QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 275 - application for a declaration about employment status of a class of persons

The Australian Workers' Union of Employees, Queensland AND Hammonds Pty Ltd and Others (No. B885 of 1999)

PRESIDENT HALL
COMMISSIONER BLOOMFIELD
COMMISSIONER BLADES

15 November 2000

Shearing industry - Section 275 *Industrial Relations Act 1999* - Application for declaration that class of persons be employees for the purposes of the Act - History of award regulation of shearing industry considered - Troubleshooters Available system of contracting - Written contract between TSA and participating shearers - Purpose of arrangement assessed - Whether contract for services or contract of service considered - Intention of parties to avoid the relationship of employer and employee - Intention critical to whether independent contractor - Actual arrangements examined - Intention of parties apparent - Exercise of control not necessarily a right to control - Role of intention, control, nature of work, manner and method of engagement referred to - Shearers and support workers found to be independent contractors - Purpose of section - Whether interest of class paramount - Full Bench not confined to the interests of the class of persons - Use of word "employees" in s. 275(3)(c) and (e) indicates interests of others may be considered - Power to protect industrial instruments - Evidence examined - Avoidance of *Shearing Industry Award - State* - No evidence of detriment to others caused by Hammonds Pty Ltd operation - No evidence others forced to work outside the Award - No evidence contractors worse off - Application overtaken by events - Future impact of arrangement uncertain - Application dismissed.

DECISION

Decision of President Hall

The genesis of all that has occurred was the delay in modernising the *Shearing Industry Award - State*. Much modernisation has, of course, now occurred. In particular, employers may now require some measure of weekend work at ordinary rates where the Monday to Friday shearing has been delayed by wet weather. With the consent of the shearers or their representative, shearing may be extended by half an hour on a Friday afternoon or after what would otherwise be the last weekend run, to shear or crutch ewes with lambs contained within the holding paddock. With the consent of the shearers, overtime (including weekend overtime) may be performed at penalty rates. However, the innovations are recent. Many commenced operation (retrospectively) from 1 January 2000. At the beginning of the 1990's, the regulation of hours of work was very much more rigid.

The inability to perform shearing work on weekends was a matter of some angst to graziers. It may be conceded that graziers were not anxious for shearing work to be performed on weekends in the ordinary course. Indeed, on the larger holdings where the shearing will take some weeks, or perhaps months, land holders seem keen to avoid weekend shearing so that the weekend will be available for the movement of sheep out of the holding pens, the mustering of sheep for the following week, and for taking the necessary steps to remove bales of wool from the holdings. (The smaller enterprises, where shearing may take only several days, seem more disposed to weekend shearing. The tendency may arise out of a desire to complete, rather than break, the exercise. Of course, it may be that on this point the witnesses were simply not representative.) Compatibly with that resistance to weekend shearing, graziers who gave evidence were committed to the proposition that shearing on weekends was an option which should be available where it was necessary or desirable. At the simplest level, where sheep were affected or likely to be affected by fly-strike and their prospects of survival if left unshorn for the weekend were dismal, graziers wanted the opportunity for shearing work to be performed on weekends. Where the holding paddocks contained ewes with lambs, and it is of course impracticable to match up lambs and ewes so that the shorn ewes and their lambs may be moved out of the holding paddocks, shearing on weekends was thought to be entirely

desirable and legitimate. Where because of the size of the holding paddocks or because lack of fodder therein, it would be necessary to move sheep from those paddocks over a weekend and bring them back again for the following Monday (rather than let them starve) weekend shearing was seen as entirely defensible. In the case where only a limited number of sheep remained to be shorn, there was seen to be considerable attraction in finishing the run on a Saturday rather than breaking for the weekend and resuming on the Monday. Where time had been lost through wet weather or some such adverse circumstance, working through the weekend (or part of it) to reclaim the time was seen as attractive. The attractions of weekend work were not confined to the graziers upon whose properties the work would be performed. Graziers engage shearing contractors considerably in advance of the time of shearing. If, for whatever reason, a shed does not finish on a Friday and work has to be resumed on the Monday (and perhaps the Tuesday) of the following week, the arrival of the shearing team at the shed next in sequence will be delayed. Late arrival can cause difficulties for a grazier attempting to muster his stock. It should be added also that there are shearers who are content and, indeed, who would prefer to work into a weekend on some occasions. A good example is furnished by expeditionary shearing. Where considerable travel would be involved in returning from a shed to a Charleville home only to return to shear a limited number of sheep on the following Monday, some shearers and support staff would be content to work into the weekend. Obviously, the attractions of weekend work to shearers and support staff varied according to whether their personal circumstances placed other demands on their time of a weekend, or left them free to substitute other rest days as they saw fit.

Against that background the rigid Award of the early 1990's was a source of temptation.

There were of course persons aggrieved by the Award other than those who wished for shearing work to be available on a weekend. One such person was Barry Hammonds. Mr Hammonds had been prosecuted by the applicant's organisers for breach of the Award on a number of occasions. On some occasions Mr Hammonds had been successful. On others he had been fined. He had served time in the Charleville watchhouse rather than pay the fine. It is legitimate to infer that Mr Hammonds felt no great affection for the Award.

In December of 1991 Mr Hammonds came across an article in a magazine published by the then United Graziers' Association which gave some outline of a system for the provision of labour known colloquially as the Troubleshooters Available System which was said to allow the provision of labour without creation of the relationship of employer and employee. The system was further said to have been approved by the Australian Courts. Mr Hammonds, at that time conducting the business of a shearing contractor under the aegis of Barry Hammonds Pty Ltd, a corporation under the law of which he and his sister were directors, made enquiries about the possibility of utilising the Troubleshooters Available System within the shearing industry. In the end result, a corporation under the law named Hammonds Pty Ltd, the respondent to these proceedings, of which Mr Hammonds and his wife were directors, was established as the vehicle by and through which the scheme was to be implemented in the shearing industry. Henceforth, Mr Hammonds was to offer a full shearing service through Barry Hammonds Pty Ltd, and was to offer the provision of labour to mount a shearing operation through Hammonds Pty Ltd.

It may be conceded that Mr Hammonds concern was with the restrictions imposed by the Award rather than the Award itself. But avoidance of the Award was seen as the path to avoidance of the restrictions. It is not necessary to dwell on arguments about immediate and ultimate purpose, or arguments about whether a soldier draws his sword to kill his enemy or to defend his country. The purpose sought to be achieved in adopting the Troubleshooters Available System was avoidance of the *Shearing Industry Award - State.* Indeed, the purpose of the Troubleshooters Available System is to avoid creation of the relationship of employer and employee which, being a relationship of long standing and of social and economic significance, has long since attracted the burden of significant legislative reforms. (For completeness, I add that Mr Hammonds wife had the subjective purpose also of avoiding the operation of the (then) *Workers' Compensation Act 1990.* Mrs Hammonds, one should add, did not form that purpose out of mean-spiritedness or greed. She sought to liberalise a sum of money which might be used to fund the establishment of three categories of wool classer rather than one. But she did have that purpose.)

In deference to the directors of Hammonds Pty Ltd, *viz* Mr and Mrs Hammonds, it should be added that

subsequent to the company's entry to the market and the provision of labour it has garnered together an enthusiastic, highly skilled and diligent squad of shearing industry workers whose labour is much sought after. The applicant does not contend otherwise. The case for the applicant is, rather, that the enthusiasm, diligence, professionalism and skill are unrelated to the legal nature of the relationship between Hammonds Pty Ltd and those workers, and would survive the making of an order under s. 275 of the *Industrial Relations Act 1999*.

Critical to the scheme developed by Troubleshooters Available is the reduction to writing of the terms upon which participating shearers and support workers are to obtain work through the good offices of Hammonds Pty Ltd. It is apparent from the evidence that the standard form contract has varied over time. There is no reason to think that the precedent in use at the time of the hearing was other than representative. It is in the following terms:-

"1. I acknowledge and agree that there is no relationship of employer/employee with TROUBLESHOOTERS AVAILABLE and that TROUBLESHOOTERS AVAILABLE does not guarantee me any work. I am self-employed and, as such, I am not bound to accept any work through TROUBLESHOOTERS AVAILABLE.

2. I hereby agree to work for an agreed amount per unit/hour for actual on-site unit/hours or job price to be agreed.

3. I expressly forbid TROUBLESHOOTERS AVAILABLE to make deductions in respect of P.A.Y.E. taxation. However, I instruct TROUBLESHOOTERS AVAILABLE to make deductions in respect of the voluntary Prescribed Payments System of taxation.

4. I hereby agree that I have no claims on TROUBLESHOOTERS AVAILABLE in respect of Holiday Pay, Long Service Leave, Sick Pay, or any similar payment.

5. I hereby agree that TROUBLESHOOTERS AVAILABLE has no responsibility or liability to me, except that I am guaranteed to be paid for actual on-site hours worked or agreed job price for work done.

6. It is agreed that I must carry out all work that I agree to do through the agency of TROUBLESHOOTERS AVAILABLE in a workmanlike manner and TROUBLESHOOTERS AVAILABLE is hereby guaranteed against faulty workmanship. All work must be made good. Further, I agree to cover the work (where necessary) for Public Liability, Accident Insurance, Long Service, Holiday Pay and Superannuation, and have no claims on TROUBLESHOOTERS AVAILABLE in respect of the above.

7. I hereby agree to supply my own plant and equipment including safety gear, boots, gloves, and any necessary ancillary equipment required, and that I (the undersigned) have no claim on TROUBLESHOOTERS AVAILABLE in respect of the above.".

On its face, clause 1 indicates in the clearest language that the intention of the parties is to avoid the relationship of employer and employee and establish and maintain the status of the shearers as self-employed contractors for whom Hammonds Pty Ltd is to find work. The intention of the parties is critical, *Harker v Boon* [1956] AR (NSW) 178 at 183 per Beattie J, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37 per Wilson and Dawson JJ. Of course, if the true nature of the relationship between the parties is that of employer and employee, the parties cannot alter the nature of the relationship by putting a different label upon it, *Ferguson v John Dawson and Partners (Contractors) Ltd* [1976] 1 WLR 1216 at 1219 per McGaw LJ with whom Browne LJ agreed, *Australian Mutual Provident Society v Chapman* (1978) 18 ALR 385 at 389 (Privy Council) and *Narich v Commissioner of Pay Roll Tax* (1983) 50ALR 417 at 421 (Privy Council). But here there is nothing in the express substantive terms of the contract to suggest that the relationship is that of employer and employee. The agreement that the shearers, classers, etc are not to receive annual leave or sick leave or any payment referable to those entitlements and that no deduction of income tax is to be made from their remuneration signifies a mutual intention that they

are not to be regarded as employees, *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 105 at 126. In those circumstances the applicant seeks to go to the conduct of the parties, not for the purpose of construing the terms used in the contract, but to assess whether the contract is a true manifestation of the intention of the parties or a sham. The applicant is entitled to do so, *Carm and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163 per Rich, Dixon, Grant and McTiernan JJ, *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 428, *Australian Timber Workers' Union v Monaro Sawmills Pty Ltd* (1980) 42 FLR 369 at 374 to 376 per J.B. Sweeney and Evans JJ and *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1990) 34 IR 138 at 143 per Lee J. The applicant's difficulty is with the facts.

The shearers, wool handlers, classers, pressers and cooks who gave evidence and who had entered into a written engagement with Hammonds Pty Ltd on the terms set forth above, were cognisant of a distinction between an employer/employee relationship and the relationship into which they were entering with Hammonds Pty Ltd. Some, such as Mr Lambeth, thought the distinction not to be of great significance. Mr Lambeth, who works as an employee shearer for shearing contractors as well as entering arrangements with Hammonds Pty Ltd, thought that the arrangements organised by Hammonds Pty Ltd gave him no greater freedom of choice. It was his view that in either situation he could decline to go to a particular shed - perhaps because from past experience he knew that the sheep were difficult to shear - without recrimination. Others thought that under the arrangements with Hammonds Pty Ltd and the graziers they were "freer" than they had been when working for shearing contractors as employed shearers, etc. Some of the witnesses were more articulate than others. One of the more articulate witnesses, a Ms Davidge (a cook) in the course of (lengthy) cross-examination observed:-

> "Yes. Is there any reason why Mr Taylor, for example, he's an employer that you know, any reason why Mr Taylor, if he was a nice accommodating chap, why he wouldn't behave exactly the same way as Mr Hammonds does? . . . I am not saying that Mr Taylor wouldn't behave in that way, it's how I would feel regarding myself as an employee, whereas I regard myself as a contractor with Barry.
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> You feel . . . ? I know I work - know the way I am now, I know I work for myself and I know I work for myself, so therefore I have a choice and I know when I work as an employee, I work for somebody else, not for myself, so therefore I would feel obligated to go to work, even if I want to do my own thing, with Barry I don't feel that same obligation.".

One can readily accept that other people may not share Ms Davidge's views. But such views may be honestly and reasonably held. It is perfectly clear what the relationship was into which Ms Davidge wished to enter.

It is contended that what Hammonds Pty Ltd did, differed not at all from what was done by Barry Hammonds Pty Ltd when that company was being used as a vehicle to conduct the business of a shearing contractor. It is put that both corporations operated a complete shearing service entering a property with shearers, wool pressers, classers, and cooks, who largely brought their own equipment*, and who worked through a flock of sheep before departing, leaving behind shorn animals and wool in bales.

[*It may be conceded that the circumstance that those employed by Hammonds Pty Ltd provided their own equipment is not of the significance which it might have in other industries because, notoriously, in this industry, shearers do provide their own equipment (save perhaps grinders) and do so on such a scale that allowances have been incorporated in the award rates. Indeed, it weighs in the applicant's favour that the cooks in the teams organised by Hammonds Pty Ltd provide only their own knives, whilst Hammonds Pty Ltd provides the other equipment.]

To begin with the proposition is not entirely correct. At the property "Calabah", neither a cook nor a presser was supplied. No presser was supplied at "Woolabra". For the period 16 April 2000 to 29 April 2000 and 4 June 2000 to 27 June 2000 at the property "Listowel Downs" a presser was supplied on only one day, and at "Newholme" no presser was supplied. Additionally, for all the pride which they take in their work, the workers to whom the application relates perform relatively simple tasks. Although some persons may shear sheep better than others, while some shed hands may maintain cleaner floors than

others, and some classers may pick a fleece better than others, the actual task performed is simple and will be the same whether it be performed by a person employed by a contractor, a self-employed sub-contractor or a member of the grazier's family. Further, at the end of the day the submission that there was great similarity in that which is done by the two teams is unhelpful. I accept the submission of the respondent that a casual observer watching a suburban cottage under construction might have difficulty in determining who was an employee and who was a contractor.

It was then put that "the manner and method" of engagement followed by Barry Hammonds Pty Ltd and Hammonds Pty Ltd was the same. In support of the submission it was put that Hammonds Pty Ltd contracted on a rate per head of sheep basis. It may be conceded that there is conflict in the evidence on that point. For myself, I entertain no doubt that Mr Hammonds does not quote on a rate per head basis. Sheets breaking down the earnings of the members of Hammonds Pty Ltd teams at a number of sheds have been put in evidence. Variations to shearers earnings may occur because of the presence of rams or sheep with double fleeces. The incomes of those paid on a time basis would be affected by factors such as packed wool or burrs slowing the pace of shearing. The invoices despatched by Hammonds Pty Ltd to the graziers are precise in detail and descend to small sums of money. To make the calculations in advance and then, armed with an estimate of the number of sheep, convert the total amount into a rate per sheep would be an impossible task. In my view what has occurred is on particular occasions Mr Hammonds has been asked to estimate what the costs would amount to on a per sheep basis and, without committing himself to the estimate, has done so. Because such a figure is readily understandable and has some tradition attached to it, it has been that figure which the grazier has remembered. I do accept the further submission that as a mathematical transaction what Hammonds Pty Ltd is doing is fundamentally what a shearing contractor does when a shearing contractor contracts on a cost-plus basis. However, other aspects of the transactions which Hammonds Pty Ltd procures differ fundamentally from transactions between a grazier and a cost-plus shearing contractor. Put shortly, the grazier is not restricted to dealing with the employees of somebody else (the contractor) who, because of the cost-plus nature of the transaction, has no financial interest in efficiency or productivity. In any event, the short point is that the major distinction as to "manner and method of engagement" is that the terms of the offer made by Hammonds Pty Ltd are fundamentally different to the terms of the offer made by Barry Hammonds Pty Ltd.

It is further contended that Hammonds Pty Ltd had sufficient control over the sub-contractors as to render them employees. The control was said to be exercised by and through the shearer managers. However, the burden of the evidence is that the shearer managers are persons, sometimes selected by Mr Hammonds and sometimes selected by consensus of the members of the team, who are paid a small sum of money to maintain the tally book and transmit details to Mr Hammonds, and to do no more. To the extent that certain of the graziers attributed greater authority to the shearer manager, they were graziers who did not actually know and who had never had to explore the matter because they had not had to take up a complaint. The submission that "someone must have been in charge" is met by the factual circumstance that in some cases, presumably by force of personality, the grazier had taken charge. In the case of Mr Davis, so much control had he seized that when he was absent one of his station hands exercised authority. The submission is met also by the argument that by selecting professional and compatible people in the first place Hammonds Pty Ltd may largely assume the cooperation will prove a substitute for control. It must be conceded that, when present, Mrs Hammonds does exercise control over the manner in which the classers perform their work. Once again, that may be by force of personality. It may be because the classers wish to learn. It may be because the classers wish to be re-graded into one of the higher categories of classer established by Mrs Hammonds. But on the whole of the evidence there is no sufficient justification for attributing the exercise of control to a right to control which would be inconsistent with all the other evidence as to the terms of the contract. (It is the right to control which is critical, compare *Zuijs v Worth Brothers Pty Ltd* (1955) 93 CLR 561 at 571 and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24 per Mason J.)

Vabu Pty Ltd v Commissioner of Taxation (1996) 81 IR 150 is unhelpful. In an industry characterised by sequential, short-term contracts, all who stand in the labour market, contractor and employee alike, take business risks.

I am satisfied that the shearers and associated persons previously described are not employees of

Hammonds Pty Ltd.

By an application under s. 275 of the *Industrial Relations Act 1999* filed 1 July 1999, amended 17 September 1999 and further amended 24 March 2000, the applicant seeks an order declaring those shearers and associated persons to be employees. The relief sought is a declaration "that the following class of persons are employees for the purposes of the Act, namely all persons who perform work in the industry of the shearing and/or crutching of sheep and the classing and baling of wool in the State of Queensland under a contract for services, irrespective of whether the contract for services is made with the person for whose benefit the services are directly performed or not.".

It is contended by the respondent that the relief sought goes beyond s. 275 in that "all persons who perform work in an industry under a contract for services" does not constitute a class of persons for the purposes of s. 275(1). Why persons who perform work pursuant to contracts for services may not be classified according to the industry in which they perform the work quite eludes me. However, though there may be power to make the order, it would be plainly undesirable to do so. The evidence has been exclusively about shearers, wool handlers, shed hands, classers, pressers and cooks. Any order should be restricted to persons in the relevant industry performing work in those classifications. Further, the evidence has been confined to persons performing work as contractors under the aegis of Hammonds Pty Ltd. There is no justification for sweeping every corporation arranging the supply of contract labour into the one order. Further, the evidence about the impact of the system operated by Hammonds Pty Ltd has (substantially) been confined to the grazing properties around or serviced from Charleville. Any order should reflect that geographic limitation. Additionally, the *Shearing Industry Award - State* has traditionally identified the classifications of employee to which it applies. That approach to drafting has eliminated issues as to whether employees mustering sheep are properly to be regarded as employees within the shearing industry or within the pastoral industry. Here an issue might arise about an independent contractor entering a property to repair the generator in the shearing shed. The Commission would be wise to define with some particularity, and by reference to work performed as well as to industry, the categories of independent contractors to which, in this case, any order made under s. 275 is to relate.

The conclusion that those whose labour Hammonds Pty Ltd makes available to graziers are (all) independent contractors makes it unnecessary to deal with paragraphs 4A to 4C of the "Statement of Facts and Issues". Paragraph 4A to 4C advance a case based on the intermingling of persons who were employees of Hammonds Pty Ltd and others who were engaged under a contract for services. It is convenient to set out the terms of paragraphs 4, 5, 6, 7, 8A, 9 and 10 of the "Statement of Facts and Issues" because they summarise the other bases of the applicant's case. [The paragraphs must be read with the applicant's opening submission to give them full flavour.]

"4. In recent years, business arrangements which were originally developed in the construction industry for use by labour hire agencies, have been utilised by persons working in the shearing industry to enable individuals to engage in shearing and/or crutching of sheep and classing and baling of wool in the State of Queensland in circumstances whereby the persons concerned are not 'employees' within the meaning of the *Industrial Relations Act 1999* or within the Common Law concepts. The result of such business arrangements being adopted within the shearing industry has meant that certain individuals ('subcontractors') have avoided the operation of the Award and avoided the very careful means by which the Award has for many decades achieved an equitable distribution of the available shearing work amongst the workers who are seeking such work.

5. These circumstances have placed all employees in the industry who remain bound by the Award at a substantial and unfair disadvantage in relation to the obtaining of work, and has placed shearing contractors at a substantial disadvantage in securing shearing contracts.

6. The nature and method of work performed by subcontractors engaged in accordance with the labour hire business arrangements is identical to the work otherwise performed by employees in the shearing industry. So long as the labour hire arrangements are allowed to continue to operate within the industry, without being regulated in the same manner as the employees and shearing contractors engaged in the industry, employees will be required to terminate their employment arrangements

and enter into similar labour hire arrangements in order to effectively compete with the labour being provided by subcontractors.

7. This is extremely contrary to the public interest and to the interests of all participants in the shearing industry. Employees of woolgrowers and shearing contractors in the industry will be seriously disadvantaged by having to undertake these measures, which will lead to the provision of labour within the shearing industry becoming wholly unregulated to the detriment of all employees and other workers in the industry who have no economic leverage and no bargaining power in relation to the obtaining of such work.

8. For many decades the Queensland Industrial Relations Commission and its predecessors has determined that the fair means of regulating the supply of labour within the shearing industry is in accordance with the Award and its predecessors. The orders sought in these proceedings are intended to empower the Commission to prevent its careful regulatory decisions being wholly circumvented and rendered nugatory, to the disadvantage of all persons who are presently bound by the Awards. Making of the orders would place all persons who wish to offer their labour within the shearing industry on an equivalent footing so far as the conditions of working and the equitable distribution of work is concerned, and would require persons who wish to be relieved of the regulatory provisions of the Award to make application to the Commission for such relief and to justify exemption from the operation of the Awards.

8A Further, the Applicant believes that the sub-contractors are being engaged under terms and conditions and rates of remuneration that are significantly less than such persons would receive if they were engaged in equivalent work at equivalent times as employees under the Shearing Industry Award. This circumstance operates to place Award employees at an unfair competitive disadvantage for the available work, and removes any possible justification for the continuing exemption of such persons from being more appropriately regarded as employees, and thereby placed within the jurisdiction of the Commission to regulate wages and conditions on an equitable basis throughout the whole industry. [This paragraph added by amendment.]

9. Under the circumstances which operate in the absence of the order sought in these proceedings, any person who wishes to be exempted from the Commission's award regulation need only adopt the labour hire business arrangements, if they have the resources to do so, and they are not required to justify their exemption from that regulation in any tribunal or forum.

10. If the orders sought in these proceedings are not made, the Award will cease to have any practical application in the shearing industry other than to disadvantage persons who are employed in the industry.".

It is convenient to set forth the "Statement of Facts and Issues" because of the exceptional nature of s. 275. The novelty of the power is not, of course, a barrier to its exercise in an appropriate case. There is no justification for importing into the power that is to be exercised only in unusual cases, or exercised only with caution. However, because exercise of the power involves altering the nature of relationships freely - here on the evidence knowingly and willingly - entered into by persons of full legal capacity, and, because in this case exercise of the power would involve alteration of the relationship to benefit persons outside the class of persons to be declared employees, it seems to me that notwithstanding the Queensland Industrial Relations Commission has traditionally declined to place great emphasis on pleading, the applicant should be restricted to the case advanced by the application (and opening submissions). It is that case which the respondent came to the Commission to meet. This caveat I should add. The respondent has gone beyond denying that the level of emoluments received by the independent contractors is less than they would have received if they had been engaged as employees under the *Shearing Industry Award - State*. The assertion has been that the arrangements are financially beneficial. In those circumstances, though in the end result I have treated the evidence as inconclusive, I have treated comparison of the earnings of those who work under the arrangements with Hammonds Pty Ltd with the notional earnings which they would have received if engaged as employees, as being a matter squarely in issue.

Before going to the evidence, I should for completeness add that it was a primary submission by the respondent that s. 275(3) indicated that one was confined to the interests of the class about whom the declaration was sought. For my part I reject that submission. The use of the noun "employees" in s. 275(3)(c) and (e) indicates that the interests of other persons may be considered. Behind any declaration will be a finding that those in the class about which the declaration is sought are not, prior to the making of the declaration, "employees". Similarly, it seems to me that s. 275(3)(d) indicates that one may utilise the power to protect industrial instruments which are the progeny of the Act. (It must be conceded that "designed to", if it causes the paragraph to cover anything additional to that covered by "does", creates great difficulty of interpretation.) It was, it should be added, against that background, as an alternative argument, that the respondent raised the submission that the declaration sought to take away from the class of persons about whom the declaration was to be made, an arrangement which was for their benefit.

The applicant's difficulties commenced with its evidence in chief. There was no direct evidence from shearing contractors of loss of work to Hammonds Pty Ltd. No shearing contractor appeared to complain that to maintain market share in the face of the arrangements negotiated by Hammonds Pty Ltd it had been or would be necessary to work outside the hours permitted by the Award. No independent contractor who was or who had been on Hammonds Pty Ltd books appeared to complain of being forced to work at weekends. No employee shearer, etc gave evidence that a shearing contractor had required him/her to work at the weekend because of competition from Hammonds Pty Ltd. No employee shearer, etc gave evidence of inability to find work with the shearing contractors because of the market share held by Hammonds Pty Ltd. The applicant was compelled to rely on the evidence of officials who could only recount what they had heard. It is possible to sympathise with the applicant. Granted that the allegation that shearing contractors were requiring employees to work outside award hours is true, one would not expect those shearing contractors to volunteer to confess. Grant the truth of the allegation that shearers, etc take engagements with Hammonds Pty Ltd knowing they will be forced to work on weekends (if necessary) because there is no other work, it is inherently unlikely that those persons would come forward to give evidence. But sympathy is not enough. The applicant is required to lead evidence.

The attempt to adduce such evidence by cross-examination of witnesses called by Hammonds Pty Ltd was unsuccessful. Indeed, the attempt let in evidence contradicting the allegations sought to be made. Graziers gave evidence that notwithstanding their dissatisfaction with the unwillingness of shearing contractors and their teams to work on weekends, they would not shift their business to Hammonds Pty Ltd from shearing contractors (and their teams) who had otherwise served them well, or teams comprised of persons with whom they had gone to school and grown up. There was evidence of significant operation by other teams in the area around Charleville and serviced from Charleville. There was evidence from independent contractors who had entered into arrangements with Hammonds Pty Ltd, that they also worked with shearing contractors, were sought out by shearing contractors and, if dissatisfied with Hammonds Pty Ltd, were satisfied that the volume of work was such that they would have no difficulty in finding employment with a shearing contractor.

The allegation that the independent contractors working under the aegis of Hammonds Pty Ltd were forced to work on weekends was not borne out by the evidence. Some did not, eg because of family commitments. Some were enthusiastic about taking work, whether on weekends or otherwise, whilst it was there. Others had no objection to weekend work but made a decision in the light of their own interests on any particular occasion. The evidence is supported by the pattern of weekend work. I reject the respondent's submission that an examination of the shed by shed analyses shows a low incidence of weekend work. I should have thought that an average (per employee) of 9 weekend-days out of every 100 man-days's worked was relatively high. However, when one looks at the figures in more detail, in many instances a relatively small number of sheep were involved. If a group of independent contractors sent to a particular shed contains persons enthusiastic about working while they can, and persons who are unwilling to work weekends, together with persons who exercise a discretion about it - and in the most common case of making up time lost to wet weather where there will necessarily have been a shortfall in income during the Monday to Friday period, one might expect an affirmative exercise of discretion - Hammonds Pty Ltd does not need the authority to force persons to work on weekends nor need to make the effort to force persons to work on weekends against their will. There will be enough willing independent contractors in the group to make weekend work a practical option.

In the event, the shed by shed analyses of earnings did not take the matter very far*. Certainly, they show that if paid in accordance with the Award, the independent contractors would have been much better off at those sheds where weekend work was performed. As to sheds where no weekend work was performed, the general pattern was for the independent contractors to have been paid better than if paid under the Award, with a variation where because of distance the travelling allowance was significant and the number of days at the shed was small. But in showing that, the analyses were not particularly helpful. At the time that the work was actually performed and paid for, the independent contractors fared very much better than they would have fared if paid under the Award. What occurred was that the Award was retrospectively amended. Hammonds Pty Ltd was unable to adjust its charge out rates retrospectively and has not made a retrospective adjustment to the payments to the independent contractors. A comparison over the next 12 months, when Hammonds Pty Ltd are free to charge out at a higher rate if they see fit, may prove more illuminating.

[*The same may be said of the comparison of the independent contractors' insurance policies with the *WorkCover Queensland Act 1996*. Apples are being compared with oranges.]

It is submitted by the respondent that if the independent contractors had been engaged as employees by shearing contractors under the terms of the Award, the weekend work would not have occurred. It is said that to compare like with like, one should compare the actual earnings of the independent contractors with that which employees would have earned if the weekend work had been shifted into the following Monday to Friday period. The submission indirectly points to a difficulty in the applicant's case. In its origin, if the assertions of fact had been maintained, the application was an application to overcome arrangements under which Hammonds Pty Ltd made shearers and others available to work on weekends (and otherwise) outside the hours permitted by the Award. Given the purpose which I have found that Hammonds Pty Ltd had in mind, there might, in July of 1999 when the application was filed, if the evidence had been available, a compelling argument for granting (at least) some relief. The Award obligations which introduction of the Troubleshooters Available System to the shearing industry sought to avoid have been removed by the modernisation of the Award. The avoidance which the application was originally intended to prohibit or at least inhibit is no longer there to be defeated. Understandably, the applicant submits that the arrangements will now be used to facilitate the performance of work on weekends (and otherwise) outside ordinary hours at single rates rather than penalty rates. If that occurs, the applicant may well have a case under s. 275. It would be a remarkable thing if, having solemnly amended an award to set rates which the industrial organisations in the industry representing employer interests and employee interests agreed were appropriate and fair, the Commission declined to exercise the power at s. 275 to strike down arrangements permitting under-payment by artifice. Whether the Troubleshooters Available System will be used to permit underpayment is entirely speculative. The insistence of the graziers that they will not pay penalty rates may prove to be bravado when paying penalty rates is an alternative to fly strike. Further, if the Troubleshooters Available System is used for that purpose, it may well be that it is used for that purpose in circumstances in which the employees of shearing contractors steadfastly exercise their right to veto work at penalty rates on each and every occasion. If such conduct were found to be a contributing factor to the use of the Troubleshooters Available System for the purposes of avoidance of the Award, that finding may well have some impact on the exercise of the discretion at s. 275.

All of that is of the future. Having regard to the basis upon which relief was sought, and to the evidence led by the parties, the current application cannot succeed.

I would dismiss the application.

Decision of Commissioner Bloomfield

I have had the pleasure of reading the decision of His Honour the President as well as the decision of my colleague Commissioner Blades.

In his decision the President has carefully, and succinctly, considered the relationship which has been entered into between various shearers, wool handlers, shedhands and the like and Hammonds Pty Ltd. He has concluded that such shearers, wool handlers, shedhands and the like are not employees of Hammonds Pty Ltd. I agree with his analysis of the law and the conclusions that he has reached in relation thereto.

The President has also referred to s. 275 of the *Industrial Relations Act 1999* and has reached certain conclusions, and made certain observations, in relation to it. Save and except for his comment that "(t)here is no justification for importing into the power that it is to be exercised only in unusual cases, or exercised only with caution" I agree with his reasoning and conclusions. In my view the very nature of the section - which allows the Commission to interfere with relationships entered into between (apparently) consenting parties - dictates that it should only be exercised with caution and, even then, only when a strong case for exercise of the discretion has been made out.

This is particularly so where the class of persons in respect of whom an application has been made have freely (and knowingly) entered into such arrangement and are content with the way that it is working.

I do, however, expressly endorse the President's remarks that the structure of the section is such that the reference to "employees" at s. 275(3)(c) and (e) indicates that the interests of persons outside the class in respect of whom the declaration is sought may also need to be taken into account in appropriate circumstances.

Like the President and Commissioner Blades I would dismiss the application.

Having indicated that position it is appropriate that I make some comments about the application and the case that has been presented by the various parties.

By an application made on 1 July 1999, the day of the commencement of *the Industrial Relations Act 1999*, The Australian Workers' Union of Employees, Queensland (AWU) filed an application which asked the Commission to make an Order pursuant to s. 275 of the Act. The application was amended on 17 September 1999 and further amended on 24 March 2000. In its amended form AWU sought a declaration "that the following class of persons are employees for the purposes of the Act, namely all persons who perform work in the industry of the shearing and/or crutching of sheep and the classing and baling of wool in the state of Queensland under a contract for services, irrespective of whether the contract for services is made with the person for whose benefit the services are directly performed or not.".

The obvious difficulties in granting the Order in the form sought have been highlighted by the President. I endorse his remarks.

In the "Statement of Facts and Issues" accompanying the application AWU contended:-

"4. In recent years, business arrangements which were originally developed in the construction industry for use by labour hire agencies, have been utilised by persons working in the shearing industry to enable individuals to engage in shearing and/or crutching of sheep and classing and baling of wool in the State of Queensland in circumstances whereby the persons concerned are not 'employees' within the meaning of the *Industrial Relations Act 1999* or within the Common Law concepts. The result of such business arrangements being adopted within the shearing industry has meant that certain individuals ('subcontractors') have avoided the operation of the Award and avoided the very careful means by which the Award has for many decades achieved an equitable distribution of the available shearing work amongst the workers who are seeking such work.

5. These circumstances have placed all employees in the industry who remain bound by the Award at a

substantial and unfair disadvantage in relation to the obtaining of work, and has placed shearing contractors at a substantial disadvantage in securing shearing contracts.

6. The nature and method of work performed by subcontractors engaged in accordance with the labour hire business arrangements is identical to the work otherwise performed by employees in the shearing industry. So long as the labour hire arrangements are allowed to continue to operate within the industry, without being regulated in the same manner as the employees and shearing contractors engaged in the industry, employees will be required to terminate their employment arrangements and enter into similar labour hire arrangements in order to effectively compete with the labour being provided by subcontractors.".

[the remaining paragraphs of the "Statement of Facts and Issues" are set out in the President's decision and it is not necessary to repeat them here].

The evidence disclosed that Mr and Mrs Hammonds adopted the Troubleshooters Available (TSA) system as a means of bypassing certain of the restrictions imposed by the *Shearing Industry Award - State*. The evidence also disclosed that since the TSA system was introduced into the shearing industry in the Charleville area by Hammonds Pty Ltd there has been a positive effect, in terms of flexibility and efficiency, in the way that shearing is performed and wool is classed.

One of those called to give evidence, a Mr Bredhauer, engaged a shearing contractor who employed employees to perform the shearing work, class the wool and bale it. His evidence was that the introduction of TSA teams had had a beneficial effect on the industry because employee teams now work in accordance with the Award provisions whereas, previously, the employees were very tardy in their whole approach to work. Other persons called gave similar evidence about the beneficial effect that the introduction of the TSA system had had on the industry. This was particularly so in relation to the way that wool was now handled and the way that it was now classed.

Contrary to the assertions in paragraph 4 the evidence did not reveal that the introduction of subcontractors into the industry by Hammonds Pty Ltd under the TSA system had in any way varied the "equitable distribution of the available shearing work amongst the workers who are seeking such work". Rather, the evidence showed that there was ample work available for shearers, wool handlers, wool classers and the like with both shearing contractors and with Hammonds Pty Ltd under TSA subcontractor arrangements. In addition, the evidence disclosed that there was a healthy distribution of work across the industry in that some graziers continued to engage traditional shearing contractors (who employed employees), others used subcontractors provided by Hammonds Pty Ltd under the TSA system and others moved between the two systems.

The evidence also did not support the contentions made at paragraph 5. Apart from some bland assertions made by witnesses called by the AWU there was no evidence whatsoever which supported the contention that employees who remained bound by the Award were at a substantial and unfair disadvantage in relation to the obtaining of work. The evidence revealed that there was ample work available for employed shearers and that persons engaged by Hammonds Pty Ltd as subcontractors under the TSA system were readily able to find work as employees of traditional shearing contractors if they did not want to take up the next engagement being offered by Hammonds Pty Ltd. That was not just the case for shearers, it was also the case for wool handlers, classers and cooks. As observed immediately above there was also no evidence that shearing contractors were losing work to Hammonds Pty Ltd and its subcontractors.

Similarly, there was no evidence to support the contentions made at paragraph 6. The evidence was that people in the industry freely moved between the TSA subcontractor arrangements offered by Hammonds Pty Ltd and employee status with various shearing contractors to suit their own convenience. There was also no evidence to support the contention that employee shearers were being forced to resign and become contractors in order to compete. [In respect of the first assertion - about the identical work arrangements - the President has already commented on the way that the TSA teams, and the individual members therein, operate without control or directions. I endorse his observations.]

Further, the evidence showed that the TSA system was invariably more expensive to graziers than was the cost of engaging traditional shearing contractors. However, the graziers who utilised a team of TSA subcontractors from Hammonds Pty. Ltd. indicated that they were prepared to pay a higher rate because they received a better quality product and, therefore, a higher market price. This was said to be because of the way that the TSA teams worked and, particularly, because of the way that the TSA team handled and classed the wool.

The "Statement of Facts and Issues" also included a paragraph (added on 24 March 2000) in the following terms:-

> "8A Further, the Applicant believes that the sub-contractors are being engaged under terms and conditions and rates of remuneration that are significantly less than such persons would receive if they were engaged in equivalent work at equivalent times as employees under the Shearing Industry Award. This circumstance operates to place Award employees at an unfair competitive disadvantage for the available work, and removes any possible justification for the continuing exemption of such persons from being more appropriately regarded as employees, and thereby placed within the jurisdiction of the Commission to regulate wages and conditions on an equitable basis throughout the whole industry.".

To try to substantiate the grounds made out therein, AWU extensively questioned the witnesses called on behalf of Hammonds Pty Ltd. In particular, AWU concentrated on the extent to which persons engaged under the TSA system had worked additional runs during the week as well as the occasions on which they had worked on a weekend. An attempt was made to show that the TSA subcontractors were paid less than equivalent persons would have been paid if they were engaged as employees under the *Shearing Industry Award - State.*

However, the exercise was not particularly useful because at the time that much of the work was performed the Award did not permit weekend work at all. Later, when it was amended to allow it, the penalty rates introduced into the Award operated retrospectively. By that time the work performed by TSA subcontractors had been worked and paid for. It was impossible to make a legitimate comparison.

The evidence also disclosed that none of the subcontractors were required, or directed by anyone, to work on weekends. None of the graziers required it. Where weekend work had been performed it had invariably been at the instigation of the subcontractors themselves. Sometimes it was to make up for work lost during the week because of breakdowns or because the sheep were wet. On other occasions it was to suit the TSA subcontractors themselves because they were engaged in expedition work and felt it was better to finish a shed by working additional runs during the week or on the weekend rather than return for a day or so in the following week. On one occasion it was because the subcontractors wanted to go fishing.

In addition, the evidence also disclosed that a number of subcontractors elected not to work weekends, for personal or family reasons, when other members of the team wanted to do so. When that occurred they were replaced by other people. Far from it being a requirement for the TSA subcontractors to work outside "Award hours" the evidence clearly disclosed that it was generally at their instigation.

Whilst the incidence of weekend work was relatively high at 9 weekend days out of every 100 man-days worked the reason why the work was performed has to be considered. The evidence suggested that 70% of weekend work was to make up for wet days lost during the week. If that be the case, and subcontractors are prepared to work at such times to make up for work lost during the week, I am not sure that it is appropriate that the frequency of such work be used to support any future s. 275 application. There would need to be much more, based on what we heard during this case, for a future s. 275 application to succeed.

In its closing submission Agforce indicated its strong support for continued access to the two alternative methods whereby its members' shearing obligations could be discharged. Those two methods are, of course, the traditional shearing contractor and employee arrangement and the Troubleshooters (TSA)/subcontractor type of arrangement offered by such bodies as Hammonds Pty. Ltd.

Agforce also observed that those two methods are not (necessarily) competitive but in many respects are complementary. It seems to me that where the evidence suggests that the two systems have been able to work side by side to the benefit of the industry for nearly a decade then the Commission should be reluctant to interfere unless there are good grounds to do so.

AWU has simply not established that this is such an occasion.

Decision of Commissioner Blades

On 1 July, 1999, the *Industrial Relations Act 1999* (the Act) became law. Section 275 of that Act gave to a Full Bench of the Industrial Commission the power to declare certain persons to be employees. The section reads:

> "**275.(1)** The full bench may, on application by an organisation, a State peak council or the Minister, make an order declaring a class of persons who perform work in an industry under a contract for services to be employees.
>
> **(2)** The full bench may make an order only if it considers the class of persons would be more appropriately regarded as employees.
>
> **(3)** In considering whether to make an order, the full bench may consider -
>
> (a) the relative bargaining power of the class of persons; or
>
> (b) he economic dependency of the class of persons on the contract; or
>
> (c) the particular circumstances and needs of low-paid employees; or
>
> (d) whether the contract is designed to, or does, avoid the provisions of an industrial instrument; or
>
> (e) the particular circumstances and needs of employees including women, persons from a non-English speaking background, young persons and outworkers; or
>
> (f) the consequences of not making an order for the class of persons.
>
> **(4)** In this section -
>
> '**contract**' includes -
>
> (a) an arrangement or understanding; and
>
> (b) a collateral contract relating to a contract.
>
> '**industrial instrument**' includes an award or agreement made under the Commonwealth Act.".

Section 275 of the Act was introduced following the Review of Industrial Relations legislation in Queensland conducted by the tripartite Industrial Relations Taskforce. At page 30 of the Report, the Taskforce pointed to the difficulty in sometimes distinguishing between independent contractors and employees and a reference was made to *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1985) 160 CLR 16 where the High Court said that the question is one of degree for which there is no exclusive measure. The Taskforce stated:

> "Where independent contractors are in circumstances similar to employees, or are party to contracts contrived to avoid the legitimate obligations that would flow from being employees, there is a need for regulation of those relationships.".

It was in response to those concerns, according to the Minister's submission, that s. 275 was passed by the legislature. In the second Reading Speech for the Act, the Minister said:

> "A further consequence of the growth in non standard types of employment has been the unparalleled growth in dependent contractors and workers engaged under contract for services in traditional award regulated areas, evidenced in industries such as cleaning, security and building and construction, and in particular regional areas of Queensland. The Bill provides important protections for these types of workers ...
>
> In addition, new protections have been introduced in the Bill which give the Industrial Relations Commission the capacity to conduct an inquiry and the power to declare contract workers to be employees for the purposes of the Act. This will enable contract workers access to general conditions of employment in the legislation, as well as giving them the ability to be covered by awards or agreements.".

On the same day that the Act became law an application was lodged by the Australian Workers Union of Employees, Queensland (AWU) (and subsequently amended) for:

> "a declaration by the Full Bench pursuant to s. 275(1) of the Act, that the following class of persons are employees for the purposes of the Act, namely all persons who perform work in the industry of the shearing and/or crutching of sheep and the classing and baling of wool in the State of Queensland under a contract for services, irrespective of whether the contract for services is made with the person for whose benefit the services are directly performed or not.".

The only entity which has entered a response to the application is the company Hammonds Pty Ltd trading as Troubleshooters Available (TSA) and which operates as a labour hire company within the shearing industry in the Charleville district. Agforce Queensland Industrial Union of Employers (Agforce), Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) and Housing Industry Association Limited (HIA) have intervened in the proceedings and also made submissions. The Honourable the Minister for Employment, Training and Industrial Relations has also intervened and made submissions to assist the Commission in its determination.

I have read the reasons of Hall P and Bloomfield C. I endorse the conclusion and generally I am in agreement with the reasons advanced. I wish to add some comments.

The unique nature of the shearing industry and the limited extent of the evidence (applying as it does to only one labour hire firm and in only one locality in Queensland) do not really lend to the development of widespread principles for the future application of s. 275. However, in any such application, it is a threshold issue that the applicant must show that there is an identifiable class of persons who perform work in an industry under a contract for services.

In exercising its discretion under s. 275 of the Act, the Full Bench is entitled to take into account, in addition to those matters in s. 275(3), the broad range of matters prescribed under s. 320. The Minister submitted that the Government's intent with the introduction of s. 275 was entirely consistent with the principal object of the Act s. 3, particularly the following elements:

> "3. The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by -
>
> (a) providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers; and
>
> . . .
>
> (f) ensuring wages and employment conditions provide fair standards in relation to living standards

prevailing in the community; and

(g) promoting participation in industrial relations by employees and employers; and

. . .

(i) promoting and facilitating the regulation of employment by awards and agreements; . . .".

That may be so but in exercising the discretion, s. 320(5) makes all objects of the Act of equal relevance including ss 3(e) which provides:

"(e) promoting the effective and efficient operation of enterprises and industries;".

It is clear that the Act recognises that both systems of employment, ie. contracts for service and contracts of service, are equally valid systems for organising work. The discretion to use s. 275 should take into account that it is an intrusion into an essentially foreign area which may create great uncertainty for business. The discretion should be exercised bearing in mind the serious consequences which may flow both to the individuals directly concerned and to industry generally. A key consideration is that it must be "more appropriate" for the class of persons to be regarded as employees.

There is no doubt that Hammonds Pty Ltd has an effective and efficient enterprise and the promotion of that enterprise is of equal relevance with other objects identified. The provisions of s. 275(3) are inclusive and not exclusive. The decision of the Full Bench is to be made after considering, weighing and balancing all of the matters identified in the various sections of the Act and for that matter, other matters which might in a particular case guide the Full Bench in the exercise of its functions. No one criteria may be sufficient, in itself, to favourably attract the Commission's discretion.

Thus whether the contract avoids the provisions of an industrial instrument is not conclusive and but one of the matters to be considered.

The Act requires the Full Bench to take into account the relative bargaining power of the class of persons and the economic dependency of the class of persons on the contract. There was evidence that if the workers were unhappy with the rates offered by TSA, it would not be difficult to move to other contractors as employees. In other words, their bargaining power involved the withholding of their labour, something they could easily exercise should they choose. The evidence also leads to the conclusion that no TSA contractor was dependent on TSA for work. It could not be said that TSA contractors were in any weak position.

It can be readily inferred that the avoidance of the Award provisions was the purpose behind the adoption of the Troubleshooters Available System. There can be little doubt that what was seen as the inflexibility of the Award was the cause. Mrs Hammonds considered the inflexibility was an unnecessary restriction on productivity and had things been different, a move to the contract for services would probably not have occurred. Mr Hammonds thought that the more flexible system offered better results for the workers and a better service to clients offering a freedom of choice to work on weekends. The whole of the evidence suggests that to a significant number of persons in the shearing industry, too many to be ignored, the restrictions are unfair and frustrating.

It must be pointed out that since this application was lodged on 1 July, 1999 (the day the Act commenced), the goal posts have moved a number of times. At the date of the application and prior to when Hammonds Pty Ltd came into being, weekend work (except for delays due to wet weather) was prohibited for Award covered employees. The Award has since been amended to allow for weekend work but at significant penalty rates. But even so, its provisions are still quite inflexible.

It was pointed out during this hearing that Agforce, representing the wool growers/graziers, had consented to an Award variation. That there was an agreement to certain variations on 12 November, 1999 (operative from 1 January 2000) was explained by me in my decision in *Shearing Industry Award - State* 163 QGIG

111 (dated 4 February 2000) where I said:

> "The unfortunate state of affairs which has arisen in this case can be explained, I think, by the significant changes occurring within the UGA and AgForce and by the untimely change over, nearly at the end of the hearing of the substantive applications, of the Industrial Advocate representing AgForce. This was a new organisation with a new outlook, a new Executive, a new CEO and a new Advocate. The dust had not yet settled on the registration proceedings.".

The significant change referred to was the winding up of the United Graziers' Association and its replacement by Agforce.

Thus whilst it was found that there was no indication that the agreement reached between Mr Swan (representing the AWU) and Mr Lyons (representing Agforce) was in any way unreasonable, it is obvious that the Executive of Agforce was unaware of the true feelings of the workers and growers in the industry, as would also appear to be the situation with the Union. Historical disagreements between the UGA and the AWU seem to have clouded the real issues.

It seems from the evidence that the current Award provisions are not held in any respect by those in the shearing industry including the shearers, contractors, growers and other workers. It may be that some modern thinking needs to be brought to bear in this industry. For example, the main complaints about inflexibility are about the restricted hours of work and restrictions on weekend work.

When the *Shearing Industry Award - State* was promulgated in 1920, there was no electricity in country Queensland. (The publication, *The Story Behind the Southern Electric Authority of Queensland*, published in January 1954 is instructive. The first electric service was introduced into Brisbane in 1888. In 1917, this was extended to Ipswich. In the 1930's vigorous development affected Beenleigh, Pine, Lockyer and Brisbane Valley areas and the adjacent farmlands. In a document obtained from CS Energy entitled *A History of Electricity Industry in Queensland*, it is revealed that from 1952 onwards, small packaged power stations were installed in many small towns throughout Queensland and for example, Quilpie obtained electricity in 1952). In 1920, it can be inferred that the only lighting source, other than daylight, would have been lanterns, it being unlikely that generators would have been used. In this regard, it is also instructive to refer back to the judgment in that first *Shearing Industry Award.* The President said in 114 QGG 2363 (14 June, 1920), in dealing with hours of work:

> "I have already promulgated my decision as to hours, awarding a forty-four hour week to be worked in four runs. I had not before me the evidence of Mr Yates (manager of the Co-operative Shearing Company) when first I intimated that a forty-four-hour week should be worked, but his evidence is confirmatory of the view at which I arrived after hearing the arguments of the parties. In a report made to the United Graziers' Association, he said - ' During the remaining six months, owing to the short daylight, the average time that it is possible to get in for work is 7 hours 33 minutes per day.'.".

It is obvious from that passage that the President took into consideration the available light. It was therefore easy to justify a restriction in the hours of work. On the shortest day of the year (21 June) sunrise in Charleville is at 7.02 a.m with sunset at 5.31 p.m. Unscrupulous employers, in the absence of some restrictions, could well have forced workers to shear by kerosene lantern (and maybe even by candlelight for those in poor circumstances).

Since 1920, little has changed in relation to hours, even after the advent of electric power to (probably) every property in the State. The original *Shearing Industry - Hours* Order appeared in 114 QGG 1421 and was for:

> "... four runs of two hours each on Mondays to Fridays inclusive, and in two runs of two hours each on Saturdays. Such ordinary working hours shall be worked between the hours of 7.30 a.m and 5.30 p.m. ... on Mondays to Fridays ... and between the hours of 7.30 am and 12.00 noon on Saturdays.".

There was a small variation in 1921 when, from April to September inclusive, the commencing time was 7.40 a.m and the finishing time was 5.20 p.m. There have been other minor variations but applications for major variations have been met with negative results. An unsuccessful application to vary the hours by providing for a half hour advance of the clock by the employer is reported at 47 QGIG 267 (decision dated 24 November, 1961). (The arguments there spoke of the "failing light"). Failing light and subterfuge were spoken of in another unsuccessful application reported at 55 QGIG 291 (dated 2 August, 1962), this rejection being based upon the undesirability of employers requiring operations to commence earlier, whether the employees agreed or not. In a curious decision 62 QGIG 39 dated 26 April 1966 an application to vary the hours *by mutual agreement* was rejected as follows:

> "So recently as 1961 (1961 [sic] Q.G.I.G. 267) a similar application was refused by this Commission on much the same arguments as were presented on this occasion and reasons for the decision were given.

> There has been no change in circumstances since that decision and we are not convinced on the submissions made on this occasion that there should be any departure from the 1961 decision.".

The 1961 decision contains the following passage:

> "In my opinion the right which the proposed clause would give to the employer to advance the clock despite the wishes of the majority, or indeed the whole, of the employees concerned, could very well create a position that would lead to industrial unrest. I do not doubt that on occasions some alternation is made in the hours by mutual consent. In my opinion that should be the only basis for any such alteration.".

The reasoning of the Bench in the 1966 decision was that the 1961 application was based on the same arguments. But that could not have been so because the applications were entirely different - the 1961 application sought the right to be given to the employer to unilaterally decide - the 1966 application sought a change by mutual consent. It is therefore difficult to understand the 1966 decision.

The latest application was decided in 138 QGIG 159 (dated 18 September 1991) when an application was made to vary the hours to "as mutually agreed" but not exceeding 40 hours in any one week. That application too was rejected. Part of the evidence adduced was that there had been AWU meetings in the shearing industry where the matter of the application had been canvassed and where resolutions rejecting the application had been put and carried. Those opinions would appear to be no longer held as revealed by the evidence before this Commission and they are not consistent with my understanding and experience of the modern day shearing industry.

The current Award provides for starts between 6.30 a.m. and no later than 8.30 a.m. and for ceasing no earlier than 4.30 p.m. and no later than 6.30 p.m. with a possible half hour extension in limited circumstances.

Employees have given evidence of their desire to be able to finish on a Friday afternoon in time to return to their local centre for shopping and access to businesses and professionals who might be otherwise closed on weekends. Why not then permit early starts and early finishes by agreement? The hot weather also provides a good reason for early starts or late finishes. There can be no good reason why the 40 hours per week spread should not be able to be decided by majority consent. (I am not advocating shearing under artificial light - only that the parties should be free to choose because, e.g. it should also be appreciated that on the longest day of the year in the Charleville area [December 21], sunrise is at 5.19 a.m. and sunset is at 7.07 p.m.).

Moreover, prohibitions against weekend work have also proved unpopular. The "concession" for weekend work at double time was no concession at all. All sides of the shearing industry agree that the grower cannot afford to pay overtime so an effective ban on weekend shearing has been achieved. That is not a bad thing. All workers need rest days or they become stale and lethargic and unproductive and family life can become non-existent. It is also a benefit to see shearing spread over as many weeks of the year as possible in order to provide stable, consistent and ongoing employment within a locality and to provide for an equitable allocation of available work in the Industry. Greed, whereby some get in and work every day for a few months, taking as much as they can get and then get out, is to be discouraged.

But there is also room for humanitarian considerations. The Award already allows for weekend shearing, without penalty, for wet weather delays and there is some limited tolerance in the case of ewes and lambs. Blow fly strike also presents a problem and greater allowance for some weekend work without penalty, by consent of those involved, should not prove onerous or unpopular. Machinery breakdown might also be considered alongside wet weather delays. The shearers' desire to wind up a shed by some Saturday work, obviating the necessity of returning on a Monday for a short period is also attractive to many in the industry. I have heard claims that drought should be another reason but Australia is almost always in the grip of drought and growers should stock the holding pens to cater for the current weather pattern.

I think it is time that the parties had a serious look at the unnecessary restrictions imposed by the Award which, except for the introduction of wide combs 16 years ago, has remained virtually intact for 80 years. The Award has just not kept pace with social adjustments and mechanisation over that period of time. Concerns expressed in this application about the possible advantages flowing to TSA contractors over Award employees and the disadvantages which might be suffered by the latter, would to a large extent dissipate by making the Award flexible. If then TSA contractors were shown to be rapacious in their pursuit of weekend work, the President has already alluded in his judgment to the possible consequences.

Union concerns about enforcement of a flexible Award are groundless and prosecutions for alleged breaches should be no more difficult than prosecutions for a breach of any law.

I agree with the order proposed by the President.

By Order of the Commission the Full Bench dismisses the application.

Appearances:- Mr A. Herbert, of Counsel, with him Mr B. Kilmartin, for Sciacca's Lawyers & Consultants and Mr B. Swan, for The Australian Workers' Union of Employees, Queensland. Mr G. Martin, SC, instructed by Mr S. Harris of Roth Warren Solicitors, with them Mr R. Perry, of Counsel, for Hammonds Pty Ltd. Mr G. Martin, SC, and Mr R. Perry, of Counsel, for Agforce Industrial Union of Employers.

Mr C. Murdoch, of Counsel, with him Mr C. Crack, for the Crown. Mr M. Smith for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers. Mr S. Lambert for the Housing Industry Association Limited. Released: 15 November 2000