TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 2706 of 1990

IN THE MATTER OF an application by the Hospital Employees Federation of Australia Tasmania Branch to vary the Welfare and Voluntary Agencies Award

re structural efficiency principle

COMMISSIONER GOZZI

Hobart, 19 July 1991
continued from 8/10/90

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Could I have appearances please.

MR D.C. McLANE: If the commission pleases, McLANE D.C., I appear on behalf of the Health Services Union of Australia, Tasmania No. 1 Branch, along with **MR JOHN KENNEDY.**

COMMISSIONER GOZZI: Thank you, Mr McLane.

MR M.C. SERTORI: If the commission pleases, SERTORI M.C., on behalf of the Tasmanian Confederation of Industries.

COMMISSIONER GOZZI: Thank you, Mr Sertori. Mr McLane?

MR McLANE: Actually Mr Sertori will give the report, sir, and present submissions and then I follow on, if that's okay.

COMMISSIONER GOZZI: ....

MR SERTORI: If it please the commission, we bring before you today a consent matter to seek your ratification to approve the second structural efficiency payment of the - for all divisions of the Welfare and Voluntary Agencies Award. Before proceeding, if I could tender as an exhibit the proposed draft order to reflect the proposed variation.

COMMISSIONER GOZZI: We'll mark that exhibit S.1.

MR SERTORI: To explain the mechanics of exhibit S.1, it is in some parts. The first deals with the consequential cross-referencing adjustments that are required to the award. The parties have taken the opportunity to go through the award and correct a number of cross-references that have been in error for some time and arose from an exercise, you will remember, that myself and Mr Holden were involved in and it appeared gremlins crept into. And also of course picks up the necessary cross-referencing as a result of changes that we proposed for the award.

The document then sets out proposed variations in the second part, from page 8, proposed conditional changes to all divisions of the award, which continues on for much of the document. And then on page 26 onwards, it sets out proposed wage variations for all divisions of the award.

Before addressing that document in detail, by way of background the position the parties present today is as follows: There has been much discussion amongst the parties in this award to consider both the title of the award and, more importantly, the scope of the award. In view of proceedings before the full bench in the Community Services Award, the parties have resolved to consider those outcomes and - in trying to determine the future of both the scope and title of the Welfare and Voluntary Agencies Award.

COMMISSIONER GOZZI: In the future.

MR SERTORI: In the future. As a minimum outcome it would certainly be our view at this stage that there's likely to be some amendment, but the nature of it, of course, will depend on those other proceedings. It's also the intention of the parties in its ongoing discussions to review the structure of the award and look at integrating where possible the conditions of the award rather than encompass an arrangement now presented across four divisions.

The commission would be aware there are significant differences between divisions in respect of certain provisions that the parties will need to address. And that is a fairly detailed exercise and one that will require the parties to do some field work in order to try and satisfy it. It became a much more monumental task than we first thought. There's been some endeavour to achieve common provisions in any of the changes that we tender here today which is at least a forerunner of that exercise.

In the area of classifications, there has been a great deal of work by both sides. The employer had developed a draft proposal which the union has reviewed and provided modifications for. We have now - we meet again on next Thursday to continue those discussions. And at this time the discussions will focus on the implementation of a full skills audit in this area, utilising the services of people from TAFE. If that is able to be brought about, given that at this time there is no funding available to us, we'll also require the parties going into the various establishments covered by this award to achieve two things in that process: (1) is to clarify precisely who is now covered by the award: one of the difficulties we've had over the years is the growth of services in this area and some confusion as to where their award coverage might lie, and (2) is there are a number of questions that the parties have unanswered that will be assisted through that process.

We will also at the same time be looking at the impact of any classification review in terms of wage rates. The employers have suggested along the phasing in of minimum rates adjustments one solution which the union are considering. At the same time we'll be talking to the relevant funding authority to ensure that they grasp the significance of any adjustments in the area of minimum rates movement.

COMMISSIONER GOZZI: Would there be much scope for minimum rates adjustment in the award?

MR SERTORI: That is a debatable point at this time. Of the classifications that are on the table, the lower - the proposed lower paid classifications there is perhaps more minimal adjustment. It's in the upper echelons where the

problems arise, where we get into the more technical and higher qualified areas some of which are new skills to this area and the parties have some hard work to look at there. Bearing in mind there is, of course, a trade - a classification in the workshop division of this award simply titled `tradesperson' and there'd be an expectation of the union that that would achieve a rate over time of $407 and it's at what use to be called `the state standard tradesmans rate', so there is a sizable gap in that area alone and other classifications relate to that tradesman rate would prima facie have an arguable case to have a minimum rates adjustment as well.

It's the view of employers that minimum rates adjustment will be necessary, the magnitude of which is something to be resolved by the parties at this point.

COMMISSIONER GOZZI: That wouldn't be based though on absorption of over awards, would it?

MR SERTORI: Well there are some classifications that are utilised in practice that are not covered by the award and rates have been struck in the field. In that context there could be .... over award. There are other incidents of over award generally as you're aware. There is - most classifications are - well effectively the award is almost a paid rates award in practice, and that is, of course, the dilemma that we strike in trying to set rates that would have some relationship to benchmarks that have been sent elsewhere.

COMMISSIONER GOZZI: So - I think then that the direction that you could be heading in is to predicate the minimum rates adjustment relative to the $407, in other words, establishing relativities in the award. Is that what you envisage?

MR SERTORI: That's the object of the parties at this point, yes. And I might say -

COMMISSIONER GOZZI: Yes, because I don't think there's any - I don't think there's a great deal of over awards in the area.

MR SERTORI: Oh, that's - certainly for employees whose classifications are picked up from this award generally correct, yes.

COMMISSIONER GOZZI: Yes. Right.,

MR SERTORI: And I might say the union have been fairly constructive in that area, recognise the difficulty. They, of course, have a desire to achieve certain rates which is their right of course, but we have welcomed what have been some very constructive suggestions as to how we might approach that matter, and it's for that reason thus far the discussions have been very fruitful. It - and the union have again offered to

involve themselves with the industry and the funding debate to try to ensure that the relevant authority is aware of obligations that might arise for this area, particularly now that - since last time we came before you, there has been a fundamental change in the way in which these areas are funded, as the commonwealth -

COMMISSIONER GOZZI: Can I - what's -

MR SERTORI: - commonwealth is about to transfer that responsibility to the states, and as you could appreciate, given the history of states of funding in this area, there are some concerns as to what may occur in that area. So, -

COMMISSIONER GOZZI: Has that actually occurred, Mr Sertori?

MR SERTORI: As I understand it, it is a decision but it has not yet, at this stage, occurred. I'm not sure of the time for the proposal.

COMMISSIONER GOZZI: So the decision has been made to transfer.

MR SERTORI: Yes. Yes. As you'd appreciate the critical aspect of that decision is how that money - monies are transferred to the states. For example, if it was transferred into consolidated revenue, there would be huge concern in consideration of finance of this State of Tasmania. On the other hand if it was put into -

COMMISSIONER GOZZI: In other words, what goes in might -

MR SERTORI: - a separate fund then there are less concerns.

COMMISSIONER GOZZI: What goes in mightn't necessarily come out.

MR SERTORI: Exactly. Or it might come out in other areas.

COMMISSIONER GOZZI: Yes. But you could be looking - I assume if - depending on the magnitude of minimum rates adjustments, once you've done your assessment of exactly what happens in the award, you may be looking at a phase in situation as well. Is that something that's been discussed?

MR SERTORI: Well the parties accepted (.... may have misunderstood you) the parties accepted the principles provide the phase in of minimum rates. The union has had a proposition put to them which needs to be formalised for a longer phase in of minimum rates. In fairness to the union, they haven't made a decision in that area and one would imagine it's not relevant until we decide upon the actual rates themselves.

COMMISSIONER GOZZI: Yes. I just say that from my point of view, of course, whilst there .... it's provided for four instalments -

MR SERTORI: I'm having trouble hearing you, I'm sorry.

COMMISSIONER GOZZI: I'm sorry. Whilst the principles provide for four instalments for the minimum rates adjustment, of course, the periods are minimum periods, not maximum periods. And I make that point in this area because of the traditional difficulty in paying wages.

MR SERTORI: I welcome that comment, and I think from what I've said, you can sense the parties are very much aware of that problem and I can appreciate the union's dilemma in having to consider something that is much less than they've had to consider in other areas, but certainly, it is one of the very tough decisions that - tough matters that confronts the parties with this particular award and one that's been the cause of frustration, not only for the parties, but the bench.

The proposal in respect of - I don't intend to table documents in respect of classifications at this time. I - the - I can assure the commission that's the product of some substantial progress and it is the intention of the parties, after today, to - subject to further liaison with you to provide a report back - probably within a 3 month period - which would allow us opportunity to do the audit that we're talking about - to get out into the field and then provide you with the opportunity to monitor that it is genuine progress.

COMMISSIONER GOZZI: Right.

(TAPE MALFUNCTION)

MR SERTORI: It would be best that we leave it to one or other of the parties to notify you. We're a bit uncertain as to dates, but it's certainly an intention to try and ....

(TAPE MALFUNCTION)

MR SERTORI: .... obstacles to overcome ....

(TAPE MALFUNCTION)

MR SERTORI: .... before proceeding on with condition variation, I should note - just mention this area of funding ....

(TAPE MALFUNCTION)

MR SERTORI: .... and also the ability subject to certain conditions that time off in lieu of the penalty rate equivalent could be taken -

COMMISSIONER GOZZI: Where are we looking at now, Mr Sertori? Division B is it?

MR SERTORI: I'm providing you with a broad summary then I was just going to relate back to the document -

COMMISSIONER GOZZI: Okay, yes, fine.

MR SERTORI: - these are more heading summaries, if you like. But -

COMMISSIONER GOZZI: So the holidays - can you just tell me again about the holidays?

MR SERTORI: Right. Wherever the holiday pay clause occurs it will provide two things - (1) is the ability by agreement to substitute that public holiday for another day, and (2) the ability by - subject to agreement to take - for the employee to take time off in lieu of the penalty rate equivalent - which, you would appreciate, is of some significance in this area given that organisations are funded on the assumption that they always work at ordinary time rates, and (2) is the nature of some services where - particularly residential hostels - where care is provided that is required on an ongoing basis and the ability to substitute that holiday provides greater flexibility to meet the demands of the work.

COMMISSIONER GOZZI: Just on that - on that point, what's the difference between substituting another day for a public holiday by agreement and time off in lieu? Isn't that the same thing for that -

MR SERTORI: No, one is it's a public holiday tomorrow rather than take it - let's agree to take it on Monday, so the person doesn't front to work on Monday and receives a day's pay.

The other situations where the employee works that public holiday and rather than being paid double time and a half they're paid the equivalent to that penalty rate as time off in lieu, so one's not working the holiday, if you like, and one's working.

The next area proposed is in the - is that relating to meal and meal allowance that currently the award consistently provides the meal allowance be taken after the completion of 5 hours and it be a minimum period of half an hour to 1 hour and that can be now - it's proposed that that can be now extended by - the time of taking that meal break can be extended by up to one half hour where work commitments dictate that that is necessary.

That's a particular problem in workshops where people are working with clients and producing certain items of work and we'll insist in ensuring that where if possible the work task is completed.

In the area of - sorry?

COMMISSIONER GOZZI: Sorry.

MR SERTORI: In the area of overtime, provision is being made for the payment of overtime as time off in lieu. Again probably more significant for these establishments in other award areas where I just repeat that funding is assuming ordinary time and the ability to work overtime to afford overtime is limited, however through the provision of time off in lieu of those extra hours are more accessible for the establishment and they can accommodate that time off arrangement.

Now again, as you will see when we look at the clauses, they're subject to certain regulatory provisions. As with the meal and meal allowance the prescribed rest periods which varied between divisions can be by agreement taken in any combination or in any manner. And again it varies from division to division. In one division for example it provides that there's a 5 minute break and a 10 minute break. Now they can be combined or changed into other quantums and provide the total remains the same as the award prescribes to suit the nature of the operation.

The terms of employment clause currently provides for the first 2 weeks of employment and employees on hourly hire as part of a probationary arrangement, if you like. The parties propose now that that clause be extended, so for the first 3 months of engagement an employee can go onto a probationary hire, be subject to 1 hour's notice either side and either party can determine whether they wish to continue the employment contract because of course .... wrongful dismissal remains, but what the provision goes to recognise is the difficulties we have in this area with new employees: (1) the employer trying to make an informed judgment that the employee will be able to work with the clients, and (2) the employee - him or herself - being able to make that same judgment.

Now that is a forerunner to our classification proposals which will in the lower level, subject to agreement being reached, have a probationary provision in them. We saw that as forerunner to that classification.

It's proposed during the classification review the parties will further look at the contract of employment clause - the introduction of apprentices into this award which is much needed including adult apprentices, the introduction of traineeship provisions and we'll also consider fundamentally

reviewing the mixed functions clause which is based on the old classification notion.

And I've also mentioned the parties will be involving themselves through what's called the Funding Disabilities Services Committee; this issue of funding and the involvement of that appropriate authority as necessary in this process so they can understand what is required of them - and hopefully we can avoid that. Perhaps the choice of word I should be careful of - we can avoid the last incident that the commission had to suffer through when we last appeared on issues of money.

It is proposed that the operative date for this proposal, should it be ratified, will be the first full pay period to commence on or after 1 August, which is approximately two pays away from today. And that would provide opportunity to ensure in this area, should you ratify this matter, that the documentation is out to the parties and will be implemented by the operative date.

Now, that's a summary of what's contained in exhibit S.1. This is - not a lot of point going through the consequential and cross-referencing adjustments, but I'd say of exhibit S.1 it is subject to both parties' errors and omissions, and hopefully we have found all those in that area of cross-referencing.

And we - the conditional changes start on page 9 of the document, in Division A. I omitted to say that part of the other part of the review the parties will be looking at is the placement of Division A. The history has been that that is the last division remaining from the old Child Care Industrial Board Award. When the WAVA Award was created it remained there along with the division covering St Giles. And the division covering that area is now known as the Child Care and Childrens Services Award.

It is a very different type of area to the remaining divisions in the award. And the parties are having some difficulty knowing where that might be placed and there are a number of possibilities. But that will need to be resolved as we move down the classification review. The outcome of the Community Services Award may also be relevant to that division. However -

COMMISSIONER GOZZI: So fundamentally you've - you don't feel that Division A is appropriately within the award?

MR SERTORI: Well, in my view, or my side of the view rather than the union view has been traditionally that it is a misfit. It's not a disability service which the other three division - the other three divisions are. And there's no science in it being in this award. You will recall back in

the Industrial Board days the - the creation of an award was at the prerogative of the minister, and this is really part of that process.

So there is no science in its placement. It is area that provides for - traditionally it covered such things as boys homes, but - able-bodied people who may have - be misfortunate enough to have a home or not be able to be cared for in their own home. And it was not necessarily the case that they suffered from a particular disability. They certainly don't as a rule, suffer from an intellectual, mental, physical or sensory disability, which is the case of the divisions.

COMMISSIONER GOZZI: I must say I thought they did.

MR SERTORI: It was all -

COMMISSIONER GOZZI: You're saying they don't? I just simply thought, when the previous Division A which related to child care and childrens services came out the residue picked up by that division related to sensory or physically, intellectually handicapped-type people. I mean, otherwise why -

MR SERTORI: As children?

COMMISSIONER GOZZI: Yes.

MR SERTORI: Yes.

COMMISSIONER GOZZI: Otherwise why leave that part of it in this award?

MR SERTORI: Because it's, I guess, been too hard for the parties and it's really been the forgotten son along the way. You will recall when we dealt with the second tier -

COMMISSIONER GOZZI: Yes.

MR SERTORI: - Derek Holden and I appeared before you, the great difficulty we had dealing with this division, given the difficulty locating people in the area. It appears there were two establishments at least covered by it. Whether the change from - whether a change of status occurred when Division A - the old Division A was taken out of the award I'm unaware. That's a new thought you've thrown to me and I take that on board.

COMMISSIONER GOZZI: I think, Mr Sertori, the other part of it that you might have to look at with Mr McLane, is that it's reflective of the demarcation arrangements entered into between the then HEF and the Miscellaneous Workers Union, as you will recall. And I must say I thought it was demarked on the basis that I've indicated to you.

But certainly it reflects the demarcation to the extent that I've indicated between the two organisations.

MR SERTORI: Yes.

COMMISSIONER GOZZI: And I'd probably just then speculate further to say, well, that covers the same sort of clientele, namely children.

MR SERTORI: Well, it certainly can cover able-bodied children. I hadn't thought about it covering disabled children. I'm not quite sure how it does, I'd have to take that on notice. Clearly it's one of those hard areas the parties will have to look at. The union has submitted a proposal to expand the employers classification proposal to include a focus in this area, where our original intention was to look at its placement elsewhere.

Bearing in mind that prior to the community services going down that course that we had a vision on this side for a Disability Services Award which, essentially, would focus around the - the last three divisions of the award be a little broader. But there's been some rethinking in that process, as a result there needs to be similar rethinking with this division.

And I take on board the comments that you've made. And clearly we will have to do some submitting and homework to then present those results to you next time we appear. Moving through that division, the board and lodging figures are adjusted. And you will recall during the course of the second tier variation it was agreed that those figures would be adjusted on a regular basis to avoid problems that have occurred where they were neglected in the past. And that's the only changes there, the figures.

COMMISSIONER GOZZI: What was that again? Was that by CPI or - what was the basis for the adjustment?

MR SERTORI: Back then? It was moved by the 4 per cent second tier. It was said any time that there was a wage movement to the classifications we should vary these rates by the equivalent, and I guess we are always subject to the principles, of course, so they are varied by 3 per cent more in accordance with the principles, but -

COMMISSIONER GOZZI: So that comes out of the second tier arrangement?

MR SERTORI: The agreement was that we focus that way, yes, it comes out of the second tier arrangement. The justification for the 3 per cent comes, of course, out of the current SEP.

COMMISSIONER GOZZI: Yes. So, it is the adjustment by the wages movement which goes back to the second tier. Probably since that time a lot of other areas are adjusted, having regard to movements in the appropriate part of the CPI. Yes, so the public sector, for instance, where the expenses incurred by the employer are adjusted as for the ones incurred by employees. It's done by CPI.

MR SERTORI: I think you will recall at the time we did lift these figures, as well as bind them up for future adjustment, and it seemed to be intricately part of that agreement that we do it this way.

I appreciate what you now put. It would certainly be open to me to argue that, but on the other hand we did agree that we should adjust it in this manner, and I'm bound by that agreement this time, unless for some reason it was to be broken.

COMMISSIONER GOZZI: Well, perhaps from my point of view, seeing as you are asking me for an interim decision, really, and you'll come back, is to look at that issue again and just see how it now sits with the full bench decision, on how these types of allowances should be adjusted.

We can -

MR SERTORI: They are deductions, by the way.

COMMISSIONER GOZZI: Yes, they are deducted.

MR SERTORI: Yes.

COMMISSIONER GOZZI: These are employee deductions?

MR SERTORI: Employer deductions.

COMMISSIONER GOZZI: Yes, employer -

MR SERTORI: Employer deductions from the employees' pay.

COMMISSIONER GOZZI: Yes, that's right. And, as I say, in the public sector where the employer makes deductions from an employee's pay in respect of these items that have been adjusted by the CPI, and similarly the other way where allowances are adjusted, expense rate adjusted for employees when the employer has to pay, adjusted by the same vehicle.

MR SERTORI: Well, the adjustment consistently through this either side is 3 per cent. I think the view of the employers in the disability service area is that the employee having waited for some time - patiently - for the second SEP that an adjustment that might be obtainable outside a 3 per cent

might be undesirable, which would be the case if we were to move it by the CPI, which would be considerably more than 6 per cent in the period since the last review which was back in '88, I think, from memory.

So, what I would -

COMMISSIONER GOZZI: Yes, they haven't moved for a considerable period of time.

MR SERTORI: Since the second tier, yes.

COMMISSIONER GOZZI: Yes.

MR SERTORI: I'd be submitting that although it is available that we could argue for a higher amount, that in the complexity of this whole review that we only put to you a variation of 3 per cent, which we believe is a fair and reasonable outcome, and is in keeping with an intricate agreement reached back in time. Of course it's your decision whether you accept that submission.

COMMISSIONER GOZZI: Well, look, I certainly recognise what you are saying, but by the same token I do think it's worthwhile looking at, to get it on a footing where the amount of allowance paid to employees and the amount of recruitment for things like board and lodging reflect the actual expense incurred. As you're aware, that's the provision provided for in the wage fixing principles under allowances.

MR SERTORI: What I'd seek to do is this: if we were able to have our proposal ratified by you on this occasion, that we would review the area of allowances. They need a review for two reasons - one is whether they have been appropriately adjusted, they get a reimbursement to the employer, or a deduction by the employer, and two is, whether in the light of the new classification structure they are more appropriately absorbed within the structure, ... is an allowance to the site, particularly if they're a reimbursement of some skill factor, and in rationalising the conditions in the award into an integrated structure it is appropriate to look at those things as well, and then set them on a proper footing for the future. Certainly I think that's essential that the parties undertake that review, however for today what we'd seek is that you would ratify the proposals we've put.

We've inserted a new clause, and you will notice that we have proposed its number, and that's why many other clauses have been renumbered in the consequential adjustment, and we've assumed all the way through the new numbering which is identified in this document.

As you will - it's not my intention to go through that clause - I am sure you have seen it now many times, but it is

intended that it is verbatim to what's become the standard clause. Clause 22 is the first example of the amendment to the holidays with pay clause.

COMMISSIONER GOZZI: That's as you've discussed it previously?

MR SERTORI: Yes, I may not have mentioned it to Mr McLane, but in subclause (a) the term `first Monday in November' is changed to `recreation day', so there is uncertainty for those of us who live in the north of the state what day the holiday would be proclaimed on. That hasn't been done in respect to the holiday clause for the other parts of the award, to my memory. Mr McLane may care to comment on that as he responds. The intended changes in subclause (e) -

COMMISSIONER GOZZI: Of course - yes, just before you leave that one.

MR SERTORI: Yes.

COMMISSIONER GOZZI: Of course at the moment where it's got the first - what?

MR SERTORI: Monday, November ....

COMMISSIONER GOZZI: The first Monday - a lot of awards have got that, haven't they ?

MR SERTORI: Yes.

COMMISSIONER GOZZI: And nobody quite knows what the government is going to do in respect of the public holiday situation, which was announced some time back earlier this year. If the awards, hypothetically, let's say, if the awards are not going to be varied then presumably employees could get two holidays in November.

MR SERTORI: Except the - the regulating act only has application for Public Service, insurance offices and banks. Awards pick up those days that are generally observed by them because the day is mentioned in the holidays clause. Now, in that case, where the banks would be shut down on a particular day in the Public Service and insurance offices, those awards that say first Monday in November would be observing the holiday on another day.

We - my concern has been in some areas that employees have indicated: You beaut, we going to have two holidays this year, and certainly that's not supported by the union officials, fortunately. But it seemed opportune where we had the chance to change the expression and adopt the term `Recreation Day' so that if the government has its play of the day, that it doesn't cause this problem with the award.

However, having been - having changed it for the purpose of Division B, as I stand - A, as I stand on my feet, I realise I didn't submit that for the other divisions.

COMMISSIONER GOZZI: Yes. I am just wondering about the wisdom of changing it now in this award. The logic of what you're saying is -

MR SERTORI: What I -

COMMISSIONER GOZZI: I've got no problem at all. But I would anticipate that in respect of all awards that somebody might make an application, both on behalf of private sector and public sector awards.

MR SERTORI: I might seek leave to amend exhibit S.1 on page 10, clause 22, and delete `Recreation Day' and insert `first Monday in November', which is as it reads now.

COMMISSIONER GOZZI: Yes.

MR SERTORI: So it's then consistent throughout the award. And if this is then an issue perhaps it's dealt with another way.

COMMISSIONER GOZZI: Yes. I - I'd - look, I'm fairly certain that - that somebody will take heed of comments by the commission that applications ought to be put in, either blank applications, whatever, to address this situation of the November holiday.

MR SERTORI: Well, it would help if the government made a decision in the first instance -

COMMISSIONER GOZZI: It certainly would.

MR SERTORI: - of course, so we knew whether we needed to absorb the commission's time in that exercise.

COMMISSIONER GOZZI: Yes. Well, on that point, it's my understanding that the minister - the relevant Minister is quite adamant that what he said in November is - in January, or whenever it was this year, would be it.

MR SERTORI: Well, there's - to my knowledge, there's been no change. It's interesting what can be changed for the sake of a horse race. But, however -

COMMISSIONER GOZZI: Well - so, what do you want me to do here in recreation -

MR SERTORI: Well, then I think it'd be - be much better if Mr McLane's organisation, and in light of our discussion, I

change `Recreation Day' to `first Monday in November', which is precisely as it reads in the award.

COMMISSIONER GOZZI: Cross out `Recreation Day'.

MR SERTORI: And put `first Monday in November'. In fact the precise wording is `The first Monday in November'.

COMMISSIONER GOZZI: First Monday in November. And those .... is not observed, right?

MR SERTORI: That's correct, yes.

COMMISSIONER GOZZI: Okay.

MR SERTORI: The change in that clause in fact occurs with the subclause (e), and it provides firstly - in the first instance there, it's predicated on the basis there is agreement. Time off can be taken in lieu of penalties. And then it goes on to say how that might be calculated. And also that further, subject to agreement, that substitution may take place.

From there the - the employee should at any time have an opportunity to consult with the relevant union, if necessary. And that the agreement should be recorded in writing. One of the difficulties we've experienced with some of these agreements is that they're not recorded in writing and, as a result, there's been a difficulty where a dispute has arisen over it.

And that the union were concerned .... happy to consent that that agreement should not be seen as something that is permanent. It's specific to that occasion and therefore there's an ability for either party to move out of the agreement. The wording therefore is generally similar to that adopted in the Hospitals Award by - I'm not sure whether that was a full bench matter on that occasion.

So it sits somewhat different perhaps to the wording in other awards, but satisfies the concerns the union have got as to problems that might occur with the provision, but nonetheless has its basic - basic level, providing there's agreement these outcomes can be achieved.

COMMISSIONER GOZZI: Mr Sertori, if I endorse what you've got there, I'm not doing that in contravention of what might be provided by legislation?

MR SERTORI: I would not have thought so, no.

COMMISSIONER GOZZI: I was looking particularly at section 42 in the Industrial Relations Act, where it says: Except as

provided for there, an award has effect subject to the provisions of any Act dealing with the same subject matter.

MR SERTORI: I'm interested in what you had in mind there .... particular response.

COMMISSIONER GOZZI: It provides for the public holiday, and this arrangement isn't contrary to that.

MR SERTORI: The Bank Holidays Act?

COMMISSIONER GOZZI: ....

MR SERTORI: That has no jurisdiction over the employers covered by this award. It simply, as I said earlier, prescribes a holiday for those people it binds: insurance offices, bank, and public servants.

Now on that basis it does determine the day it is generally observed for the purpose of this award, where it nominates that same day without necessarily specifying a date, but I would suggest to you that if we were to delete all the holidays listed in this award that there would be no - whenever a public holiday occurred in other areas the employees of this award wouldn't be entitled to those holidays. It is only by virtue of this award that they have achieved this entitlement.

COMMISSIONER GOZZI: So, you say the Bank Holidays Act doesn't apply. It mightn't even apply to public servants, does it? It might just be picked up by gazettal, I suppose.

MR SERTORI: I guess I could be cheeky and say it doesn't apply to employees in private enterprise unless they worked in a bank or an insurance office, and avoid the question of public servants.

I have always understood that it did, but I guess it's academic to this debate. The bottom line would be that it does not, in fact, oblige an employer in this industry to take the holiday, unless his award forces that holiday.

COMMISSIONER GOZZI: All right, yes, I'll accept that. Yes, I think with public servants in some cases they are gazetted and in some cases they are not. I must confess I am not quite sure what the reason for all that is.

MR SERTORI: Yes. So, in light of your question, I see no difficulty with that provision in terms of any other act, or the Industrial Relations Act itself, and it is not a new provision, of course, it has become quite common in awards, not only of this jurisdiction, but with others, What is a little different is some of the wording, of course, that I alluded you to.

COMMISSIONER GOZZI: Yes. I raise it with you because it was raised in the commission as a threshold argument in proceedings before me only a matter of about 3 or 4 weeks ago.

MR SERTORI: In the Laundrymens Award?

COMMISSIONER GOZZI: Yes.

MR SERTORI: Yes, I read the transcript with intrigue. Yes.

COMMISSIONER GOZZI: Not precisely in that same sort of way. It was raised in the context that the commission would be delegating its powers to employers and employees to do certain things, and there is no provision to delegate that power.

MR SERTORI: I thought the other submissions, quite frankly, had substance.

COMMISSIONER GOZZI: All right.

MR SERTORI: However. As I say, the only change essentially is to subclause (e), unless there has been some - oh, yes, there was a repeat in that - the number of subclauses remain the same, and this may be the holiday clause where in fact there are two references to rostered days off, and it has been rationalised, but the net effect is to introduce subclause (e).

COMMISSIONER GOZZI: Fine.

MR SERTORI: Clause 25 - Meal Allowance as talked about earlier, it takes the existing clause and amends it to allow for the flexibility of the taking of a meal break subject to certain criteria, i.e. pressing circumstances and complete the task at hand. The remaining provision, the meal allowance has been adjusted, and otherwise the clause is simply restated.

COMMISSIONER GOZZI: You did say it extends it by an hour and a half, is that right, or -

MR SERTORI: No, when I said by one half hour, I meant by half an hour in total. Yes. So, in other words, you can go 5.1/2 hours before you took your meal break.

COMMISSIONER GOZZI: Well, not less than 30 minutes nor more than 1 hour. So, it's 1 hour, isn't it?

MR SERTORI: We may be at cross-purposes: (a) the award provides that within 5 hours in the first instance you must take a meal interval which must be at least 30 minutes or more than 1 hour, otherwise you may change the time of taking that meal break up to half an hour, in pressing circumstances you complete the task at hand, which may do two thing - go past

the 5 hour time period, or two, go past the prescribed time of taking a meal break which might be within the 5 hours.

COMMISSIONER GOZZI: Oh, yes, okay, you can defer up to half an hour, and that's the new part.

MR SERTORI: Yes, exactly, the last sentence, yes.

COMMISSIONER GOZZI: Yes, okay. Yes, thanks, I -

MR SERTORI: And on page 12, subclause (c), the allowance has been varied, otherwise the clause is restated. Clause - what is now clause 18 - Overtime, there's some cross-referencing adjustment in there and the major change is in subclause (e), which was allowing for time off in lieu at the penalty equivalent. And again the procedure is similar to the time off in lieu arrangements for the holidays provision that I predicated on there being agreement, that opportunity to consult be recorded in writing, and that it be an agreement that has some time aspect to it.

In terms of engagement clause, on page 13, it extends the existing arrangement of - of that award. The existing subclause (e) provides for a 2 week period in which hourly engagement applies. As I said in the summary, that this clause now provides for a 3 month period for hourly employment where both parties can consider their - their desire to continue that contract.

It then covers the circumstances of summary dismissal, as it always has; the means of calculating the divisor; its application to all categories of employees; and the final provision, as always, has been there to ensure that if there's inconsistency with any other provision this clause prevails. And it's an option for the employer, and it's one that - that's quite workable in this area and perhaps reflects the unique aspects of this area.

Division B, over the page, the board and lodging clause is slightly different but the principle is the same. And I again take on your comments earlier. The enterprise flexibility clause is the same. The holidays with pay clause has been varied to the same type of wording as - or the same wording as - as was offered in Division A.

At the same time the clause has been tidied up a little. There was a series of nonsense somehow crept into that particular clause that made it difficult to determine the payment for public holidays or holidays worked for some categories of employees. So that is now clarified by virtue of getting rid of the gremlins in the clause.

COMMISSIONER GOZZI: Mr Sertori, just looking at the holidays with pay clause, second paragraph of (a), you've got

Recreation Day in those districts where Hobart Regatta Day is not observed. That's again a bit different to what the other is, isn't it?

MR SERTORI: Again that should be amended. And I might just take the opportunity to flip through to Division C, which is not a problem. So again, I'd seek leave to amend that to `the first Monday in November'.

COMMISSIONER GOZZI: So we just have the first Monday in November in those districts where Regatta Day is not observed.

MR SERTORI: Precisely.

COMMISSIONER GOZZI: Does it need to be qualified by `Hobart Regatta Day' in Division A?

MR SERTORI: I think some clauses talk about north of Oatlands and south of Oatlands. This one doesn't. It does infer I suppose Regatta Day. I guess what we've done is use some standard from some part and - to make it clear.

COMMISSIONER GOZZI: It's got `Hobart Regatta Day' in Division B.

MR SERTORI: I think the wording is the same in all divisions at the moment, but it helps to clarify where some of the parameters for Hobart Regatta Day and the first Monday in November, but some of that defined by virtue of the other areas. But it wasn't - it hasn't - it wasn't the intention of the parties to vary that aspect of the clause, I guess. And that's - currently that's how it reads in the award.

COMMISSIONER GOZZI: Yes. You see the first Monday in November - I don't think that coincides - Hobart Regatta is -

MR SERTORI: It's in February.

COMMISSIONER GOZZI: In February.

MR SERTORI: Yes. Well, it is one of those parochial issues that, because there's a holiday in February in Hobart there must be an equivalent in the north of the state at some point. And it's always - it's always been said, and what the science of it is I'm unsure, but that first day in November was introduced to provide that equivalent day for Launceston. Now why it's in November, I have no idea. But it is the northern Regatta Day equivalent, if you like.

And we were a little, the north, a bit smarter than the south, because we take it on a Monday instead of a Tuesday. Well, it is - it is I suppose standard wording parties are familiar with. I'm a bit uncertain what it means if we change it.

COMMISSIONER GOZZI: Well, let's just go back one. Division A currently has `Show Day as defined the first Monday in November in those districts where Hobart Regatta Day is not observed'. So there is a - there is a provision in the award that currently provides that a show day is taken. Right? And it's the first Monday in November where Hobart Regatta Day is not observed. Now, that's Division A. I'm not sure what Division B has got.

MR SERTORI: I think you'll find it should be the same.

COMMISSIONER GOZZI: Until it's sorted out - yes, Division B is the same, clause 53. And I would prefer to put that wording in. In other words, Show Day. You've got `Show Day (as defined)', and then you've added on the first month in November. I'm not sure whether that is supposed to be an additional holiday -

MR SERTORI: I'm afraid you are losing me at the moment.

COMMISSIONER GOZZI: Well, in the draft order you've got reference to Show Day, as defined, and then you've proposed in Division A to put the first Monday in November where Regatta Day is not observed, as another holiday, as I read it. Whereas the current award provides for Show Day in lieu of Hobart Regatta Day. So the way it's written in the draft order, the way I am reading it, is that you have provided an additional public holiday.

MR SERTORI: I see. I'd suggest - I .... some fun. Well, there is no question the parties intend there to be 11 public holidays available under this award.

COMMISSIONER GOZZI: All right, well let's count them then.

MR SERTORI: On your interpretation, that would make it 10 for the north.

COMMISSIONER GOZZI: Well, I count to 12 the way I am reading it in your draft.

MR SERTORI: Fine. Now, of that - in my draft? Yes, but of course in one case you can get one of those days, you can't have the other.

COMMISSIONER GOZZI: All right, so I can read Show Day, as defined, the first one in November as being the one holiday?

MR SERTORI: Yes, I'd also refer you to subclause (d) which is that definition of Show Day that came out of the old Industrial Board ruling.

COMMISSIONER GOZZI: (d)?

MR SERTORI: (d) of - well, it is my order - but if you are looking at the award as it stands, we're just in Division B, it's subclause (d) at the moment, Show Day, which defines Show Day, and notably it talks about and therefore making a total of 11 paid public holidays per year.

So you have the definition of Show Day in itself trying to ensure that there are, indeed, 11 holidays for anyone covered by this particular clause.

I think the problem is the old award omitted a comma after `Show Day (as defined)' and therefore it is capable of being read as `Show Day (as defined)' and it runs into the first Monday in November, and that raises some question as to its interpretation.

COMMISSIONER GOZZI: Okay, well, can we take the comma out, and just go back to the wording -

MR SERTORI: Well, shouldn't the comma go in after `Show Day (as defined),' in fact?

COMMISSIONER GOZZI: Well, each holiday is identified by, or separated by a comma.

MR SERTORI: Exactly.

COMMISSIONER GOZZI: So, `Show Day (as defined),' means the first Monday in November in those districts where Hobart Regatta Day is not observed.

MR SERTORI: No.

COMMISSIONER GOZZI: That would be in keeping with the existing award.

MR SERTORI: Well, it is arguably in keeping with the existing award.

COMMISSIONER GOZZI: Well, it is exactly the same as the existing award. I am reading from the existing award.

MR SERTORI: No, no. The existing award certainly omits the comma. It's arguable that it might mean Show Day or the first Monday in November. In other words, if you observe Show Day you don't get the first Monday in November.

I suggest that could be arguable, but certainly the only reason it appears that way, I'd suggest, is that the parties have committed a drafting error back in time, and forgot to put the comma after `Show Day (as defined)'.

COMMISSIONER GOZZI: Well, I just read it when the comma was in there as another holiday for the -

MR SERTORI: Given part of our exercise was to tidy up the award and correct anomalies, and so forth, I suggest that that would be an anomaly.

What it would provide is, in fact, for people who live north of Oatlands, 10 public holidays. It would turn the award into a nonsense, given that also it provides on Show Day 11 public holidays, and clearly by inserting the comma after `Show Day (as defined),' it is clear then that any employee is capable of achieving 11 paid holidays provided they fall so eligible.

COMMISSIONER GOZZI: But they do, whether the comma is there or not.

MR SERTORI: Well, as I understood ...., as I understood what you put to me because the comma is omitted you're reading the first Monday in November in conjunction with Show Day and negating Show Day, unless you -

COMMISSIONER GOZZI: Well, isn't that what it is meant to be?

MR SERTORI: Do you mean to say Regatta Day or Show Day?

COMMISSIONER GOZZI: No. I am saying that if you take `Show Day (as defined)' and I thought that the definition - if we go to Show Day, let's see what's Show Day say as defined? I thought the definition was that you take the `Show Day (as defined)' on the first Monday in November in those districts where Hobart Regatta Day is not observed. That's what I thought it means. It doesn't mean that?

MR SERTORI: That's arguable, but it is not meant to mean that, because the outcome of that is that somewhere along the way someone is going to get only 10 holidays as a result of the way it is written, when it has always been intended there be 11. The other problem you have, `as defined' is it ensures there has got to be 11 holidays, and it could become a rather unintelligent piece of words.

Certainly the intention was and it goes back to the Industrial Board day in inserting that Show Day definition from that particular test case and the Industrial Board was to ensure that an employee working at least full time would attract the 11 holidays, therefore, my - I'm suggesting, that in keeping with all the other awards of this authority that there should be a `comma' after `Show Day' and therefore the first Monday in November is in substitution of the north of the state for Regatta Day in the south and has nothing whatsoever to do with Show Day. It's clearly - if the deletion of that comma gives it any other meaning -

COMMISSIONER GOZZI: Yes. Okay, I accept what you say. I'm just looking at -

MR SERTORI: - it's an anomaly.

COMMISSIONER GOZZI: So we'll put the comma back in and have the first Monday in November -

MR SERTORI: Yes.

COMMISSIONER GOZZI: - in those districts, but we're going to put in `Hobart'.

MR SERTORI: Hobart is already there in my copy.

COMMISSIONER GOZZI: Well, I'm looking at Division A, page 10 of your draft -

MR SERTORI: Division A. It might be in Division B.

COMMISSIONER GOZZI: And I would be proposing that in that second last line there we put in `where Hobart Regatta Day is not observed'.

MR SERTORI: I see. I'm looking in the wrong division. That should be in there as well, yes.

COMMISSIONER GOZZI: Okay.

MR SERTORI: So, page 15, that's in fact in there for Division B.

COMMISSIONER GOZZI: At page 15.

MR SERTORI: Yes.

COMMISSIONER GOZZI: Right. So - yes, yes - now how this all started was - looking at page 15 - Recreation Day - should that be qualified to say `the first Monday in November (in those districts where Hobart Regatta Day is not observed)'.

MR SERTORI: I have asked that Recreation Day be deleted and we insert -

COMMISSIONER GOZZI: Oh, have you? Right. Okay.

MR SERTORI: Yes, and we insert `the first Monday in November'. So, I guess in summary, the only change to the existing award then is the insertion of the comma is after `Show Day (as defined)'.

COMMISSIONER GOZZI: Yes, and then we go to the first -

MR SERTORI: Monday in November.

COMMISSIONER GOZZI: Now in qualifying in that way - and I realise it's in the existing award - and saying `the first Monday in November', should this other matter arise, what happens then?

MR SERTORI: Well the minister has an enormous problem if no-one does anything because the vast majority of awards - employees covered by awards - the holiday won't be available to them on the alternate day, so it would require an application to this commission to vary the holidays clause, which I don't think the minister has considered. Perhaps that's why he doesn't have the industrial relations portfolio.

COMMISSIONER GOZZI: Okay. Well just follow me then; should we put in the award that - a title for that holiday? I mean, should we title it `recreation day'?

MR SERTORI: Well that was - that's, of course, what I proposed in the first instance because of that problem.

COMMISSIONER GOZZI: Well -

MR SERTORI: It begs the question, I guess, there is an argument that is it recreation day in fact by title or is it the first Monday in November, and I'm not sure how it's proclaimed, whether it's proclaimed as a day or it's proclaimed by title. So there could, in fact, be that problem, by calling it recreation day you may still not resolve the problem. I guess it's safe to go with the status quo and nominate the day.

COMMISSIONER GOZZI: Fine.

MR SERTORI: I'll have to have a look at my own contract because it affects me. I'm not sure of my own service, whether they give you any. Subclause (f) is the - contains the major change to the award that I highlighted to you and it's the same wording virtually as appears in Division B, and as I said, there's also been some tidying up of that clause give it - there was some other - some additional verbiage there that need not be there.

COMMISSIONER GOZZI: Okay.

MR SERTORI: The meal and meal allowance clause is again amended as in Division A and the verbiage is identical and the allowances amended. Likewise the overtime clause - the specific clause - has been amended in a like manner to Division A. The same applies to the rest period and in the case of this division, Division A does not have a separate clause regulating overtime where it can be worked on a Saturday and Sunday whereas this division does, and you'll notice that the clause again is providing time off in lieu. It's the same principle as the overtime clause. It, of

course, only applies to overtime performed on a Saturday and Sunday as opposed to ordinary time.

COMMISSIONER GOZZI: Just before we go off that page, in the 4 per cent second tier exercise wasn't there something about rest periods? Was there a reduction of one rest period or an elimination of a rest period?

MR SERTORI: I think there was some rationalisation of it, it varied from division to division. There was certainly nothing in the award that allowed to be taken flex - any more flexibly than one break in the morning and one in the afternoon, or in one case there was just simply an afternoon break.

COMMISSIONER GOZZI: Right.

MR SERTORI: So that became a prescribed time. I think what we did was to reduce it by 5 minutes in its totality.

COMMISSIONER GOZZI: Yes. Okay.

MR SERTORI: Whereas I think there's a more meaningful provision now in looking at the way in which it's taken. Certainly the rest break is essential.

COMMISSIONER GOZZI: Okay.

MR SERTORI: The Saturday and Sunday work clause, as I said, is strictly overtime and I think it's probably opportune given that there have been given problems in the past with these sort of provisions. For the record it is not intended by us that that have any meaning, that an employee working ordinary time can have time off in lieu of payment. It is strictly overtime as defined by the award.

COMMISSIONER GOZZI: Yes. In respect of all the time off in lieu.

MR SERTORI: Yes. I'm just conscious of things that have happened in other places in other jurisdictions, so there - if for any reason the wording didn't achieve that effect, my organisation would be bound to correct it and restore its meaning.

COMMISSIONER GOZZI: Yes.

MR SERTORI: The terms of engagement is identical to that that you saw in Division A, and amends the existing award subclause (e). We then move to the sheltered workshops, Division C on page 20. There is the general conditions clause, at this stage refers back to enterprise flexibility and previously only had the cross-referenced occupational superannuation.

The holidays with pay clause, on this occasion I've only changed the relevant subclause and introduced the time off matters that you saw elsewhere. The meal and meal allowance change is identical, including the allowance. As is the overtime clause. The rest period. The tool allowance clause has been amended by the 3 per cent adjustment.

The terms of employment clause is identical. And for that matter, if we flick through Division D, as you'll see from the headings, again is identical. Next follows 27 onwards, the wages adjustments. Again they are identical to the movement as occurred on 23 November.

I draw the commission's attention to page 27 of Division A, classification 6, and that has been adjusted as it was on 23 November, which was a $12.50 adjustment. And I have no idea what the science of adjustment for those particular rates might be, given that prima facie they appear as though they could be in fact junior rates, particularly in the under 20 category. However, that's unclear.

So what I have done is to go back to the commission's variation flowing from 23 November and adopted it for the same adjustment. Perhaps it's something the parties might consider. There is of course a separate junior clause in that division in any event, but -

COMMISSIONER GOZZI: Yes, but -

MR SERTORI: - it does look remarkably like things I've seen in the days gone by in the Hospitals Award where even the party - the commission parties themselves had difficulty working out how you adjust at the rates, given they were prescribed rates for juniors. And I suspect that's more of the same here.

COMMISSIONER GOZZI: Yes. Have we got an adult child care worker here? Child care aide? Where's -

MR SERTORI: Well, it's a trained child care worker, but -

COMMISSIONER GOZZI: So the adult rate -

MR SERTORI: - one would - one would reasonably accept that 20 years and over that's most likely to be an adult. Under 20 years of age, one wonders how young that can be and what it means. I suspect that it would be an adult employee.

COMMISSIONER GOZZI: Is that something you're looking at in your classification structure?

MR SERTORI: Well, we're going to have - yes, we're going to have to go out and locate these residents and go and have a look at precisely what's done.

COMMISSIONER GOZZI: Yes.

MR SERTORI: It may well be they don't have trained child care workers, and so the exercise is academic, but it's obviously an anomaly the parties must address.

COMMISSIONER GOZZI: What's the adult rate with respect to juniors?

MR SERTORI: Oh, it is based on - well, there's two possibilities. There are junior office assistants. Junior others is based on the appropriate adult rate, whatever that might be. So it begs the question: is there such a thing as a junior trained child care worker? And then the other is the junior office assistant. So on the one hand, if you said there was a junior child care worker you have two juniors at prescribed rates - it's 100 per cent of 20, but below 20 it prescribes 90, 85 and 75 per cent.

And yet in classification 6 for under 20 it has years of service. So presumably years service being three under 20, must start at possibly 17.

COMMISSIONER GOZZI: Yes. In a lot of awards the years of service have been replaced with the age. So that if you have a junior employee under 20 coming in, instead of putting him if he, say - if he is 20, rather than putting that person on the first year of service the person is put on the 20 year old rate. And in this case, of course, it makes a difference of $23 or thereabout a week.

In other words, the years of service for junior workers have been largely deleted in the public sector. There are only one or two residue areas where there is debate as to whether or not the employees are juniors. But where they are juniors, then the - as I say, the years of service criteria has gone out and the juniors have been paid according to their age. And it makes a significant difference, particularly where you get a junior that is not 16 when he starts - he or she starts work. And I suspect that this particular construction probably emanates from some public service area back in the halls of time.

So, can I say that when I deal with this matter by way of a decision, that you'll be looking at - as well as what you said about the structure generally - at the trained child care worker classification and junior rates?

MR SERTORI: Definitely, yes. It is only come to the attention of the parties in drafting the order and looking at the classification rate, and it suddenly occurred to me it is anomalous. The fact that -

COMMISSIONER GOZZI: Well, me too, just looking at it.

MR SERTORI: The fact I have never had a question on it suggests that it may not have a great deal of impact. Nonetheless, it doesn't sit comfortably and needs to be addressed.

COMMISSIONER GOZZI: Right.

MR SERTORI: Otherwise, Division B and C the rates have been adjusted accordingly in like manner to the rest of the award.

The Commission will be pleased, I have had budget approval for a new laser printer photocopier, so the standard of my exhibits in the future will be better. You can see it is long overdue by the way some of that's copied, and I apologise for that.

That then, through exhibit 1, is the proposal we submit to you for the second SEP variation. It has been the result of some considerable discussion. We would submit that we are able to demonstrate considerable progress being made under the structural efficiency principle and, therefore, would seek on that basis that this matter be ratified.

We have had regard to our statutory provisions under section 36 of the act, and as I indicated to you earlier in the proceedings, that we have had in this area one full funding year where allowance was made for a wage movement that didn't occur, which places the establishments in a position where this is an affordable increase, and the impact is one that they have been financed for, and therefore we don't see that there is any barrier to your ratifying this proposed agreement under section 36.

Again, it is not contained in the documentation from memory, but it is proposed that the operative date be the beginning of the first full pay period to commence on or after 1 August, which in most establishments is two full pay periods away from today. If the Commission pleases.

COMMISSIONER GOZZI: Mr Sertori, thank you for that. Just before you do sit down, going back to the issue of juniors, going through the wage schedule there, Division C, you'll note there that in fact what we have been talking about is shown in the junior rates column, so unapprenticed juniors other than clerks, you'll see there 16 years of age and under. The ages are specified. So, if you get a 17 year old employee he or she would be paid 55 per cent, a 19 year old employee 85 per cent, whereas the way is years of service.

A 19 year old employee would receive 45 per cent of the junior rate. That's the effect of what's currently contained in the juniors provision in the first part of your wage

schedule Division A. As you say, it may have no effect, or minimal effect, at the most, but that's the effect of it.

MR SERTORI: Yes. I take that on board. It is obviously - even if it's a paper exercise - it is one that the parties must address and correct in the award, and what is a number of complex matters that the parties have to consider about, particularly the division, in any event.

COMMISSIONER GOZZI: Yes, it has particular effect, as I say, to classification VI in Division A, because classification VI provides for under 20 years of age, years of service. The rest of Division A seems to be all right. Now the other .... I would like to address to you is, what is happening with respect to clerks in this award?

MR SERTORI: The clerks have had opportunity for involvement through this process, and received a copy of the draft order. There has been dialogue between the union and the clerks. Their absence today is curious. We are looking to develop a classification structure that would identify the administrative area. It would - and its outcome is subject to what the clerks might wish to do, given they're a party to this award.

Their position has been a bit unclear since they haven't taken much of an opportunity to be active in this award area. Traditionally, they haven't had much of a role until recently when they became a party to the award.

We would hope to be able to negotiate some settlement in that area, given that there is a different desire in employing clerks in many areas under this award, where a clerk can, in fact, become more a supervisor trainer of a client than the traditional clerk. But one must say I have no knowledge that they are not a consenting party.

COMMISSIONER GOZZI: Are they a party to the award?

MR SERTORI: Yes, unfortunately they were made a party when the interest bound provisions were put in the Act, and they were made a party to this award. I don't have the decision with me but it's a recent - they're a recent edition.

COMMISSIONER GOZZI: Was that by consent?

MR SERTORI: Wasn't by my consent, no. Oh look, I could -

COMMISSIONER GOZZI: There was a hearing apparently.

MR SERTORI: I was - told by my peers we had no right to appear in those proceedings. I believe the matter was the subject of considerable argument between the HEF and the FCU

and ultimately the commission decided in favour of the FCU. My organisation's part, I understood -

COMMISSIONER GOZZI: Who said you couldn't appear?

MR SERTORI: It was - well, I must say I haven't - I must say it's not an area that I've delved into and had we been appearing it wouldn't have .... on that occasion. I haven't delved into and I'm not really in a position to debate that with you rather than to indicate that's the advice that I had rightly or wrongly. I might have to be relying on my memory to call all the bits and pieces to do that, but I'm not sure whether we tested that either but we might have.

COMMISSIONER GOZZI: Well let me say, the area is confusing - that in the context of initially determining interest in an award section 63 of the Industrial Relations Act applies and under that section it only relates to the organisations involved in the matter - right? So if you go to 63(11) of the Act - section 63 subsection 11, okay, before making a determination under subsection 10(c) which is the - the matters that a commissioner should have regard for when determining interest, he shall notify in writing and you'll see there in (a) in the case of the determination of awards which an employee organisation has an interest in, or other employee organisations - right?

So in the first determination of interest, it's certainly between employee organisations, but in this case of course interest had already been determined in the award for the organisations in that award - interest was determined in respect of the Welfare and Voluntary Agencies Award quite some time ago and this matter was really a matter under section 65(a)(i) of the act and that's after the issue of certificates of registration, and what happens is that the registrar on his own motion or at the request of an organisation make application to the president for leave to recall the certificate and to re-issue the amended certificate with the name of the award not specified on that certificate.

So, what would have happened here in this case is that the Federated Clerks Union would have written to the registrar most likely to have their certificate of registration amended to include the Welfare and Voluntary Agencies Award. Now the processes under 65(a)(i), if you follow that through to section 65(a)(iv), requires that the commission before making a determination shall give the applicant the determination and the organisations having an interest in the award concerned an opportunity to be heard in the matter.

And of course in that context the TCI hasn't - is an organisation with an interest in the award. And so the two areas of interest are quite different: (1) you might say is determining the interest on a de novo basis as happened when

the awards first had interest determined in them; the second interest is when certificates of registration are recalled where an organisation seeks to have an amendment made to that certificate as happened here, and in those circumstances under section 65(a)(iv) all the organisations having an interest in the award should have an opportunity to be heard.

MR SERTORI: I appreciate that. I would suggest that some of the parties making a submission to you weren't appreciative of that point, given the dialogue they had with me and, without naming the organisation, request that I may take the witness stand in support of their submission. So I'd suggest there was a gross misunderstanding of what might have taken place.

COMMISSIONER GOZZI: Yes.

MR SERTORI: The FCU do have a member in this industry - or a membership in this industry I should say, albeit limited, and they of course are now party to the award. We would hope -

COMMISSIONER GOZZI: Oh yes, look I'm not arguing and suggesting that they shouldn't be. I'm just trying to clarify the point that the organisation could have been represented at the hearing.

MR SERTORI: Yes, well I - that's - that's a misunderstanding on our part. The original question of where the FCU stand, I guess I am notable to speak for them, but I would - perhaps Mr McLane is in a better position than I to talk about discussions they have had. From my part, we have provided them with all documentation. We will be looking for their involvement to clarify where they stand. We would hope that we could, in fact - our preferred position would be to negotiate them away from the award so that we could achieve a one union focus for this award from whence we started, and that will be subject to Mr Fry and his organisation making certain decisions. But that might be another hard issue that confronts the parties down the track.

COMMISSIONER GOZZI: Mr Sertori, I suppose what I had in mind when I asked you that question is, what is happening with respect to the structure the clerks are pursuing by way of having all classifications, clerical classifications, shown in the Private Sector Clerks Award, modelled along the Victorian commission's decision, and what the attitude of the TCI would be.

Let me just say, in monitoring proceedings covering all awards around about April 1990 the Federated Clerks Union said in respect of their awards that they would be seeking to withdraw all classifications out of those awards and have them shown in a proper structure in the Private Sector Clerks Award, and the TCI said that they were opposed to that. They would like to

maintain clerks classifications in the award, in all of the awards. Since that time the TCI have been here to say that with respect to some awards they are now not opposed to withdrawing the classifications, but in some others they want the classifications to be maintained. It was in that context I was wondering what was happening between the TCI and the clerks in respect of this award.

MR SERTORI: In those exchanges I don't think WAVA had a proper focus by both the FCU and the TCI at that level of discussion. Subsequently, the FCU have not been specific about their intentions for this award. However, I'm certainly aware that at this point the `in principle' positions I guess that you've referred to would be that they would seek the withdrawal of the classifications from this award, and we would seek to oppose it. I believe, however, there are some unique aspects with this award that need to be considered - negotiated - and therefore it perhaps fits into category C of all the options, if you like.

COMMISSIONER GOZZI: Yes.

MR SERTORI: Unfortunately, the FCUs involvement to this point has been minimal, but I guess that's their choice. If the commission pleases.

COMMISSIONER GOZZI: All right. Thank you, Mr Sertori. Mr McLane?

MR McLANE: Thank you, Mr Commissioner. I don't have any disagreement with anything Mr Sertori has said. We are before you today on a consent matter. There has been a lot of discussion and a lot of work been performed by the parties to this award, or by the parties that appear before you.

Scope is one thing, as Mr Sertori said, that we are looking at in light of other developments. We don't propose to make any changes at this stage, but down the track we realise that that will have to be addressed, and will be addressed, in the light of other full bench matters that are going on in that area at the moment. We've done a lot of work on the career path and the classification definitions. Both the TCI has a position and the HSU has a position.

Extensive work has been done by both parties. What we have done now is establish a working party to try and find the areas that we have agreement and work on those areas that we don't in relation to career path, classification definitions, the modernisation of the award, and the minimum rates adjustments.

Now we believe that there is quite an avenue for minimum rates adjustments under this award. For example, the current tradesmens rate as it exists now is $368, where the benchmark

of the metal industry if 407. Having said that, we are also quite pragmatic, and we realise that because of the funding arrangements of this particular industry we're not going to be able to achieve those things tomorrow. But it is an area that needs a lot of attention. We're attempting to cooperate with the employers and address the real problem, and that is the funding, or the lack of funding.

Now there has been discussion that maybe we have to look at a longer phase-in period than what we'd expect. We'd hope that that isn't the case, but as I said, sir, we're being quite pragmatic about it, and we're working through that with the employers at this stage. We're looking at such things as skills audit, inspections of the various work sites. Quite a number of grey areas exist, and it is a growing area, and really we have got a lot of work ahead of us just to try and determine where the award actually applies to. Group Homes being one example, I suppose, that springs to mind. Also some of the areas that Mr Sertori alluded to there could be an argument as to whether or not they're sheltered workshops, and we could well have other unions coming in and trying to seek coverage in those areas.

There's a lot of work to be done. But we're quite serious about it. We believe that this award is well below the established standard in relation to wages. And we hope to address that, but as I said we're - we're not - we realise the unique difficulties that this industry has.

There's a number of things that are - award variations that are in the draft order that we've agreed to, and Mr Sertori worked through those. I'll just touch on them, and briefly, shortly. We take on board what you said about the allowances and having them tied to the CPI in line with - with the decision. I'd just like to - to point out that our membership would be severely disadvantaged if that was to be the case at this particular time, bearing in mind that they haven't had a wage increase since November 1988.

I suppose CPI is up quite a bit since then, I would imagine, probably somewhere around the 9 per cent, so - so they would lose out at this stage. But certainly if we can tidy things up there will be room to move there and that's something that we'll take on board, as Mr Sertori has said. I don't have any problems with the amendments Mr Sertori seeks to make to the draft order in relation to the public holidays and, in particular, substituting the first Monday in November. Likewise, we support 1 August as the operative date.

Just to touch on a few things. As Mr Sertori said, the enterprise flexibility, as he used the words, quite correctly, rightly or wrongly, appears to be the standard. I've just endorsed that. The other one, the holidays with pay dealing with the public holidays, is starting to become, certainly to

the HSU, a bit of a standard clause as well, where we actually .... that clause now in our private sector Hospitals Award.

We could see that that will be quite beneficial to this industry when it's funded on people working at that single time. And I just point out that it is an agreement to be made on each occasion. It can vary from time to time. For example, if it suits the parties to work the time they can, if one of the parties holds the view: Look, I can't afford to be without the money, there's part of our house payment due, so be it. That's the end of the matter.

With the meal time and the time of taking the meals, the way I'd see it, that extra half and hour - where work can continue for half an hour because of pressing circumstances, how I'd see it applying in practice, sir, is that if the practice is for a half hour meal break in a particular establishment, that would mean that it could go out to an hour before the person having a break. If the - if the practice in a particular establishment is for a 1 hour meal break, I would see that half hour being tacked on the end of that.

So I wouldn't see it as something hard and fast, I would see it depending on just how it operates in the particular enterprise. The overtime: Once again, because a bit of a standard clause as far as the HSU is concerned. Terms of employment: This was an area we had some difficulty coming to terms with, looking at the prospect of a 3 months probationary period, bearing in mind that at this stage it's only 2 in the award.

However, the employers, and Mr Sertori, were quite persuasive and logic in the arguments that they put forward to us and won us over to their line of thinking. And what that line of thinking was that - that's a peculiar industry. People come in from outside, in a lot of cases tradesmen, especially in the sheltered workshop situation, come in from outside, quite skilled people in their trade or their craft, but no experience of working with the disabled. And the logic of the argument was that 3 months gives the employers and the employee, but specifically the employer, the opportunity to make sure that somebody can relate to working with disabled people.

COMMISSIONER GOZZI: Yes. I think that's fair. I think that's fair comment ....

MR McLANE: Yes, as I say, sir, we saw a lot of merit in that after - after listening to the arguments and were prepared to agree. We have a concern that somewhere down the track some smarty might decide to abuse it and use it for other - for other things. But we've been assured by the TCI that they won't support that sort of thing. That it's a vehicle for increasing temporary employment in the industry, and we're

quite happy with the commitments Mr Sertori has given us on those things.

There's some other things that will be - really I suppose, there's a hell of a lot of work been done to date, but really the hard work is only just about to start and that's as we work our way through the classification structures and all those other things and try and reach agreement on them.

Now some of the things we'll be bearing in mind as we work through that process, sir, is the contract of employment, apprenticeships and adult apprenticeships within the industry, traineeships and looking at such things as mixed functions, allowances and those sort of things that may well become obsolete depending on the way we structure the new classifications.

As I said previously, sir, we are also quite keen to address the core of what could become the obstacle to our minimum rates adjustments and that is the funding arrangements. We're looking at revamping a committee that involves employers, unions, parents ....

(TAPE MALFUNCTION)

.... people collectively and we'll be more than happy to appear before you at a time you see fit to give a report-back on the developments that will be taking place over the next couple of months in regard to such things as classification structures and all those other things that I've mentioned. I'd submit, sir, that 1 August be the operative date. People have been extremely patient in waiting for their second three. I've no further submissions.

COMMISSIONER GOZZI: Mr McLane, Mr Sertori suggested that I not put a date in at the moment and leave it to the parties to contact the commission about relisting - what's your view on that?

MR McLANE: Yes, I'd support that, sir. We looked at sort of the 3 months timetable and we would hope to be able to achieve that. We're meeting next week. We've already met a number - a couple of times on just the classifications and that sort of thing with the working party. I think it would probably be better left to either one of the parties or the parties hopefully jointly to request another hearing before you for the report-back. I'd support what Mr Sertori said on that. Thank you, sir.

COMMISSIONER GOZZI: Mr Sertori.

MR SERTORI: If the commission pleases, I'd very briefly just like to respond to one comment that Mr McLane slipped in in his submission and it's the comment that HSU seem to make

regularly about this award, particularly in recent times, and that is that the rates in this award and the award generally is well below established standard. Now the introduction of the award - shortly after the introduction of the award before the former Industrial Boards, we were presented with an argument by the then secretary of the No. 1 branch, Mr Imlach, who said that the award contained interim rates from inception and that rate should now be reviewed.

That case was run before the then Assistant Deputy Chairman of the Industrial Boards, Mr Holden, and rejected. Subsequently Mr Rees ran a work value case before you, that you'll recall, travelling around the countryside, and I forget the year but I think '83, '84 -

COMMISSIONER GOZZI: Yes.

MR SERTORI: - would be a good guess.

COMMISSIONER GOZZI: Oh, no, no, no. Look, no, no, it was after that. No, no, it was -

MR SERTORI: That's even better for me if it was.

COMMISSIONER GOZZI: We didn't get up and running till 1985.

MR SERTORI: Oh, that's right, of course, yes, yes.

COMMISSIONER GOZZI: I think it might have been '86, '87.

MR SERTORI: Eighty-six, '87 - so the point -

COMMISSIONER GOZZI: I know it was a substantial work value case.

MR SERTORI: Exactly - so the rates were then work valued, subsequently you'll recall condition variations brought before you by Mr Holden on behalf of the then HEF which was not part of a second tier review as such. It pre-empted the second tier review and it resolved in a number of conditional changes to also upgrade the award, because on his submissions the conditions had fallen below some established standards.

So whilst I am, and those that I represent, entering this issue of setting relativities for new classifications with an open mind, and constructively, and I anticipate there would be need for minimum rate adjustment, I give notice to the parties - to the other parties to this award - and I put on record in this commission that if it is intended that there should be some reliance on this concept that the award is below standard - and may I remind it that the award has gone through that history of work value and other changes - and that the award has been tested right through up to the current date of principles, the only adjustment therefore available

to it would be that that arises out of relativity settings for new classifications in accordance with the minimum rates adjustment. If the Commission pleases.

COMMISSIONER GOZZI: Right, thank you, Mr Sertori. I'm satisfied from what I've heard this morning that you have applied yourself very seriously to this award and I am appreciative that that has happened - it's certainly a way to go with it and I am satisfied too that you'll achieve an acceptable classification structure at the end of the day.

I don't propose in the circumstances to relist it at this time for a report-back. I'll wait for you to - to contact the commission and we'll put in the lists as soon as we possibly can thereafter.

As far as the subject matter of the application is concerned I can indicate my intention to vary the award in the manner requested operative from the first pay period to commence on or after 1 August 1991 and a decision and order will issue in due course.

HEARING CONCLUDED