

HEARING COMMENCED 10.40am

COMMISSIONER: Take appearances>

5 **MR R. FLANAGAN:** If it pleases the Commission, FLANAGAN R., for the Australian Workers' Union, Tasmania Branch. With me is MR WAKEFIELD, MR LOWE, MR DAVIN and MR DOOGAN. If it pleases the Commission.

COMMISSIONER: Thanks Mr Flanagan.

MR W.J. FITZGERALD: If it pleases I appear on behalf Pasminco Rosebery, FITZGERALD W.J., and with me MR SALTMARSH M.

10 COMMISSIONER: Thanks Mr Fitzgerald. Now what have we got to report.

MR FLANAGAN: Thank you commissioner. Commissioner this application seeks to vary the Pasminco Rosebery Mining Award to give effect to arrangements which have traditionally been observed at the site in respect to employees of contractors.

The application is based on three grounds, firstly that the proposed variation as indicated gives effect to arrangements which were intended by the parties to apply to employees of contractors.

20 Secondly, that the proposed variations seeks a remedy to address a particular evil, and that evil is a decision on the part of Pasminco to unilaterally withdraw from the contractors agreement as it is known.

Thirdly, that it is in the public interest of Tasmania that permanent employment and job security be protected and encouraged.

25 Consistent with that proposition it is the union's view that it is against the public interest that permanent employment be displaced on the basis of cheaper rates of pay for workers engaged by contractors. So they are the three grounds upon which the union wishes to pursue the application for variation which is before you, commissioner.

30 The catalyst for this application, together with an application before the federal commission, has been a very regrettable set of circumstances which has occurred at Rosebery, which has seen approximately twenty employees lose their employment and a contractor lose their role at the site. In support of that application, the union proposes to call four witnesses, Mr Bill Lowe, Mr Ian Doogan, Mr John Davin and Mr Wakefield.

At the conclusion of that evidence, if it is necessary, we may need to call one more witness, but we will endeavour to extract the evidence that we need today. It would only be in the event that we can't extract

the evidence that we need that we might need to call a further witness, but we will attempt to avoid that, commissioner.

COMMISSIONER: Yes, tell me Mr Flanagan, have you had discussions with the other side about this?

5 MR FLANAGAN: There haven't been extensive discussions about the matter. I think the position has been that we have made the application, the employers have indicated that they intend to - well actually we've inquired from Pasminco as to whether or not they were prepared to consent to the application and they indicated that they
10 were not. I guess that's about the extent of the discussion that we've had. We've indicated to Pasminco the fact that we intended to call witnesses today and they've indicated to us that they were content with that and prepared to go to hearing on the matter.

COMMISSIONER: They virtually said go for your life?

15 MR FLANAGAN: That's right.

COMMISSIONER: Thanks. Is that what your understanding is Mr Fitzgerald?

MR FITZGERALD: Not exactly, commissioner, no, I didn't certainly give that understanding. Mr Flanagan has taken it as the
20 understanding and if that's the case I didn't give him any guarantees in that regard at all. We have a number of concerns about this application, fundamental concerns about this application, which we'll put to you shortly. Prior to doing that commissioner I think it's incumbent on Mr Flanagan to indicate the, to what extent, well sorry
25 the objectives of the evidence being put by the four witnesses, what's the basis of the evidence and that will allow me to better consider our response to it.

The discussions really haven't centred round the application itself. There's been ongoing discussions about the ongoing survival of the
30 mine and maintenance to the mine but not as to this particular application, but I think it's incumbent on Mr Flanagan to actually outline to the commission the purpose with the evidence.

COMMISSIONER: You confirm, as I understand it Mr Fitzgerald, that discussions at this stage are not advisable, is that right?

35 MR FITZGERALD: Are not advisable did you say?

COMMISSIONER: Yes.

MR FITZGERALD: In respect of this application I think because of the fundamental concerns we have, which we have indicated quite clearly to Mr Flanagan, but Mr Flanagan doesn't accept obviously,
40 because he's still pursuing the application, it's not a question of

whether they are advisable, I just wonder whether they'd be productive. My view is that they probably won't be, given the fundamental difference we have which we'll outline to the commission shortly.

5 COMMISSIONER: Yes, all right. Proceed, Mr Flanagan.

MR FLANAGAN: Thank you commissioner. I wonder if I could seek some clarification. Mr Fitzgerald has indicated they have some concerns that they wish to outline to the commission shortly, I understood that the company, or the employers, would be content for
10 us to proceed with hearing of the matter, am I to understand that that's the position.

COMMISSIONER: I don't know.

MR FLANAGAN: I'm unclear on that point, commissioner.

COMMISSIONER: Yes, perhaps you'd better repeat it, I don't think
15 Mr Fitzgerald was concentrating at that time, Mr Flanagan.

MR FLANAGAN: As I was understood it, the employers would be prepared for us to proceed with the hearing. I'm not quite sure what you're referring to, in relation to the fundamental concern that you have, and whether you intended to raise that in response to the unions
20 submissions following the evidence or whether you intended to raise it as a threshold matter.

MR FITZGERALD: Well, commissioner, we haven't given any undertakings in respect to that. I suppose to some extent we'd be
25 guided by the commission, but as to the fundamental issue whether it's to be pursued as a threshold issue or whether you feel it's appropriate the union can proceed to evidence, but it's our view, and it's always been our view that this application is fundamentally ill-founded and ill-concieved.

It relates to matters quite clearly outside the jurisdictional competence
30 of the commission and it's really whether it's appropriate that we go through a whole series of evidence which could seemingly last today and even longer if Mr Flanagan is going to call another witness when in fact the question the commission's jurisdiction is far from certain.

It's our view that the application is self-evident in its lack of
35 jurisdiction. The matter clearly relates to third parties, not parties to this award, and for a number of reasons which we've consistently put to Mr Flanagan the application lacks jurisdiction.

Now we haven't - and as late as the last couple of days, we haven't
40 given any undertakings. I said very much so that we're clearly within the instruction of the company as to how they want to proceed with it but I'm of the view that we could put outline some submissions

generally and also outline our submission in full regarding the threshold issue and it's up to the commission to determine whether they decided on that issue alone or whether they proceed to hear all the evidence and determine it on a number of issues.

5 COMMISSIONER: Yes, thanks Mr Fitzgerald. What do you say?

MR FLANAGAN: Thank you commissioner. Commissioner, we didn't understand the position as it's been outlined but despite that our view is that, firstly in terms of the evidence, the evidences we intend to call goes to the question of what has occurred in terms of the traditional
10 arrangements on site, why they have come to be, what has occurred in terms of the consequence of the company walking away from that arrangement and the concerns that employees on the site have about the issue and its potential to create disputation.

Now, what we say is that on a full and complete of that evidence the
15 commission would accept that the application is well within the capacity of the commission to vary the award. But what we say is that it would be necessary for the commission to hear all of that evidence to form that view.

COMMISSIONER: Yes, thanks Mr Flanagan, we'll adjourn and I'll
20 have a word with both sides in my offices, thanks.

INTO CONFERENCE 10.50am

HEARING RESUMED 11.15am

COMMISSIONER: Thanks for that gentlemen, just for the record I'd
25 say that it seems to me that this is clearly a matter of jurisdiction and that ought to be decided first. The union contends that to establish that it does have jurisdiction it needs to bring witnesses and put a full submission to me. I have misgivings about that, nevertheless I feel obliged to give the union the right to put whatever case it thinks fit in the circumstances and that is how I propose to proceed.

30 MR FITZGERALD: Could I just briefly respond commissioner to that, just for the purpose of the record. We share your misgivings commissioner, regarding the intent of the AWU in presenting witnesses in support of jurisdictional argument, which it seems to be the case. What Mr Flanagan has outlined on record already in my view doesn't
35 go to jurisdictional matters but goes to past historical matters which doesn't assist us in the issue of whether this commission has the jurisdictional competence to include the clause which is the subject of this application.

But at the same time we acknowledge the points you made in terms of
40 allowing the AWU to put their case, but we would very clearly put that right on record that we don't believe the witness evidence will have anything to do with jurisdiction. But that remains to be seen.

5 In making that submission commissioner, I just wonder whether, and I'm not wanting to jump up and down every time a question is asked, but I wonder whether the commission would consider that, in terms of whether the evidence should continue if it's quite clear that the submission I've just made is in fact correct, that there's no element of jurisdiction coming out of that evidence. And I'll just leave that to commission to determine at any particular point.

10 COMMISSIONER: Yes thanks, Mr Fitzgerald. I've made my position clear, it may well be that what you've said, Mr Fitzgerald, comes to fruition, but nevertheless I think the union's made its position clear and I intend to proceed and see it through. Steel myself to see it through. Yes Mr Flanagan?

15 MR FLANAGAN: Thank you, commissioner. Again, just for the record, and I'll be very brief, as you've indicated, from our perspective this should be a full and complete hearing. We don't propose to divide the evidence between merit and jurisdiction, such division would only delay the proceedings and take up unnecessarily the resources of this commission. In those circumstance we'd seek to call our first witness, which is Mr Lowe.

20 COMMISSIONER: Yes all other witnesses should leave the room and be called as required. Thank you.

MR FLANAGAN: Before I call Mr Lowe, actually commissioner, I'd just seek to tender an exhibit.

25 COMMISSIONER: We'll mark that **AWU EXHIBIT BOOK**. And that's it, is it, Mr Flanagan?

30 MR FLANAGAN: Yes, thank you, commissioner. I'll just very briefly identify what is in the exhibit book, for the benefit of the commission and the parties. On the face of it, what I do need to indicate is that it's not in any particular order unfortunately, but I'll run through what's in it. Behind the green tab numbered 1 is an application to vary the federal Drilling and Exploration Award -

COMMISSIONER: That's the first snag - green tab number 1, I've got a yellow tab number one.

35 MR FLANAGAN: I'm sorry, yellow tab number 1, yes commissioner. I'm sorry about that, it's definitely yellow, number 1, an application to vary a federal award, the Drilling and Exploration Award, and I won't dwell on that at this point.

40 Orange tab number 2, is firstly a correspondence to a contractor by the name of Pontil, followed by a further correspondence from Pontil to the AWU.

The green tab 3 is correspondence from Pontil to one of their employees.

5 Red tab 4 is correspondence from Pasminco Rosebery to Pontil followed by a general notice issued to their employees in relation to Pontil followed by correspondence from Pontil to the AWU.

Behind blue tab 5 is correspondence provided to on-site union delegates by Pasminco in January of this year followed by the proposed manning levels put to the union by Pasminco in recent negotiations.

10 Yellow tab 6 is simply this application actually to vary this state award.

Behind orange tab 7 is a recommendation of Commissioner Leary.

15 Behind green tab 8 is a decision of Commissioner Gozzi in relation to, what has been described as, core and non-core functions in November 1991.

Behind red tab 9 is a decision of Commissioner Gozzi in respect of the establishment of the Pasminco Rosebery Mine Award.

Behind blue tab 10 is an unregistered agreement between the unions and Pasminco in relation to sick leave and the payment of wages.

20 Yellow tab 11 is the consolidated Pasminco Rosebery Award which was established in 1991 and dealt with all provisions.

Behind red tab 12 is the Rosebery restructuring agreement, which formed part of the proceedings which were in the decision referred to in yellow tab 11.

25 And behind green tab 13 is simply a copy of the federal Drilling and Exploration Award.

Behind orange tab 14 is the recently registered Pasminco Rosebery (Mining) Agreement together with the supporting documents which were tendered in those proceedings.

30 And behind blue tab 15 is a draft proposal which was put to the unions in 1997 in relation to negotiations which were occurring at that stage.

So those are the exhibits which will be referred to during the course of the evidence principally, commissioner.

35 MR FITZGERALD: Commissioner, and I undertake that I won't be jumping up for anything further here on, but I think it's important to note for the record that in our view none of those exhibits relate to the issue of jurisdiction and if that's the exhibits which are going to be

5 produced during witness evidence then it just reinforces my point, just simply that it doesn't relate to the jurisdictional issue. Again I'm in the commission's hands, if I can just leave it at that rather than getting up on each occasion where it clearly doesn't relate, but if I can make that general statement at this point in time.

MR FLANAGAN: As we indicated commissioner, we aren't going to restrict the evidence to either jurisdiction or merit, that we propose to deal with both matters in the same evidence.

10 MR FITZGERALD: Well I think that bears a response, that needs a response. I think Mr Flanagan's missed the point, with respect, he says that they are not going to differentiate between merit and jurisdiction. My point is, commissioner, that there's no issue there of jurisdiction. It clearly hasn't differentiated, but they all go to merit as to past arrangements, however that may be relevant to this
15 application.

COMMISSIONER: Yes I take the point. Mr Flanagan, I'm proceeding on the basis that all your arguments are based upon relevance to jurisdiction. Evidence and everything.

MR FLANAGAN: Only on the point of jurisdiction, commissioner.

20 COMMISSIONER: Well that's as I understood it. We'll adjourn now so that, Mr Flanagan, you can review your position in relation to this question of jurisdiction. Thank you.

INTO CONFERENCE 11.30am

HEARING RESUMED 11.40am

25 COMMISSIONER: Where are we, gentlemen?

MR FLANAGAN: I guess the position is this, commissioner. The employers have raised the jurisdictional question and we've agreed that it's appropriate for them to put their views initially and for the union to respond to that.

30 COMMISSIONER: Thanks, Mr Flanagan. Yes, Mr Fitzgerald?

MR FITZGERALD: Yes, well, we would certainly agree with that course, commissioner, and I understand that Mr Flanagan will be seeking to raise with this evidence in support of a jurisdictional issue but our reservation, as I've already stated on record, still remains in
35 that respect and I'd certainly leave that for the commission.

Commissioner, this is a fundamental issue we've got before us. There's no question about that. I think it's important before we do proceed to the full jurisdictional issue, it will be our submission that the effect of the application before you is clearly *ultra vires* the commission. The

5 commission hasn't got the power to include such a provision in the award and therefore the matter should be dismissed in accordance with the Act and shouldn't proceed further and the matter can be dismissed in accordance with section 21(2)(c)(iv) of the Act and that'll be our submission.

10 I think it's important, firstly, to look at the first application, and I realise it's not part of this application, but an application was made by the AWU back on 5 May 1999, T8405 of 1999 and that application sought to do a number of things and one of those things which it sought to do was to effectively - if I can describe it this way because it's somewhat of a hybrid application, I'd suggest - effectively to change the nature of the award, which is clearly an enterprise award. It deals with this enterprise site only - to include employees engaged by other employers on site.

15 Now, that application was subsequently withdrawn by Mr Flanagan, for whatever reason and quite clearly, it's open to the applicant to withdraw applications or to make applications, but he has withdrawn that application but in its place we have the current application.

20 It's my submission, commissioner, that what we effectively have is exactly the same result, or exactly the same outcome, which is made by this application. It's just, if you like, a big of rejigging which has occurred and the effect of the this current application is to ensure, as was the first application, that rates paid by other employers on site are exactly the same rates as struck by this award or whatever applies on site by the company, Pasminco Rosebery.

25 Now, it's just a rose by another name in my view. It's just another way of getting before the commission and I think it's important to point out that the AWU have obviously had some concerns about their first application so they sought to withdraw it but if you closely examine the outcomes sought by both applications, they are exactly the same. So, it's somewhat surprising that the AWU have adopted this tactic.

30 The other important point - and again it relates to jurisdiction because these matters, quite clearly, have some cross relationships with the federal matters which we've already spoken about - is that in the first application which was withdrawn it was stated by the AWU, that this application is directly relating to proceedings before the Australian Industrial Relations Commission C70125 of 1999 listed for conference before Commissioner Leary on Saturday 8 May 1999 - I just interpose there, I understand it didn't proceed at that time, and an application to vary the Drilling and Exploration Industry Award 1991, an award of the Australian Industrial Relations Commission.

40 The union requested the president consider his powers under section 16(1) of the *Industrial Relations Act 1984* and I understand that that was refused.

Now, I'm not wanting to look at all matters related to that application in the federal commission but the application in the federal commission similarly was framed in that it sought to draw the connections between the state application and that federal application.
5 I'm just trying to find the grounds, but it indicated in the application before the federal commission that there were strong connections.

I should state for the record, commissioner, and it is on record, that the federal matter has already been before Commissioner Leary of the federal tribunal. That matter has been adjourned but Commissioner
10 Leary and the record can be revealed for this purpose, expressed strong doubts, in my view, in which she described the application there - and that was an application to restrict responsency to those respondent to the award, those parties respondent to the award, that it wouldn't apply in the locality of the Rosebery Mine and she made a
15 comment that it was unusual and she made comments on record - she expressed doubts as to whether that matter would proceed at all.

I think in terms of the jurisdictional argument, commissioner, it's not possible to simply say that the federal application is a separate matter application and it doesn't have any implications for this one. It
20 certainly does.

The other point I make about the application is - and I'll be getting to the heart of the jurisdiction argument in a minute, if you're wondering about that, commissioner - is that the two clauses which it seeks to insert in the award, section 33A and B clearly are matters - and I'll
25 make further submissions that they don't affect the relationship between the employer, subject to this enterprise award, that being Pasmenco Rosebery and its employees, but another relationship all together, but in my view those two clauses, the first one, clause 33A which seeks to prevent Pasmenco engaging contractors unless there is
30 a provision within that commercial contract. That being, again, something, quite clearly, outside the jurisdiction of this commission, that it be in fact bound by the terms of this award.

Those two clauses, I don't think can be separated out. They are very much dependent on each other. They are not mutually exclusive. So,
35 you can't just simply drop one without the other. They both would have to proceed. So, it's our submission that both of those clauses are, quite clearly, *ultra vires* the Act and therefore the commission shouldn't proceed to hear them.

I think I should go now to section 32(1) of the *Industrial Relations Act* which clearly outlines the commission's powers in respect to awards and if I can just quote section 32(1):
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Subject to subsections (1A) and (2), an award under this Act may contain provisions with respect to any industrial matter.

It's important to focus in on the definition of an industrial matter and this is again very much fundamental to the commission's jurisdiction. The term 'industrial matter' is defined in section 3.1 of the Act under the definition of 'industrial matter' and it means, and I quote:

- 5 - any matter pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes -

And there's a whole range of issues which I'm sure we're all aware of. But they all relate, if you like, to specific relationships between
10 employers and employees, not between employers and other third parties. They all relate to - if I take, for example, (a)(i):

the mode, terms and conditions of employment

Now, clearly, that must be read in terms of the direct employment relationship, not some other relationship which I assume Mr Flanagan
15 will raise. The next one:

the termination of employment of an employee or former employee

Now, it's employer's employee, not someone else's employee we're talking about. The same with reinstatement, the same with
20 compensation, the same with severance and also, breach of an award, which is again quite clearly confined to this particular award, not someone else's award or someone else's employee.

It then goes on to exclude a number of issues. It doesn't specifically exclude the relationship, a principal and a contractor. In my
25 submission, it doesn't have to because, clearly, in the first instance, you would have to fall within the definition of an industrial matter which is the pre-eminent definition there and that, to remind you, commissioner, relates to the relations of employers and employees, not someone else.

30 Section 31 and its connection back to section 3 is important in that respect. Section 33 is also very important in respect to that as well. Section 33, as you would be aware, commissioner, talks about how awards in the private sector can be made and it differentiates between:

- (a) *all or any private employees employed in an industry; or*
35 (b) *all or any private employees employed in an enterprise.*

In our submission, the intended clauses doesn't affect employees within that enterprise. It affects other persons but not employees within that enterprise and it doesn't relate to the relationship between

Pasminco Rosebery and its own employees. That's the distinguishing factor.

5 If Mr Flanagan attempts to draw some sort of connection between Pasminco as an employer and some other employers and employees, then that's clearly something outside the ambit of section 33(b).

The commission's jurisdiction is also further defined in section 19(1) of the *Industrial Relations Act 1984* and I quote:

10 *Subject to this Act, the Commission has jurisdiction to hear and determine any matter arising from, or relating to, an industrial matter.*

15 Again, it's confined to industrial matter. Now, that, in my view, is in respect to the broad range of the commission's powers, not only the award making powers but the dispute settling powers, the powers relating to private arbitrations, the powers relating to interpretations. Now, what I'd say, commissioner, is that the commission's award making powers are even better defined by - in other words, section 19 provides the overall ambit of the commission's powers. It quite clearly relates to an industrial matter but it is even better defined by section 32(1).

20 Commissioner, the commission also, prior to making any award, have to be satisfied in accordance with section 36 relating to public interest and there's a number of issues there relating to economic and employment aspects of the award change. We would say that not only is there a fundamental jurisdictional issue here but in terms of section 25 36, what the effect of the application is, is to put in place changes which would inhibit Pasminco Rosebery to passage or engage third party contractors and inhibit the commercial arrangements which were properly made between Pasminco Rosebery and the company it contracts with. This may, in our view, affect ongoing flexibilities and 30 viabilities in respect to the operation.

Further, in respect to section 36, the making of an award variation to the effect of the proposed clause 33 would set, in our view, an unfavourable precedent under which award obligations would be extended past the enterprise and clearly the powers in respect to 35 making of enterprise awards under section 33 are confined to that enterprise and its employees, not to other than that.

40 It's my guess, commissioner, that Mr Flanagan, in his wisdom, has withdrawn the first application because he can see the flaws contained within that, in that clearly it related to the extension of the enterprise award past the enterprise itself and its employees. What has happened, effectively, is he's replaced that with an application which does exactly the same thing. Clearly, it's not in the public interest, commissioner, that changes like this should be contemplated which

would allow the commission to extend the award coverage which applies to the immediate employer to other employers.

Clearly, commissioner, it's not in the public interest for the commission to make such a provision where it would create confusion about which award applies, particularly where those other employers are subject to their own enterprise agreements or conditions or AWAs, whatever, a whole range of things including industry awards. That would create absolute bedlam and not be in the public interest because it certainly wouldn't - when a particular employer goes on site and is contracted to Pasmenco Rosebery there would be confusion legally as to its obligations.

Here's the connections which I'm drawing between Mr Flanagan's applications in the federal commission and this application. What he wants in the case of the Drilling and Exploration Award, the federal award, is for it not to apply when those particular employers respondent to that award work on the site and what he wants is for this particular award to apply.

Now, that both in terms of its jurisdictional aspect, which I've already referred to the commission, and the inter relationship of federal awards and agreements will create a position of chaos, I would suggest.

In summary, commissioner, in respect to this jurisdictional issue, we say, commissioner, that clearly the application is outside - or it needs close examination. It's outside the commission's jurisdiction because it is not an industrial matter. It doesn't relate to the relations between the respondent company, if I can call them that, Pasmenco Rosebery, to its own enterprise award and its own employees. It refers to another third party relationship which is clearly subject to the jurisdictions of, not this commission but courts of competent jurisdiction. Any commercial contract, if it comes into dispute, it doesn't come to this commission for resolution but to a court of competent jurisdiction.

That's what this application seeks to do. It seeks to effectively create a de facto jurisdiction in this commission to deal with matters relating to other parties and I'm sure the commission has enough work on its hands in respect to normal disputes which occur between employers and employees and would not wish to be involved with third party contractor disputes.

In summary again, the definition must be - in our view, of industrial matter, must be read in the context of employees and direct employees, not employees and third party employees.

Clearly, the Tasmanian Industrial Commission does not have jurisdiction to include clauses of this application as they are not industrial matters and they are properly contained within commercial contracts.

It's our view, commissioner, that this matter shouldn't proceed, based on the jurisdictional argument and it's our view that the matter should be dismissed in accordance with the section that I've already indicated.

5 It's also our view, commissioner, that the intention which has been broadcast to the commission by Mr Flanagan of the evidence, relates to those issues. We've already seen the production of the intended evidence in terms of the exhibits. There's nothing in there which relates to the submissions I've just put as to this fundamental issue.

10 They all go to historical matters which don't go to the commission's award making power and that's what we've got to centre in on, not what occurred in respect to some past dispute in accordance with section 29 of the Act but whether the commission has got the legal power to include such provisions within this award and we clearly say, commissioner, they haven't because it clearly doesn't fall within the
15 definition of industrial matter.

Now, I'd leave my submissions in respect to that and reserve any further submissions in respect to the merits of the matter, if that's required.

20 Mr Saltmarsh, commissioner - I think it might be opportune for him to make some comments about background. If he could make some comments, that would be appreciated.

25 COMMISSIONER: Just one point before that, Mr Fitzgerald. You said the proposed amendment refers to a third party relationship. In other words, in the commercial area or whatever, outside this commission's jurisdiction?

MR FITZGERALD: Yes.

30 COMMISSIONER: I take it you include in that - don't let me put this into your mouth if that's not what you're saying, Mr Fitzgerald - that a third party relationship, is that between the contractor and his or her employees and the federal jurisdiction?

MR FITZGERALD: Yes, I think that's a good summary of it, commissioner.

35 COMMISSIONER: I think you were saying - that's what you actually said, finally, that it refers to a third party relationship, in other words, the contract with the other party could be taken elsewhere, shall we say, the company's jurisdiction or whatever.

MR FITZGERALD: Yes, that's right.

40 COMMISSIONER: But what I'm saying is, yes, that may well be so but is it not so - and I think you may have already said it before that, that the federal jurisdiction, in other words, the relationship between

this contractor and the contractors' employees is also in the federal jurisdiction?

MR FITZGERALD: Yes. Well, that could be in respect to particular contractors, not all contractors, but certainly particular contractors
5 and we've seen one already subject to the dispute in the federal commission on Monday where the AWU sought to remove one particular contractor, that being, Pontil. Not 'remove', sorry, restrict the respondency in respect to working on the site. So, clearly, there is already - I think this is what you're getting at, commissioner, already
10 an existing obligation to that contractor legally under their federal award and clearly that has precedence from a jurisdictional point of view over this commission. So, there is certainly confusion created by the application of awards and which has precedence et cetera.

COMMISSIONER: Thanks, Mr Fitzgerald. Mr Saltmarsh?

MR SALTMARSH: Thank you, commissioner. I'd just like to add - I
15 guess, in summarising our position, the evidence led up until now in regards to jurisdiction and public interest, I would just like to add weight to that. It certainly represents Pasminco's view and I think it's important this forum have a reality check to what it really means in
20 terms of economic impact on the business.

As it's been pointed out, the changes proposed here in this application would have the effect of inhibiting Pasminco Rosebery's capacity to engage contractors on a commercial basis and would therefore detrimentally affect the mines economic position and I think that's
25 been pointed out in our Life of Mine study. It has the potential to jeopardise the ongoing viability of the operation. I think that's something that needs to be noted.

The company has indicated in previous forums and it has indicated to its employees on site and it's been received in a positive manner,
30 understanding the concerns that people have, that it can't be limited in pursuing all options available to ensure the ongoing viability of the mine. As recently demonstrated by the Life of Mine study, as you are well aware, commissioner, and the operational changes, which is a positive, we're moving in the right direction.

It also needs to be on record that any move to put at risk our ability to
35 do so, to pursue available options in the future, will be challenged by any means available. And I say that, commissioner, on the basis that any commercial impact that it may have on our business, and it's a performance of the business and the bottom line that determines our
40 best chance and gives us our best chance, and not an application of this nature. I can't add any more to that other than, it's the commercial outcome of any decision that has an impact on increasing our costs that is the major concern of our operation. That's all I have to add.

COMMISSIONER: Thanks, Mr Saltmarsh. Mr Fitzgerald?

MR FITZGERALD: I have no further submissions in respect of ..[inaudible].. Mr Commissioner.

5 COMMISSIONER: Mr Flanagan, I meant to say. I'm sorry, yes. I get those two names confused. Mr Flanagan?

MR FLANAGAN: Thank you, commissioner. We'd certainly confirm that there was an application made by the union in May of this year which was subsequently withdrawn. That is a matter of public record. In terms of the proposition that this application should be dismissed
10 under section 21(c)(2)(iv), we reject that proposition.

In terms of the fundamental issue which is raised by the employer, that this application doesn't affect the relationship between the employer, and if I can paraphrase it, and their employees, we dispute that proposition. We say we accept that section 32 provides the
15 commission with an opportunity to make an award in respect of any industrial matter.

We also accept that section 3(1) defines an industrial matter as:

- any matter pertaining to the relations of the employers and employees -

20 Those are the critical words, in our view. And what those words mean is not an understanding which is agreed or shared by the union, compared to the views expressed by the employers. They have expressed the view that this application does not relate to that relationship between Pasminco and Pasminco's employees and we say
25 that there is a direct relationship between the company, its employees and this issue.

We say that that relationship is based on two propositions: one, that job security; secondly, the possibility of industrial disputation, are both matters which relate to the direct relationship between Pasminco
30 and its employees. On that basis, there is a jurisdiction for this commission to make an award as determined under section 32.

Mr Fitzgerald also took the commission to section 33(b) and contended that the Pasminco award is an enterprise award. I'm not aware of any formal determination under - when I say, determination, I'm not aware
35 of any formal interpretation on that issue. There is certainly an application by the union on that question before the president which has been adjourned as a consequence of other proceedings before this commission to make a Metalliferous and Mining Industry Award which contains more than what is presently the case.

40 What we say is, that the evidence we will call this morning will demonstrate that job security and the potential for industrial

disputation is there, that that does, when read together with the line of authorities on the relationship between the employer and the employee, that does provide the commission with ample jurisdiction for the merits of this matter to be heard and determined.

5 The other point which has been raised by the employer is that this matter has to have regard to section 36 and if we go to section 36, in particular section 36, subclause (b), it is very clear that one of the matters which the commission needs to have regard for is the level of employment and as a consequence of this company's conduct, the level
10 of employment in Tasmania has dropped by 20 full-time employees.

In relation to section 36, subsection (c), the commission is required to take into account the public interest. As the union indicated at the beginning of these proceedings, before we were put in the position of
15 dealing with the jurisdictional matter, we indicated that in our view it is in the public interest of Tasmania, the permanent employment and job security be protected and encouraged and consistent with that proposition it is against the public interest that permanent employment and job security be displaced on the basis of cheaper
20 rates of pay for workers engaged by contractors. So, we say that that is a matter that the commission should have regard for in both cases.

The company have contended that for the application, and I think this deals with the merits of the matter rather than the jurisdiction, if the application was to succeed then it would create confusion. That is
25 clearly not the situation. This application, and we won't deal with this in detail because it's really not critical as I perceive it to the jurisdictional element, but on the hearing of the merits of the matter, it will be quite clear that there was no such confusion, that once it was established what the rules were, those rules would apply but we can
30 deal with that when the matter moves on to the merits of the matter.

What goes to core then - the core issue has to be what is an industrial matter? What does the Act means when it refers to relationship between the employer and employee? Once the evidence has established that the issue in contention here relates to concerns of
35 Pasminco's employees about job security and that that issue can lead to disputation, we will then take the commission to determinations of the full court of the High Court of Australia, the full bench of the Australian Industrial Relations Commission and a decision of an individual commissioner of the Australian Industrial Relations
40 Commission who also has dual appointment with the Tasmanian Industrial Commission.

In those circumstances, commissioner, we'd seek to call our first witness who will be Mr Wakefield.

MR FITZGERALD: Well, commissioner, prior to that occurring, if I
45 could - it effectively became our application on the jurisdictional issue

and I think it would be appropriate that I have a chance to respond to those submissions at this point.

5 MR FLANAGAN: We haven't had an opportunity to call the evidence to support our proposition that it deals with job security and that that can lead to industrial disputation.

COMMISSIONER: I just make the point that it seems to me that - I accept without the need of witnesses that it would lead to industrial disputation - if I were to make a ruling on jurisdiction.

10 MR FLANAGAN: Does the commission accept that it goes to the question of job security on the part of the employees of Pasminco?

COMMISSIONER: I accept that as well but that is a matter of disputation, shall we say, but not necessarily between the employer and the employee, in relation to amending the award.

15 MR FLANAGAN: In terms of job security, commissioner, is the commission saying that it accepts that job security is an issue of concern for the employees of Pasminco and that that is a direct relationship between these employees and Pasminco?

COMMISSIONER: Which employees?

MR FLANAGAN: The employees of Pasminco.

20 COMMISSIONER: Yes. That's a matter for dispute.

MR FLANAGAN: I see. So, we would restrict our evidence to that. Is that -

25 COMMISSIONER: I'm saying that I can quite accept, without the need of witnesses, that the matter before us today could lead to dispute but that doesn't therefore follow that the application is in jurisdiction.

30 MR FLANAGAN: I understand that. There are two elements to our view. One is the potential to lead to disputation and indeed the commission recognises that. The other is, that the important issue for the employees of Pasminco is their own job security and that job security, or at least there is a perception that that job security is threatened by the absence of a provision such as this, or an arrangement such as this being in place. In fact, this arrangement has been in place for some nine years and it is only as a consequence of
35 the company unilaterally walking away from it, that we have been compelled to make this application.

COMMISSIONER: Well, I can't see, on the face of it, that hearing evidence is going to help me decide this matter of jurisdiction, Mr Flanagan. I can accept that the matter of the contractor and the

company and the company's employees could quite easily cause
disputation. It may have already caused disputation.

MR FLANAGAN: Yes, it has, commissioner.

5 COMMISSIONER: But that is not a matter related to an application
to amend the award.

MR FLANAGAN: The question of the job security and the perception
that the employees at Pasmenco have, is perhaps the area that we
would need to call the evidence on, by the sounds of it.

10 COMMISSIONER: Well, again, if the company's employees have a
problem with job security caused by this matter of contractors, that is
a matter for disputation. I can't see that it is a matter for the
amendment to the award.

MR FLANAGAN: Well, the critical thing, commissioner, is that there
is a recognition that it is an industrial matter and if it's recognised -

15 COMMISSIONER: On the basis of a dispute it's an industrial matter.

MR FLANAGAN: No. If I can take the commission to section 32.
Section 32 provides the commission with the capacity to make:

*- an award under this Act may contain provisions with respect to
any industrial matter.*

20 COMMISSIONER: Yes.

MR FLANAGAN: And the proposition that we are putting to the
commission is that, for the purposes of the industrial matter definition
contained within section 3(1) which pertains to the relationship
between the employer and the employee, that the question of job
25 security and disputation, but you've accepted disputation - the
question of job security is a question which relates to that relationship
and as a consequence of that relationship, and that's the evidence
which we had intended to call - as a consequence of that relationship
the commission is then empowered to vary the award in the terms
30 sought subject to a hearing of the merits of the matter, but that there
is a clear jurisdiction there.

If the commission is content to recognise that job security is an issue
which relates to that relationship between Pasmenco and its
employees, then we would not need to call witnesses in relation to that
35 point.

COMMISSIONER: Yes, all right. I'll hear Mr Fitzgerald on that.
Thank you. Yes, Mr Fitzgerald?

MR FITZGERALD: Commissioner, just briefly in response. We would certainly echo your remarks you made on record relating to the distinction between disputes settling and award making and I think Mr Flanagan has confused the topics, either deliberately or unintentionally, for the purposes of trying to achieve a jurisdiction in this case, which is not there at all.

I don't want to reiterate my submissions but, clearly, it goes back to the definition of industrial matter which Mr Flanagan really hasn't addressed at all in terms of whether there's jurisdiction or not. We've made the submissions that the two clauses which must go together, in our view - you can't have one without the other, relate to another relationship, not the relationship between the employer and the employee.

Mr Flanagan has expressed the view that employees of the company have thought that there is in fact an industrial matter. That's all very well but it won't turn on the employees' views simply because they have some perceptions about job security or possibility of industrial dispute. It will turn on the issue of whether, legally, there is an industrial matter or not, subject to this application and, clearly, the relevance of the employees' or employer's view is really dubious in that regard.

Mr Flanagan also made the statement about my contention about section 33 in the enterprise award. There's enough on record in this commission, I believe, and there's enough from a past, particularly a past organiser of the AMWU, Mr Harding, who stated on record that clearly the intention of this award was to apply to this particular enterprise.

Without going into all the matters in the award, the definitions in the award which refer to employer means Pasminco (Mining) Rosebery, all the classifications refer specifically to the Rosebery skills acquisition program as set out in clause 29 in the award. Clearly, that is not something which is going to be extended to some other employee. Mr Flanagan's own application in the first instance, which was withdrawn, sought to change the definition of an employer to, means Pasminco (Mining) Rosebery and/or any contractor.

MR FLANAGAN: The position here is that we put submissions to the commission about a) whether or not the commission would accept that the question of job security was an issue which dealt with the direct relationship between the employees of Pasminco and Pasminco. What the commission asked of Mr Fitzgerald, is to indicate their views on that point, particularly in terms of the union suggesting, that if the commission accepts that proposition then there would be no need to call witnesses.

Mr Fitzgerald was not given some sort of liberty to start responding to all the submissions that have been made. That opportunity will be

5 given to him, no doubt, and he's entitled to it, when we have completed our response to his initial submissions. We haven't done that. It was a simple question put to Mr Fitzgerald by the commission: what views do you have about the proposition that Mr Flanagan has put to the commission about job security and where that fits within the context of the relationship between Pasminco's employees and Pasminco, and that is the issue that he should be addressing. If it pleases the commission.

MR FITZGERALD: Commissioner, can I respond to that?

10 COMMISSIONER: Yes, certainly.

MR FITZGERALD: Commissioner, the issue which we're addressing clearly relates to jurisdiction. It's responding to submissions made by Mr Flanagan in respect to jurisdiction. It's responding to Mr Flanagan's remark and he indicated on record that there was some doubt about the enterprise award status of this award. It's as simple as that. It relates to jurisdiction, not some other extraneous matter. I would wish to complete my submission in respect to that matter.

MR FLANAGAN: We'd object to that, commissioner, because the situation is -

20 MR FITZGERALD: Well, that's already been objected.

MR FLANAGAN: Mr Fitzgerald will have the opportunity to do that when we've had the opportunity to respond to his initial submissions and we haven't had that opportunity yet.

25 COMMISSIONER: Yes, all right. I'll take that. That'll be enough, thanks, Mr Fitzgerald. On the other hand, Mr Flanagan, I certainly will not hear evidence from witnesses in relation to this matter.

MR FLANAGAN: Yes, commissioner. In that case, I'd like to take the commission to some decisions which I referred to earlier. The first decision that I'd take the commission to is a decision of the full court of the High Court of Australia. I seek to tender a copy of that decision.

COMMISSIONER: **EXHIBIT AWU.1.**

35 MR FLANAGAN: I should indicate, before I go to these cases, commissioner, so that there is no confusion, that what we are saying in relation to the matters which we are tendering now are matters which we say, or decisions which we say support the proposition that the potential for disputation and job security are both issues which relate to the relationship between an employer and the employer's employees.

40 The first thing I would indicate is, what this decision dealt with was the definition of an industrial matter and it was reviewed by a full

5 bench of the High Court under the auspices of, Mason, CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron, JJ and it was a unanimous decision by the full court. It was a question which dealt with, what is the appropriate jurisdiction of an industrial tribunal in the context of, how do you define what is meant by the relationship between the employer and employee.

10 If I can take the commission to the last page of that decision and take you to the first column on the left-hand side and what they say, under the heading, Managerial decisions and industrial disputes - the full court unanimously said this:

15 *In reaching this conclusion we reject the suggestion, based on the remarks of Barwick C.J. in Melbourne and Metropolitan Tramways Board, at pp 451-452, that managerial decisions stand wholly outside the area of industrial disputes and industrial matters. [I highlight the words 'industrial matters'] There is no basis for making such an implication. It is an implication which is so imprecise as to be incapable of yielding any satisfactory criterion of jurisdiction: see Federated Clerks Union at pp 490-491. Indeed, the difficulty of making such an implication is*
20 *accentuated by the fact that the extended definition of "industrial matters" proceeds on the footing that many management decisions are capable of generating an industrial dispute.*

25 *These considerations indicate that the objection voiced by O'Connor J. in Clancy to the regulation and control of business enterprises by industrial tribunals is not a matter that goes to the jurisdiction of the tribunals. Rather it is an argument why an industrial tribunal should exercise caution before it makes an award in settlement of a dispute where that award amounts to a substantial interference with the autonomy or management to*
30 *decide how the business enterprise shall be efficiently conducted.*

And we'd make the observation that that particular phrase relates to merit of the application, not to jurisdiction. The full bench then went on to say:

35 *The evident importance of arming such tribunals with power to settle industrial disputes capable of disrupting industry is a powerful reason for refusing to read down the wide and general definition of "industrial matters" -*

40 I will leave it at that point. If I can then take the commission to the second column on that page, at the third paragraph from the top, which states:

On the other hand, for reasons already stated, the impact on an employer-employee relationship of the level of manning and the mode of recruitment is direct -

5 So, it's a direct relationship not a consequential relationship. They go on to say:

10 *We should express a caveat at the suggestion made in argument that a dispute between an employer and employee about a matter which lies outside the concept of "industrial matters" as defined can never develop into an industrial dispute. If such a dispute escalates to the point that there is a threatened, impending or probable dispute involving the withdrawal of labour, it is possible that a dispute about an industrial matter may come into existence, notwithstanding its origins.*

15 So, what we have here, in short, Mr Commissioner, is the full court of the High Court of Australia saying that we should not take a narrow and limited perception of what the term 'industrial matter' means. They also go further than that, they say, that matters about the mode of employment are direct in the relationship between an employer and employee, not indirect, not inconsequential.

20 That view was further reinforced by a full bench of the Australian Industrial Relations Commission and I'd seek to tender a copy of that decision.

COMMISSIONER: **EXHIBIT AWU.2.**

25 MR FLANAGAN: If I can first take the commission to the second page, you will see that this was a decision by the president at the time, O'Connor, Senior Deputy President MacBean and Deputy President Bryant and it was made in Sydney on 14 March 1996. If I can take the commission to page 9. Indeed, this was an appeal against a decision of Senior Deputy President - sorry, the name of the deputy president
30 escapes me, commissioner, but it will come out of what we've highlighted.

35 It was a decision which was appealed by the employers and one of the aspects, interestingly enough, it was appealed on, was the question of contractors. If I can take you to the bottom of page 9 and I hope the commission's copy is highlighted. It states:

The Senior Deputy President, after receiving the evidence then came to a number of conclusions set out at page 11 [and that refers to his original decision]:

40 *"There is no issue in these proceedings about the existence of the policies of the South Australian and Western Australian*

Governments with respect to the potential use of contractors in accordance with the concept of 'contestability'.

5 *It would be nonsense to suggest that there could be no dispute about a decision by an employer to retrench his employees because he could have the relevant work performed by the employees of a contractor at cheaper rate on account of the fact that such contractors' employees were paid lower wages and lesser benefits. Such a situation represents the capacity for the most severe industrial confrontation and disputation. It would be utterly unrealistic to expect the competition of that kind would not be vigorously resisted by the employees of the principal employer. In those particular circumstances the matters in dispute would pertain to the relations between the employer and the relevant employees not a perceived or suggested relationship of some artificial kind between the relevant employees and future contractors who are perhaps unknown at this time."*

10

15

And later at page 12, the following:

20 *"The fundamental point about the concept of 'contestability' is that if contractors are able to perform work as efficiently, or even more efficiently, and at a lower cost than current employees then it is likely that contractors will be awarded the work. The employees who face the prospect of retrenchment have a very real interest to ensure that the cost of their services is not undercut by the use of cheaper labour."*

25

Now, that was the assessment that the full bench made of what Deputy President Riordan had observed in his original decision and that was his name, commissioner, it was Deputy President Riordan. If I can then take the commission over to the last page of the decision where they summarise their view. The commission says this:

30

COMMISSIONER: Where do I find this?

MR FLANAGAN: It's page 42, I beg your pardon, commissioner. It's the second-last page. If I can take you to the third paragraph - it's a one sentence statement:

35 *These conclusions, [and that refers to the conclusion that they had made that I've just taken you to] as we have stated, were, on the evidence, conclusions open to the Senior Deputy President.*

If I can take you to the second paragraph below:

The appellants, in our view, have not been able to demonstrate any error of law or error in the exercise of a discretion on the part of the Senior Deputy President coming to his decision. In the absence of any error, leave to appeal is refused.

5 In fact, what has occurred, is the full bench of the Australian Industrial Relations Commission have endorsed the comments which I took the commission to in relation to whether or not the use of contractors was a matter which went to the relationship between the employer and employee. Like the High Court - the full court of the
10 High Court, they endorsed the view that there was a direct relationship.

If I can then finally take the commission to a decision -

COMMISSIONER: One point before you go any further, Mr Flanagan. Does that mean that the ultimate court found a dispute? Is that what
15 it means?

MR FLANAGAN: The ultimate court?

COMMISSIONER: This final decision of the full court, I think you called it. Does that mean they found a dispute? The ultimate result of this decision was, a dispute was found. Is that right?

20 MR FLANAGAN: Yes, that's right, commissioner.

COMMISSIONER: All right.

MR FLANAGAN: There were a number of other issues that they dealt with, commissioner, but that was the one which was relevant for these purposes.

25 Finally, I tender a copy of a decision by Commissioner Leary.

COMMISSIONER: **EXHIBIT AWU.3.**

MR FLANAGAN: And again the issue here was the question of whether or not a contractor's provision was something which involved the direct relationship between the employer and employee and
30 Commissioner Leary made this decision in Hobart on 8 May 1996 in respect of a dispute between the *AWU v Alpine Australia* in an application where the union had sought to establish regulation in the skiing industry.

If I can take the commission to the last page of Commissioner Leary's
35 decision and in particular - I beg your pardon, commissioner, it's not the last page.

COMMISSIONER: Page 4.

MR FLANAGAN: Is your copy marked?

COMMISSIONER: Yes.

MR FLANAGAN: Page 4, commissioner. If I can take you to the fourth paragraph which is highlighted, which states:

5 *The respondents referred to two claims submitting that they were
not matters pertaining to the relationship between employer and
employee. Those claims were Clause 79, "Union Dues" and
Clause 84 "Work Done Through Contractors" [indeed the same
clause which is the subject of these proceedings]. The respondents
10 relied on the authority of re: Alcan Australia Limited and others,
ex parte Federation of Industrial Manufacturing Employees
(1994) [123 ALR 193] in claiming that the deduction of union
dues was an "industrial matter" and a decision of the High Court
re The Manufacturing Grocers' Employees Federation of
15 Australia and another; ex parte The Australian Chamber of
Manufacturers and another [160 CLR 341] in respect to
contractors. The AWU chose to reserve its position as to clause 79
-*

If I can just pause - that was the Union Dues clause:

20 *- and did not present an argument against the submission of the
respondents.*

So the AWU had accepted that the Union Dues was not an industrial matter:

25 *The AWU stated that the claim regarding contractors addresses
security of employment for employees and does not seek to
regulate the terms and conditions of contractors therefore the
authority of Manufacturing Grocers' has no application.*

30 Indeed, that is our submission in respect to this matter. We do not tell
Pasminco how or who they use as contractors. All we are seeking to do
is address the job security concern of employees of Pasminco Rosebery
employed at Rosebery.

If I could then take the commission down to the bottom of the page, in point 4, the commission observes:

35 *The claims in the log of claims, other than clause 79 [which
relates to Union Dues] are matters pertaining to the relationship
between employer and employee.*

And that includes the provision, Work Done Through Contractors. So, in summary the union's position is this, commissioner. We have an authority from the full court of the High Court of Australia, we have an authority from a full bench of the Australian Industrial Relations
5 Commission and we have a decision of an individual commissioner of that commission who has dual appointment with this state commission. They are all contemporary decisions, 1987, 1995, 1996. And all of those decisions support the proposition that work done through contractors is a matter which goes to the heart of the direct
10 relationship between an employer and employee.

We submit, that given that, that there is, in accordance with section 3, subsection (1), jurisdiction for this commission to determine the application which is before you, that in accordance with section 32,
15 given that there is an industrial matter before this commission, the commission may hear and determine the merits of the subject matter which is in the application and pending that determination, if it accepts the submissions put in relation to the merit, make an award of variation in the terms sought by the application.

In short, we say that this commission is very clearly empowered and very clearly has the jurisdiction as demonstrated by those cases to
20 hear the application which is before you, that the commission should find jurisdiction and that the matter should be listed for hearing of the merit. If it pleases the commission.

COMMISSIONER: Yes, thanks, Mr Flanagan. Just one point, I note,
25 and I just want to get your comment, that the federal system relies on a dispute finding prior to the making of an award. This system is different in that we have clear separation between disputes and the making of an award. One applies to have an award made or amended. A dispute is not required.

MR FLANAGAN: Yes, I accept that, commissioner. The critical point
30 in our view was that each of these cases dealt with the question of, what is an industrial matter, and does this position which is before you, this application, does that conform with what an industrial matter is in the context of, is this about a direct relationship between
35 the employer and the employee. What we say is that those matters which we just took you to, as indicated by the High Court, they use the word 'direct' relationship.

Commissioner Riordan clearly said, it was an industrial matter, and that was endorsed by the full bench of the Australian Industrial
40 Relations Commission and Commissioner Leary in very, very clear words said, this is a matter of direct relationship between the employer and employee, and it is those words, the direct relationship between the employer and employee, which are found in our state Act at
45 section 3(1) where it very clearly states, in terms of the definition of an industrial matter that it pertains to the relations of employers and employees.

There is that direct relationship required by that section. Those cases say, yes, this is a direct relationship matter, job security and the possibility for industrial disputation, both of which we have as real issues for the employees of Pasminco and indeed Pasminco itself.

5 I suppose that it's also appropriate to respond to the submissions of Mr Saltmarsh. Mr Saltmarsh has put it to the company - he has made an assertion, an assertion we're all too familiar with, unfortunately, this year. He has referred to Life of Mine study which has demonstrated that certain things needed to be done and indeed, in our
10 view, we have done what is needed to be done and that in fact is also dealt with and it's the only time, unfortunately, this morning I'll have the opportunity to refer to our original exhibit in these proceedings, but if I can take the commission to - I'm not sure what it's titled now - the exhibit book which was -

15 COMMISSIONER: Yes. It was a rather extenuated title, wasn't it? The AWU exhibit book.

MR FLANAGAN: That's the one, commissioner. If I can take you to tab 14 in that book, the fifth last page. The document that you are looking at, or the page that you are looking at is a part of a supporting
20 document which was tendered in the proceedings for certification of the new Rosebery award and if I can take you to the Introduction Summary - the company there and the parties there identify the changes which were made to ensure the viability of this operation and they are identified:

25 *Single crib breaks*
Shift Change 17 Level/formalised change over all areas
Annual Leave
Common Classification Structure
Module System Replaced by "Positions"

30 It goes further than that. It says in the last sentence of that clause 1:

The new agreement reflects the necessary changes for the future -

And that's exactly what they've got. They've got that in place. To suggest that the use of contractors as proposed by the union restricts the company's capacity to use them is inaccurate. It does not do that.
35 They are still free to engage contractors. We don't intend to tell them what contractors they can or cannot use.

To make the suggestion that the Life of Mine study in some way supports the proposition that he has advanced is interesting because it is nothing more than that. It is an assertion based on nothing. There
40 is no Life of Mine study before this commission and we've had no opportunity to cross-examine the proposition which was put in respect of that.

For those reasons, we say that the comments of Mr Saltmarsh should be regarded as assertions and read down. If it pleases the commission.

COMMISSIONER: Yes. Mr Fitzgerald?

5 MR FITZGERALD: I just wonder whether Mr Saltmarsh can just respond to that last comment and then I'll just respond generally?

COMMISSIONER: Right.

10 MR SALTMARSH: I think, commissioner, if it pleases the commission, rather than who said what or who did what, taking on board the comments made by Mr Flanagan, we did in fact, as he's quite correctly pointed out, successfully negotiated the agreement which identified those changes back on 28 January when we announced the sorts of changes we were looking at which included those identified and negotiated in the agreement and in their exhibit AWU.1 behind tab 5, rather than take you through it, was the letter that went to the unions on 28 January which indicated the sorts of things we were looking at for changes. On page 2, it talked about:

The Life of Mine study has also outlined a number of other reforms which will be critical to the operation's future.

20 It's behind tab 5, commissioner, on the second page which identified a number of changes, and the last dot point simply said:

greater flexibility in the use of contractors

25 So we've been open and communicated since 28 January on that. The use of contractors as well as our own employees, which we've successfully negotiated with a lot of effort from the respondent unions, clearly indicates that we would seek to continue to utilise all resources including contractors.

30 As I've said before in response, that this company will not surrender its right to continue to pursue opportunities that are available to ensure the long term viability of the mine. That's the reality check for this forum. Thank you.

COMMISSIONER: Thanks, Mr Saltmarsh. Mr Fitzgerald?

35 MR FITZGERALD: Yes, I'll be very brief in response. I just want to respond - just to continue with the issue which was objected to and I understand - I hope I have the right to continue and this is the issue of whether Pasminco Rosebery Award is an enterprise award or not and when I was last addressing the commission I referred to the withdrawn application, where the union sought to change the definition of employer which is restricted to Pasminco Rosebery to mean, Pasminco (Mining) Rosebery and/or any contractors, subcontractors,

transmittees, assignees, however described, whatever they mean in that context.

5 I think, by their own admission - I understand it's been withdrawn but, clearly, and on the points which I've made previously, the award is very much characterised by aspects relating to Pasminco Rosebery only. That clearly is an enterprise award. The definition of employer is confined to Pasminco Rosebery. We've had admission by union colleagues that it's intended to apply to that site only.

10 Clearly, the provision of 33(1)(b) comes into play and that is, it is an enterprise award between private employees employed in an enterprise. Clearly, employees of third party contractors are not employees of that enterprise. So, for Mr Flanagan to slip out of it on the basis that it's not an enterprise award, then the only natural thing to say then is it's an industry award.

15 Well, if that is the case, then why was Mr Flanagan in the first instance attempting to change it into an industry award because I think that obviously indicates that he concedes it was an enterprise award.

20 Now, Mr Flanagan has failed to address the issue of industrial matter and I take your point, commissioner, that in terms of the exhibits which Mr Flanagan has produced, notably, they were all federal matters. They don't - as you quite clearly indicated, the federal commission's powers are confined by constitutional restrictions particularly in terms of dispute settling and the finding of a dispute.
25 The commission's powers in this instance are clearly separated into disputes settling and award making powers.

30 That does very much confuse the whole issue of jurisdiction. If you attempt to use principles applying to particular cases in the federal jurisdiction to this matter - it doesn't matter what other case is decided in another jurisdiction, what we're talking about, commissioner, is this application, the clause relating to the particular attempt to introduce contractors as part of this award and whether it falls within the definition of this legislation, not some other piece of legislation, and particularly whether it relates to an industrial matter.

35 Now, without wishing to reiterate my earlier submissions, if you look at the definition of industrial matter, clearly it's between the relations of employers and employees. Clearly, it's not employees at large. It could be anyone's employees, is what Mr Flanagan is saying. It then goes on to give some indicative matters and particularly relating to
40 termination. If that's the case, then what we've got is the relationship between Pasminco Rosebery as the principal and some other employee of another contractor and it refers to the termination, so it's an absurd proposition to say it could include the termination of another employer's employee. It's got to be the direct relationship.

5 Exhibit AWU.1 - certainly, there have been some changes in recent times within the federal jurisdiction as to the issues of management prerogative, manning levels and the like but that does not impact on the clause the subject of this application. It doesn't relate to the third party contractors' issues and whether terms and conditions should be applied in the same terms as the current award.

10 Certainly, I'm aware of decisions by the federal commission - and I know Deputy President Johnson was one and I haven't got copies because I wasn't intending to produce it to the commission but I can say that in a decision which is equated in volume 34, No. 16 of Australian Industrial Law Review 1992, Commissioner Johnson said and he noted: That it was established that the commission was not able to prohibit an employer from using contract labour, and that's backed up by the proposition, *Queen v Commonwealth Industrial Court* 15 *Judges ex parte Cox* 1968, 121 Commonwealth Law Reports.

Clearly, Commissioner Johnson, as he was then, in that case in the federal commission, clearly acknowledged that the commission couldn't interfere in those rights and this is what this application seeks to do.

20 I won't exhaustively go through the exhibits, but exhibit AWU.2 - difficult in the time that we've had to respond to it, to actually get to grips, but it's really the federal system's of appeals, where you've got to make out a *prima facie* case. I'm not certain that in fact the conclusions which were drawn by the bench are as those described by 25 Mr Flanagan. Certainly, he made the statement, commissioner, that the bench confirmed the views of the Senior Deputy President.

My view is that this decision didn't do that at all. It simply quotes the views but doesn't necessarily confirm them. Again, particularly with the differences in jurisdiction and the separate and distinct award 30 making powers of this commission as against the disputes settling powers of this commission, it's not on all fours and doesn't do much to assist.

35 Similarly, in respect to exhibit AWU.3, again, the same propositions apply. Again, you can't draw any similarities because, quite clearly, it's in accordance with the federal commission's powers and its restricted powers in that regard and not only is it an interstate factor but it is also issues of genuineness and the like, which you'd be well aware of. Those issues just don't impact in this jurisdiction.

40 With those comments, commissioner, nothing that the AWU have put impacts on our threshold argument, that there is no jurisdiction in this commission. If the AWU had something to put which was of merit in this regard, then clearly there'd be some issues relating to this jurisdiction, not another.

For those reasons we ask the commission to grant the application by the company to refuse jurisdiction to allow the AWU's application to proceed. If it pleases.

5 COMMISSIONER: Thanks, Mr Fitzgerald. I'll reserve my decision in relation to jurisdiction in this matter. I believe I have some things to chew on and so I will issue that decision as soon as I can. Unfortunately, I've got a couple of heavy matters already in train, so it won't be tomorrow. However, I will try and get it out as soon as I can and in all that, Mr Flanagan, if you want to disagree with me in 10 relation to not hearing the witnesses - I don't believe it was at all necessary. I think the points before me are certainly hard enough for me to make a decision on but of course if you still disagree with me on that point, you know what you can do, when I make my decision.

15 MR FLANAGAN: Yes, commissioner. Thank you for clarifying that, commissioner.

COMMISSIONER: Nothing else? I adjourn this matter.

HEARING ADJOURNED 1.00pm