in that case then we might want to make some submissions in relation to it. I am just thinking about expediency of the issue, but would that be something, Commissioner, that you would want to bring the matter back on?

PN238

THE COMMISSIONER: No. I mean, it is the sort of thing that could be put by correspondence, you know, say within the next 14 days for a copy to Mr Flanagan - - -

PN239

MR WATSON: Yes.

PN240

THE COMMISSIONER: Mr Flanagan would be allowed another seven days to respond.

PN241

MR WATSON: Yes. Okay then.

PN242

MR FLANAGAN: We won't need the seven days, Commissioner. We have already put it, yes, but I will deal with that shortly.

PN243

THE COMMISSIONER: All right.

PN244

MR FLANAGAN: Okay. So Commissioner in relation to the issue, there has been a fair bit said about Tasbuild today. I just want to make it clear that I am a director of Tasbuild but I am here representing TCCI today, I am not representing Tasbuild.

PN245

THE COMMISSIONER: Yes.

PN246

MR WATSON: Now, just a final point, Commissioner, in relation to section 42 because I think we do need to nail this point. My view on section 42 stands and I just put this to you that the provisions of section 87 of the Act in relation to freedom of association are very clear about an employee, whether or not they make the decision to join a union, and it is simply their choice.

PN247

Now, there used to be preference to unionist clauses in awards that you would be familiar with that have now been taken out of the majority of awards and in fact I would put to you that even if one was attempted to be used, that it would be

unenforceable given the provisions of section 87. So we would say that is a clear example of how section 42 of the Industrial Relations Act would actually work in relation to an award matter being subject to the provisions of an Act.

PN248

THE COMMISSIONER: Okay. Well, perhaps if I could go to an example. There are numerous provisions in awards which go to what might be described as amenities - workplace amenities. There is legislation which, in part at least, does go to that same question. Are you saying that the award provisions are null and void because of section 42?

PN249

MR WATSON: Amenities in which particular award?

PN250

THE COMMISSIONER: Well, for example there is provisions in the building awards which go to the question of workplace amenities such as change rooms, toilets, etcetera. There is also legislation which touches, at least, on the same subject matter, perhaps less comprehensively.

PN251

MR WATSON: No, I think in relation to that issue that you raised there, specifically, I believe that the legislation is not in conflict with the award provision.

PN252

THE COMMISSIONER: Why?

PN253

MR WATSON: Because as you say the legislation is fairly broad and it does touch on the issue but I don't believe - I mean, I suppose to a certain extent, Commissioner, with this question I am talking off the top of my head so I would need to be careful, but I would say that the legislation would be the occupational health and safety legislation that we are talking about - - -

PN254

THE COMMISSIONER: Yes.

PN255

MR WATSON: - - - is fairly broad in some respects and I think, probably the award provision would be regarded as complementary to the Act as opposed to in conflict with it and therefore I don't believe that the same conflict would arise in relation to that particular provision. If it pleases.

PN256

THE COMMISSIONER: Thank you. Mr Flanagan, did anything arise which was new?

PN257

MR FLANAGAN: Yes, just one matter - well, two matters I suppose. One is, we would sort of welcome receiving a copy of the minister's second reading speech, but what we are saying is the weight that is to be placed on that is minimal and that in fact the Commission should not rely upon it. We remain

firmly of the view that there is a need to establish an ambiguity or a vagueness in the words which are used before you look to extrinsic material. Now, what we say, is the fact that parties before you choose to place a different meaning on what the words say, does not of itself establish an ambiguity or a vagueness.

PN258

What establishes whether the words are ambiguous or vague are the words themselves. Now, if I am reading the words, you cannot give them a normal - an ordinary understanding in application and that is evident from the reading of the words, then that may lead to the need to look to other considerations. But the words themselves in this legislation are particularly clear and the words simply are "matters relating on" - I will go to them, "Any matter pertaining to the relations of employers and employees" and those are the words on which the AWU rely.

PN259

Now those are the words which were subject to consideration by the Full Court of the High Court in the few cases that I have taken you to. The words without limiting the generality of the foregoing includes those words "operate to extend" the definition, that is what those words do. Now, if it is of assistance to the Commission I can provide you with authorities which clearly - or an authority that indicates the word includes "operates to extend" - - -

PN260

MR FITZGERALD: Just a - I point - a point for the Commission, I think this is clearly new material, isn't it?

PN261

MR FLANAGAN: I am explaining what - - -

PN262

MR FITZGERALD: Yes, yes it is, that is why I am responding to it.

PN263

MR WATSON: Well, it didn't come out - it is new material, it is something which Mr Flanagan could have raised in the first submission and I ask that it not be - - -

PN264

MR FLANAGAN: I am struggling with what Mr Watson put, that is all.

PN265

THE COMMISSIONER: I don't think we should stand on ceremony. I am interested in anything that the parties consider relevant and obviously that means that all parties will be given the opportunity to respond either now or subsequently to all material that is submitted. So I will allow you to make that submission and provide that authority but obviously the respondents will have an opportunity to comment on it, should they wish.

PN266

MR FLANAGAN: Yes, certainly, Commissioner. Look, all I was going to say on that point was that the premium, if I can call it that, is of itself the source of the authority. The Act then goes on to extend it and it extends it by specifying certain

matters which, regardless of the initial source, are additional sources for authority that may have terms and conditions of employment, the termination of employment, the reinstatement, the payment compensation, severance pay, disputes under long service leave, are in addition to the general source.

PN267

It then goes on, a breach of agreement, which is an additional matter that it wants the Commission to consider as an additional matter and then goes on to say, "but does not include". So it removes from the general source certain specific issues that the Parliament didn't intend the Commission to deal with. That is what I am wanting to say on that point, and to simply go back to that point that if there is no established ambiguity, and the existence of a disagreement between the parties does not establish that, then you don't - and it would be an error for the Commission to place reliance on extrinsic material. If it pleases the Commission.

PN268

THE COMMISSIONER: Thank you. I think probably the better way of handling this is to - two issues have been raised, that is the second reading speech by Mr Watson, and Mr Flanagan has raised some question of an authority as to what he describes as the extension provisions in section 3 of the Industrial Relations Act. What I propose is to allow both parties 14 days to provide that material with any supporting submissions they wish, and a copy to each other of course, and a further 7 days for any response that the other party may wish to make. If there is nothing further for record, I will reserve my decision on this matter. It does raise a very interesting jurisdictional question and I will give it my early attention. It stands adjourned.

ADJOURNED INDEFINITELY [11.15am]

INDEX

LIST OF WITNESSES, EXHIBITS AND MFIs