

TASMANIAN INDUSTRIAL COMMISSION
Industrial Relations Act 1984

T No. 6098 of 1996

IN THE MATTER OF an application by the
Health Services Union of Australia,
Tasmania No. 1 Branch for an
interpretation of the Community Services
Award

re clause 2 - Scope, - application to
Personal Carers employed by Family Based
Care (South) Inc.

PRESIDENT

HOBART, 19 March 1996

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: Appearances please.

MR C. BROWN: If the commission pleases, C.BROWN appearing for the Health Services Union of Australia, Tasmania No.1 Branch.

PRESIDENT: Thank you, Mr Brown.

5 **MR I. PATERSON:** If the commission pleases, IAN PATERSON, appearing for the Australian Municipal, Administrative Clerical and Services Union, Tasmanian Branch party to the award.

PRESIDENT: Thank you, Mr Paterson.

10 **MR M. WATSON:** May it please the commission, MARK WATSON. I appear on behalf of the Tasmanian Chamber of Commerce and Industry, and with me is **MR ALEX TUBB** from the Family Based Care (South) Incorporated.

PRESIDENT: Very good. Thanks, Mr Watson. Well Mr Brown, you might care to tell me what the problem is.

15 MR BROWN: I'll do that, Mr President. The application by the HSUA, Mr President, for an interpretation hearing as pursuant to section 43(1) of the Industrial Relations Act and the application goes to the issue of whether personal carers employed by Family Based Care (South) are covered by the scope clause of the Community Services Award. As you're no doubt aware, the commission finalised the making of the
20 Community Services Award in November last year with an operational date of the first full pay period on after 1 July 1995.

Following the commission's decision which resulted in the finalisation of the award, the HSUA wrote to the manager of the (South) in December 1995 pointing out that the award had been finalised and requesting that they advised the union as to when they'll be translating their staff to the new award and providing any back pay to their
25 employees if appropriate.

In reply, the HSU - to the HSUA, the management of Family Based Care indicated that they had received industrial advice that personal care workers, or support workers as they refer to them at the enterprise level, employed by the organisation were excluded from the Community Services Award, and the reasons given for adopting this position
30 was that the scope specifically excludes them, in our view that obviously the HSUA contests.

It was and still is the HSUA's view that because of the primary functions and the industrial disputes of the organisation called Family Based Care (South), personal care workers employed by that organisation are in fact covered by the Community
35 Services Award, and what we're seeking today is the services of the commission to interpret the scope clause of the Community Services Award to establish whether Family Based Care (South) as an organisation, and therefore the personal carers they employ are covered by the Community Services Award.

That's by way of introduction as to what the issue is, Mr President, and I - if I can
40 proceed I will go on with my submission.

PRESIDENT: Yes, sure.

MR BROWN: If I could tender an exhibit -

PRESIDENT: Yes, we'll mark this exhibit B.1.

MR BROWN: Sorry, exhibit?

PRESIDENT: B.1.

MR BROWN: B.1.

MR WATSON: Chris, is there a second page?

5 MR BROWN: No, there's only one page - oh - there should have been a second page. It doesn't matter, I'm not going to be referring to the second page in any case.

I apologise, Mr President, there is a second page to it which has actually the signature block on it but I'm not actually going to be referring to that and I don't think Mr Watson would dispute that this in fact was a letter that Family Based Care sent on the
10 15th December.

In this letter the employer outlines the reasons why they believe that the organisation's personal carers are excluded from the award, and in particular, paragraphs two and three, which I'll read out:

15 *In relation to the Community Services Award, I have received industrial advice which indicates that Family Based Care's Support Workers are excluded from this Award. Part (b) of the Scope clause on page 2 of the Award states:*

(b) *This award shall not have incidence on the following services and/or occupations:*

20 *The health industry including the aged care industry, or services which provide personal support and/or personal care to persons with intellectual, sensory or physical disability, ...*

*As Family Based Care is part of the aged care industry and provides support services and personal care to persons with intellectual, sensory or physical disability, we do not believe the Community Services Award applies to this
25 organisation.*

Given the argument put forward in this letter, I'd like first to deal with the issue of the exclusion subclause (b) in the award, before addressing myself to subclause (a) which refers to inclusions. In so doing, Mr President, I'm aware that the bench needs to give due regard to the decision arising out of matter T.30 of 1985, which establishes
30 guidelines for those bringing interpretation matters before the commission.

Mr President -

PRESIDENT: There are other guidelines that have been established in the past decisions -

MR BROWN: Yes.

35 PRESIDENT: - as well which you're probably aware of.

MR BROWN: -Aware of - perhaps some of those. And I'll -

PRESIDENT: Before you move on to that though, Mr Brown, I'd just ask Mr Watson to confirm that he's satisfied that exhibit B.1. is a true and accurate copy of the letter of the 15th December issuing from Family Based Care (South) Incorporated.

MR WATSON: Yes, I will confirm, Mr President, that is in fact the first page of the letter that was sent.

PRESIDENT: Right. Is there anything on the back page that's relevant apart from the signature block?

5 MR WATSON: Well -

PRESIDENT: Or you don't want to go to that?

MR WATSON: I don't think it's relevant to these proceedings.

PRESIDENT: All right. Very good. Thank you. Mr Brown.

10 MR BROWN: Mr President, given the argument put forward in this letter, as I said, I'd like to deal first with the subclause (b) of the scope. The full bench in its decision of the 22nd January 1992 in matters T.2225 of 1989, T.2311 of 1990 and T.2691 of 1990 made a number of decisions regarding the scope clause of the Community Services Award, and if I could just hand up that decision as an exhibit.

PRESIDENT: We'll mark this exhibit B.2.

15 MR BROWN: Mr President, I've also spent quite a considerable amount of time going through the transcript of the full bench's deliberations and the submissions. To anyone involved it was obviously a very long drawn out and arduous process which went to a number of issues which I was going to actually tender the full bench transcript as an exhibit and go to it but -

20 PRESIDENT: Yes. Before -

MR BROWN: - I don't think it's

PRESIDENT: - before you go into that though, in dealing with an interpretation, I'm concerned with the words first -

MR BROWN: Yes.

25 PRESIDENT: - and what they mean, and if we find there's some ambiguity in the words then we can go to decisions and transcript. But fundamentally we really need to look at the words and what they mean in the common English usage.

30 MR BROWN: Yes, I'm aware of that, Mr President, and I intend to go to the words and demonstrate my case on the basis of the words. I do however wish to go to the transcript. The extent to which you give that any weight or not is obviously a consideration that you need to know.

PRESIDENT: Yes, all right. I may also draw some comment from the other side as you're -

MR BROWN: Certainly, they expect that.

35 PRESIDENT: Yes, all right.

40 MR BROWN: The matter of the scope clause for this award was in fact the subject of an application by both the Tasmanian Confederation of Industries and the Australian Social Welfare Union, and the hearing in these matters commenced in February of 1990 before Commissioner Gozzi. In July of 1990 the matter was referred to a full bench at the request of the parties by Commissioner Gozzi and the full bench first sat

to consider the matter in August 1990, and following numerous adjournments a decision was handed in January 1992, making the award in respect of title and scope.

5 As we note from the outcome the bench made and industry as opposed to an occupational award which is, and I quote “established in respect of the industry of social and community services”.

10 The scope clause consists of two parts; subclause (a), which has listed primary functions and industrial pursuits relevant to the social and community services industry; and subclause (b) goes to certain industry and occupational exclusions. The exclusion subclause which caused the parties so much angst was the main reason why it took the commission almost two years to establish the scope clause to this award. The principal concern of the full bench, as reflected in its decision of the 22nd January, 1992 was that the scope should not intrude on the scope of other awards established by the commission and yet be comprehensive enough to ensure that services in organisations within the social and community services industry which were award free would fall under the coverage of the proposed Community Services Award.

If I could take the bench to page 4 of that full bench decision and quote from the second paragraph, third sentence which states that:

20 *In that regard the Bench endorsed a process which would facilitate a settlement of the scope clause and would provide for a phased approach to the rationalisation of other awards of the industry which prima facie commit coverage in certain sections -*

PRESIDENT: But that’s not quite what it -

MR BROWN: Sorry?

25 PRESIDENT: That’s not quite the way it reads is it?

MR BROWN: Well let me - actually I was reading from something that I typed out - I might have typed it out wrong, so I’ll actually read from the transcript itself.

PRESIDENT: Yes.

MR BROWN: Quote:

30 *In that regard the Bench endorsed a process which would facilitate a settlement of the scope clause and would provide for a phased approach to the rationalisation of other award scope clauses which prima facie permit coverage in certain sectors of this industry, i.e the Hospitals Award and the Welfare and Voluntary Agencies Award.*

35 In establishing the scope clause for this award, the full bench was obviously concerned that the scope clause should include an exclusion subclause based on the scope clauses of other awards of the industry which were in danger of overlapping with the Community Services Award. This is further made clear in the full bench decision, still on page 4, the section in italics, where reference is made to steps agreed
40 by the parties to resolve the issues surrounding an agreement on the scope clause, and I quote from the beginning of the section in italics:

“The course of action to facilitate the progress of the matters is for a phased approach to achieve these objectives.

5 *Firstly, the making of the Community Services Award with an extremely descriptive scope; the wording will be devised to eliminate any confusion for award users and is not intended to cut across any awards already in force. To that end there may have to be exclusion provisions at the scope clause of the proposed Community Services Award.*

Secondly, the three unions and the Confederation of Industries will meet and will draft appropriate exclusion provisions, and obviously we'll have to meet in relation to the first point.

10 The two awards cited by the bench that needed to be the subject of any exclusion subclause were the Hospitals Award and the Welfare and Voluntary Agencies Award as they were known at that time. This is in effect exactly what happened, and if I could tender the scope clauses for those two awards at that time

PRESIDENT: Any order for these to be marked do you think, Mr Brown?

MR BROWN: No, Mr President.

15 PRESIDENT: Okay, well we'll do the Hospitals Award, exhibit B.3, and the Welfare and Voluntary Agencies Award exhibit B.4.

20 MR BROWN: Mr President, I won't bother actually going through those clauses in detail as any examination would make it absolutely clear that the exclusion clauses in the Community Services scope clause, in particular subclause (b) paragraphs 1 and 2 is almost word for word duplication of the scope clause in the Hospitals Award and the Welfare and Voluntary Agencies Award as I've just tendered in the exhibits.

Obviously the effect of the full bench decision in endorsing the exclusion subclauses developed by the parties was to eliminate the coverage already in force in these two awards.

25 If I could take the bench back to page 4 of the full bench decision which goes on to say in the fourth paragraph of the italic section, and I quote:

Thirdly, it's agreed that as a consequence of this the HEF will withdraw application T.2691 of 1991.

And if I could tender that application as an exhibit.

30 PRESIDENT: Exhibit B.5.

MR BROWN: As can be seen, Mr President, this application by the then HEF relates to a proposed variation to the scope clause of the Welfare and Voluntary Agencies Award, in particular to subclause (d) is where the real change takes place which proposes, and I quote - to cover workers - and I quote:

35 (d) *providing care for intellectually, physically and/or sensory handicapped persons in the non government sector in other than residential homes, residential hostels, sheltered workshops, day training and activity centres as specified in Divisions A, B, C and D of this award.*

40 Mr President, the Welfare and Voluntary Agencies Award at that time was very much aimed at covering institutions because of the nature of the disability services industry at that particular point in time.

The application actually proposed to extend the coverage of the Welfare and Voluntary Agencies Award to cover those workers undertaking personal care activities such as those employees currently employed by the Family Based Care organisations which are the subject of this current application.

5 The HSUA, or actually more correctly the HEF as it was known at the time, made this application as a result of early discussions on the Community Services Award scope clause which indicated that this category of worker, the personal carer, may be excluded from the scope clause of the Community Services Award thus rendering them award free. If this - if they were to be excluded from the scope clause of the
10 Community Services Award, then it was the intention of my organisation, the HEF, to have them covered by the scope clause of the Welfare and Voluntary Agencies Award.

The HEF, as indicated in the full bench decision, requested the withdrawal of its application T.2691 of 1991 following discussions with the parties because it was the understanding of the parties, and they include all the parties in there, that the
15 occupation of a personal carer, the subject matter of the application would be covered by the Community Services Award. In fact that's exactly what happened; the full bench, in handing down its decision of the 22nd January 1992, made a specific point of including personal carers such as those employed by the Family Based Care organisation in the scope of the Community Services Award.

20 There are more specific examples that personal carers employed by Family Based Care are in fact covered by the scope of the award.

In a letter from the then Australian Social Welfare Union which was tendered as an exhibit in the hearings before Commissioner Gozzi, the ASU produced a list of employers in the industry of Community Social Welfare Services on whom the ASWU
25 Tasmanian Award - and that was the working title at the time - would have incidence included in that list were three regional organisations known as Family Based Respite Care, later to be known simply as Family Based Care. The reasons these organisations were included in the list of coverage was that they were deemed to be part of the social and community services industry and not the health industry which was the
30 subject of the final exclusion clause adopted by the full bench.

Additionally and following the full bench's decision and the establishment of the scope clause, Commissioner Gozzi undertook inspections of sample organisations which were to be covered by award - bearing in mind that this was after the scope clause, including the exclusion subclauses have been finalised by the full bench and in
35 September 1992, one of the organisations included in Commissioner Gozzi's inspection was the Family Based Care (South) organisation.

Clearly Commissioner Gozzi, having full knowledge of the scope clause that would apply to this award, saw it as appropriate to include Family Based Care in the list of organisations to be covered by the Community Services Award.

40 If I could now turn my attention to the wording of subclause (a) of the scope clause of the Community Services Award which establishes coverage. In addition to areas of coverage listed in subclause (a) of the scope clause, the full bench made an unambiguous decision to include personal carers in the coverage of this award, and if I could just take you to - again to the full bench decision on page 5, and the
45 paragraph which commences "In our opinion", and quote:

In our opinion and having regard to the very diverse nature of the Community Services industry, Exhibit ASWU 11 conforms with the thrust of what the Bench intended. However we do not intend to exclude "personal carer" from the proposed scope clause -

- et cetera, et cetera. ASWU.11 was in fact the exhibit which a proposed scope clause for the award which in fact became the scope clause for the award as we know it today.

5 It was proposed that a number of occupations be excluded from the Community Services Award. There are occupations such as cleaner, ground keeper, cook, laundry hand, driver, et cetera. Also included the proposed list of occupational exclusions were personal carers. In considering which of these occupations should be excluded, the bench gave consideration to other award coverage. In the final analysis excluded a number of occupations subsequently listed in subclause (b)(iv) of the scope clause in
10 the Community Services Award but decided that personal carers should be included because they were not covered by another award. In fact, to have excluded them would have rendered them award free.

15 It was the full bench's decision not to exclude - if it was the full bench's decision not to exclude personal carers from the award - then why would it then go on to exclude personal care work from the award in subclause (b) of the scope clause. It just wouldn't make any sense.

And, also given that the bench's in-principle endorsement of the scope clause proposed by Exhibit ASU.11, just where did the full bench intend personal carers to be reflected into the scope clause.

20 The award, Mr President, is an industry award and it states very clearly that:

This award is established in respect to the industry of social and community services in which the primary functions/ industrial pursuits include -

- etc., etc.

25 The question which needs to be answered is not necessarily where personal carers as an occupation fit into the award, but rather where the organisation for family-based care fits into the award.

30 If I can demonstrate and establish that the primary functions in industrial pursuits of the employer fall within the social and community services industry, then unless specific occupational groups employed by the organisation are excluded from the award they are, by virtue of being an industry award covered by the scope clause; and, as I have just indicated, personal carers were not one of the specific occupations excluded in the scope clause; in fact, the full bench, as we have seen, said, 'We do not intend to exclude personal care from the proposed scope clause.'

35 So the question that I will attempt to answer now is, do the primary functions and industrial pursuits of Family Based Care (South) fall within the scope of the social and community services industry and, obviously from our point of view, the answer is clearly 'Yes'.

As evidence I will tender the following exhibits.

PRESIDENT: Which one first, Mr Brown?

40 MR BROWN: Support workers, I think, Mr President.

PRESIDENT: That will be Exhibit B.6, and the 'Handbook for Consumers', Exhibit B.7.

MR BROWN: Mr President, I have tendered both these handbooks for the information of the bench, but they are essentially exactly the same handbook and the

one therefore that I will be referring to Exhibit B.6, the 'Handbook for Support Workers'.

5 Both of these exhibits are handbooks which have been produced by the management of the family-based care organisation and they describe the primary functions of the organisation.

I would also indicate that Mr Watson and myself have examined both of these documents and are agreed that they in fact are an accurate description of the activities and functions of the family-based care organisation. We did that to save the issue of having to put up witnesses and unnecessarily take up the time of the commission.

If I could turn the bench's attention to the 'Handbook for Support Workers' and quote from page 3 and state, 'Was is Family-Based Care', and it says, and I quote:

15 *Family-based care is a State and Commonwealth funded service. It is managed by three regional based boards of management with representatives from support workers, consumers and other interested people, and family-based care is a service which aims to enhance the quality of life of people with disabilities and the family by providing care to persons within their home or community setting, thus allowing new friendships to develop and new experiences to be shared, providing reliable care that will enable the family of the person in care to enjoy a regular or an occasional break from their usual routine.*

The handbook then goes on on page 4 to describe two types of services provided by the organisation, namely respite care and personal care, and if I might just read that out:

Respite Care:

25 *This may be provided in two ways: in home care is care offered in consumers' own home or within the local community. In-home care is usually provided on a regular basis but may also be provided on a casual basis.*

Host Family Scheme:

30 *Respite care is provided in this host's family home where people with disabilities can participate in another family's activities. This may include overnight care for perhaps one weekend or a month, depending on the -*

PRESIDENT: One weekend a month a month, I think, yes.

MR BROWN: Sorry - one weekend a month -

35 *- depending on priority the hours available may vary, and service to veterans provide supplementary assistance for eligible veterans and their carers by the Department of Veteran Affairs. This assistance takes the form of paying for emergency short-term home relief and in-home respite care, and personal care may be needed by people with disabilities or frail-aged persons to assist with showering, grooming, therapy activities. The service allows people with a disability or elderly people to live independently in the community and avoids unnecessary institutionalisation. It is available for two people in stable health*
40 *conditions who can safely be assisted without the need for medical or nursing intervention.*

And then over the page, pages 5 and 6 of that handbook, actually describes who does what within the organisation, and I offer this information not so much to establish the role of the personal carer within the organisation but rather to further establish the primary functions and industrial pursuits of Family Based Care (South).

- 5 Who does what is basically divided up into two groupings. The family-based care manager and coordinators and there is a lit of activities that are the responsibility of those workers, including under (h) 'providing information on other services' and refers consumers to more appropriate and/or additional services, if necessary.

10 And then on page 6 the home support worker, or personal carer, and if I can just quickly run through those:

(a) Provide reliable, resourceful direct care and supervision as companions to consumers. Perform other tasks arising from the care of the consumer as would normally be performed by their family or usual carer.

15 *Provide transport for consumers as negotiated and approved by the service coordinators.*

Assume care of other family members, e.g. siblings, as required.

Provide opportunities and experiences that will facilitate the personal growth and the development of new friendships for consumers, and assist consumers to participate more fully in the community.

- 20 Mr President, the primary function then, industrial pursuit of the family-based care organisation, evidenced by that description, is not part of the health industry but rather part of the social and community services industry.

25 As the handbook from which I have just quoted clearly indicates that consumers of this service must be in a stable, health condition and that the primary function is that of enhancing the quality of life of not only the people with a disability but also their families.

30 Some of the specific activities of the organisation such as providing companionship to consumers, relief for other family members to enable them to have a break from the constant demands of caring for a disabled or aged family member, transportation for consumers, the provision of care for other family members - especially siblings, the provision of opportunities for personal growth and development of friendships, the provision of information on other services and referrals to those other services, and assistance to the consumers to participate more fully in the community all clearly fit the description of the service functions which fall within the scope of the social and community services industry and, therefore, I would submit the Community Services Award.

More specifically, the family-based care organisation and, therefore, their employees, are covered by many of the primary functions and industrial pursuits listed in subclause (a) of Clause 2 - Scope of the Community Services Award.

- 40 And if I could take you to the scope clause of the Community Services Award, Mr President, and I don't actually have that as yet as an exhibit, I'm sorry.

PRESIDENT: Well, I have got a copy in front of me.

MR BROWN: Yes, I thought you might - well, it is in the decision, anyway, yes.

PRESIDENT: Well, let's deal with - if it is word for word from the decision, that is fine - but it would be good if we could keep the precise words in the award.

MR BROWN: To do that I will actually quote from the award itself.

The subclause (a) states that:

5 *This award is established in respect of the industry of social and community services in which the primary functions/industrial pursuits include:*

(i) social support and/or the enhancement of social functioning of the individual, family or community -

10 - which very much fits the description that is outlined in the handbook that I have just quoted from.

 And, variously, it fits several other of those sentences which are in that subclause (a). For example program establishment, development coordination, management support for the above services - not necessarily provided by personal carer, but we are trying to establish whether the organisation itself falls within the scope of the Community Services Award, and under (v):

disability services which are demonstrably social welfare in nature including:

(1) counselling, advocacy information, referral and liaison services -

20 - which is part of the description of the function that the organisation provided in the handbook. Things like coordination of access to other services, and community access participation.

 Clearly, family-based care from that reading falls within the scope of the community services industry rather than the health industry per se.

25 In closing, Mr President, the HSUA submits that personal carers are employed by the Family Based Care (South) are covered by clause 2, subclause (a) of the Community Services Award by virtue of the fact that the primary functions and industrial pursuits of the organisation fall within the social and community services industry and, therefore, coverage of the Community Services Award scope clause.

30 We further submit that because the organisation employs person carers, and the full bench did not exclude the occupation of personal carer from the award - in fact, made a clear decision that they would be included in the award coverage - then personal carers are clearly covered by clause 2 - Scope of the Community Services Award.

 The HSUA therefore seeks from you a declaration indicating that personal carers employed by Family Based Care (South) are covered by the scope clause of the Community Services Award and are not award free as suggested by the employer.

35 If the commission pleases.

PRESIDENT: I didn't know the employer had suggested that. Is that contained in that letter?

40 MR BROWN: It's not contained in the letter, Mr President, but by inference they don't fit into the Welfare and Voluntary Agencies Award - or they don't fit into the scope clause of the Welfare and Voluntary Agencies Award - neither do they fit into the scope clause of what is now the Nursing Homes Award. At the time the scope clause

was made it was the Hospitals Award, and there is no other award that we can see that they would fit into.

So by excluding them from - well, by them being excluded from the Community Services Award would in effect render them award free.

5 PRESIDENT: All right. And, operative date?

MR BROWN: We would be seeking the decision - if it was found that the organisation is in fact covered by the Community Services Award - then the Community Services Award already has an operational date and that was effective from the first full pay period on or after 1 July 1995, and we would see that as being an appropriate date.

I may have some more comments to make about that following Mr Watson's submission.

PRESIDENT: All right. Well, that's a reasonable start then, Mr Brown, thank you. Mr Paterson?

15 MR PATERSON: I can be quite brief at this stage and I just have several short observations in support of what Mr Brown said, and leave the employers to make their primary response.

On that last question there may well be an issue of the operative date in fact being earlier than 1 July '94 - '95 - because in fact the hours and penalty rate entitlements in the award which have major cost impacts applied 12 months earlier than that, and other provisions of the award such as annual leave and sick leave applied from December '93, in fact.

The award is found to apply and to have applied over that time. I believe that they should be the dates to be considered in the decision, pending on what aspect of the award we are talking about.

I just add a little further to what Mr Brown has said on behalf of the Health Services Union of Australia.

The Australian Services Union with the full and long involvement in the development of the scope of this award also reinforces the claims that the scope - the words included in the scope clause both in subclause (a) in respect to primary functions and industrial pursuits do in fact describe the work of family-based care; that the organisation in fact through its handbook and through its approach to the relationship between carers and those being cared for puts a primary focus on the coordination of that relationship in order to avoid institutisation, and it is our contention that that falls well within the industry of social and community services.

In respect of the exclusions in subclause (b) I support the arguments and the evidence led by Mr Brown that this is not the health care industry or the aged care industry as that would be understood by common parlance. The health industry clearly is to do with the maintenance of physical health and the remedying of deficiencies in health, and I would submit that the aged care industry by and large would be understood to be that which is covered by the nursing homes or formerly by the Hospitals Award.

The exclusions specifically listed and which go to the further question there of services which provide personal support and/or personal care are specifically those which are embraced by the coverage and scope clauses of existing awards.

I submit that that is how the award should be read and that is further supported by the purpose and effect of the decision to the extent that it is necessary to go back to the full bench decision, and I believe that the case put forward by the Health Services Union of Australia is supported by the actual words of the scope clause of the award
5 and by the purpose and effect of the determination of the full bench.

Should there be any need for any further clarification on the process I would suggest I am as well able to - I modestly suggest I am as well able as anyone to clarify the process that produced this outcome. Thank you.

PRESIDENT: All right, yes. Thanks, Mr Paterson. Mr Watson?

10 MR WATSON: Thanks, Mr President. I might just commence if I can, please, just by handing up an exhibit which is just an outline of the matters that we intend to cover in submissions.

PRESIDENT: We will mark this Exhibit W.1.

15 MR WATSON: So, just going through that exhibit, Mr President, first of all we intend to go to the issue of the Principles of Interpretation which Mr Brown has in fact touched upon; then we intend to cover the requirements of the Industrial Relations Act, in particular section 43; we will then go to the circumstances of the present case, vis-a-vis the words in the award, and that will also lead into Family Based Care
20 (South) Incorporated, what they actually do, the services provides, and again we will be referring to the handbook that Mr Brown has already tendered; then we will go to the Principles of Interpretation, vis-a-vis the words in the award and tie things in there; and then our conclusion and the declaration that we say that you should make under section 43.

PRESIDENT: Very good.

25 MR WATSON: Mr President, we intend to put submissions to you today by outlining the circumstances of the particular case in hand, and then to apply the award and the Principles of Interpretation to those circumstances, and we believe that this is, in fact, in check with the interpretation principles as determined by the then President Koerbin in Matter T.30 of 1985, and I would just like, for completeness sake, to table
30 that decision.

PRESIDENT: Exhibit W.2.

MR WATSON: Now this decision will obviously be well known to you, Mr President, and to the other persons here today, but this decision in fact sets out the seven particular points of principle in relation to how interpretation matters are determined.

35 I don't intend to go to those in any detail at this point, but simply to table that decision for the purpose of the record.

PRESIDENT: Good.

40 MR WATSON: Now these principles again, Mr President, were in fact confirmed as standards for interpretation by a full bench of the commission in Matter T.4715 of 1993, and I would also like to table that decision, again for completeness sake.

PRESIDENT: Thank you. Mark that Exhibit W.3.

MR WATSON: Now the particular points that I wish to refer to in relation to this decision, Mr President, are that this was in fact an appeal against a declaration made by yourself in -

PRESIDENT: You don't have to remind me, Mr Watson.

MR WATSON: No. Okay, well - yes, so in fact on page 4 of the decision - I am sorry, starting on page 3 of the decision, Mr President, and I quote, the full bench said:

5 *In a decision arising out of T.30 of 1985 the Commission handed down some of the more important guidelines that should be understood by those wishing to bring interpretation matters before the Commission. They were as follows:*

End quote, and then they go through the seven points as determined by the then President Koerbin, and then over the page on page 4 again quote:

10 *The Full Bench said, 'We have had regard to these guidelines when determining this appeal'.*

So we believe, Mr President, that in view of the decision in T.4715 of 1993 in fact that the commission regards these principles as being appropriate in dealing with interpretation matters.

15 Now there is one other point in relation to interpretations I think that you alluded to when Mr Brown was putting his submissions that I will come to also in relation to our submissions.

20 In relation to the principles of interpretation regarding specific circumstances and/or facts, as I said before, we believe that that is the normal course of events in relation to interpretation matters, that in fact the parties nor the commission need to turn to merit, equity or intent, provided that the words used in the award are intelligible, using normal English meanings and as I will come to in our submission, we would put to you that in fact the words in the award are pretty straightforward, unambiguous and are clear.

25 The other point of interpretation would be the one going to the doctrine of generous construction which is where, in other words, the interpreter in fact views the award as a whole, to ensure that any interpretation where there is ambiguity in the award doesn't in fact lead to an extreme advantage or disadvantage either to an employer or to an employee. In fact, that particular point in relation to interpretations again was decided by the then President Koerbin in matter T91 of 1985 but in fact we don't
30 intend to go to that particular point of interpretation in any detail because as I will come to in my submission, we believe that the words are clear and therefore the seven general points of interpretation will in fact cover this matter.

35 In relation to the Industrial Relations Act, Mr President, we would say that you in your role in interpreting the award, would declare retrospectively or prospectively how the provisions of an award are to be interpreted and that provision in the act also provides a mechanism to remedy any defect in the award. We would say that you would have to declare the true meaning of the words, vis-a-vis the present case without regard to merit, equity or intent.

40 Those issues, we would submit - that is merit, equity and intent, would be issues that really should be up to the parties to sort out rather than a strict interpretation which, as has been stated in previous decisions, rarely solve disputes but frequently create them.

45 We don't believe in this case that it is appropriate for you to exercise your power, which under the act you have, to in fact vary the award but rather simply declare the meaning in relation to the present case.

Now, if I can just go to the circumstances of this particular case and again, I'd probably be covering some ground that Mr Brown has already covered but I'd still like to, for completeness sake, go to the issues that I intended to go to in preparing submissions.

5 The handbook that has already been tabled by Mr Brown as exhibit B.7, I think it was -

PRESIDENT: Which is B.6, I think.

MR WATSON: There were two, Mr President.

PRESIDENT: Yes. Support Workers was B.6.

10 MR WATSON: Okay. Bearing in mind that they're virtually the same, I wish to go to the one, Handbook for Consumers, which would be B.7.

PRESIDENT: Yes.

MR WATSON: As Mr Brown stated, we have had discussions in relation to procedure for today and we did agree that the handbook would in fact service the document to be referred to in relation to what Family Based Care does and what services they provide for the purposes of matching that against what the words say in the award.

15

Broadly speaking, Mr President, Family Based Care is an organisation that provides personal care and respite services to people and families living with people with disabilities and also to frail elderly people who also have disabilities as well. They operate by going into clients' homes and providing care in the family home as a mechanism of avoiding institutionalisation.

20

If I can take you to the handbook itself - first of all, on page 2 of exhibit B.7, in the middle of the paragraph, I quote - for completeness sake, I'll quote the whole first paragraph:

25 *This handbook has been prepared so that you and your friends will have a greater understanding of Family Based Care and how to make the best use of a service which has been specifically designed to meet some of the needs of the people with disabilities (regardless of age) and their families.*

Again, on page 3, if I can take you to the third paragraph there and quote:

30 *Family Based Care is a service which aims to enhance the quality of life of people with disabilities and their family by -*

Providing care to the person within their own home or community setting thus allowing new friendships to development and new experiences to be shared.

On page 4:

35 *Host Family Scheme Respite Care is provided in the Host Family's home, where people with disabilities can participate in another family's activities.*

PERSONAL CARE:

Personal Care may be needed by people with a disability or frail aged persons to assist with showering, grooming or therapy activities. This service allows

people with a disability or elderly people to live independently in the community and avoid unnecessary institutionalisation.

These two programmes are responsive to the needs of people with disabilities and their families and can be provided anywhere in the state of Tasmania.

5 Again, on page 5, 1. c):

Interview and assess people with disabilities and their families for eligibility for the service.

And again, on page 6, at the bottom of the page:

10 *The service of Family Based Care is provided by the Support Workers, who receive individual training. Every effort is made to "match" people with disabilities and their Support Workers and is coordinated by the Manager or Co-ordinates for each region.*

Again, on page 7, in the fourth paragraph:

15 *Host Family Care is provided in the Host Family's home and enables people with disabilities to participate in another family's lifestyle.*

Again, on page 8, where it is headed up, Am I eligible to Receive Care?, under the heading, Yes:

If you are a person with a permanent disability or have a family member with a permanent disability.

20 *If the use of regular care helps to prevent a crisis situation which may mean that the person with a disability could be institutionalised either on a temporary or permanent basis.*

Those are the relevant points in relation to the handbook, Mr President, that I wish to highlight in support of our position. I think it becomes fairly clear of what the services are that Family Based Care provides and effectively it is summed up in the introduction to the handbook. Again, on page 2, which I did highlight, where it talks about the service specifically designed to meet some of the needs of people with disabilities.

30 If I could now go to the Scope clause in the award. Subclause (a) talks about the industry of social and community services, as Mr Brown has taken you to. I don't in fact intend to go to that subclause (a) in any detail because the crux of our argument in fact goes to subclause (b).

35 PRESIDENT: Just before you go to move to subclause (b), would you say that Family Based Care is an organisation that might be covered under paragraph (a), disregarding (b)?

MR WATSON: I guess it then becomes a matter of a play on the words -

PRESIDENT: That's what we're here about.

MR WATSON: To a certain extent some of those words that appear in subclause (a) in some situations may apply to Family Based Care (South) but our position is that subclause (b) surely would override subclause (a).

5 PRESIDENT: Yes, I know you're going to get to that with (b) in a moment, but would you say that the activities of Family Based Care (South) are embraced by the description of social and community services which provide social and support and/or enhancement of social functioning of the individual family or community?

MR WATSON: Could I just have a moment please, Mr President?

PRESIDENT: Yes.

10 MR WATSON: Mr President, I have just been advised that in a very broad sense, some of those parts of subclause (a) would apply but the point made is that the only tools that Family Based Care have to provide those particular services, are through the personal care and personal support service that they actually provide. They provide personal care and personal support primarily, then through that you would
15 then have some of those things in subclause (a) in a broad sense being provided as well.

So, I guess in answer to your question, the answer would be, yes, but you would first have to look at the personal care and personal support service that they provide and then some of the things in subclause (a) flow from that, in a broad sense. I know that's
20 not particularly specific but that's the best position that we can put to you in relation to the question that you asked.

PRESIDENT: All right. We might have to pursue it later but I accept that as an interim response.

25 MR WATSON: In relation to subclause (b), I just wish to quote, again just for the purpose of the record, subclause (b) of the Scope clause:

This award shall not have incidence on the following services and/or occupations:

*The health industry including the aged care industry, or services which provide personal support and/or personal care to persons with intellectual, sensory or
30 physical disability, or the child care industry and without limiting the foregoing shall not have incidence on:*

After that, it goes on to talk about further exclusions.

Now, the particular words in that paragraph which we say are critical to this particular interpretation are those words which read as follows, and again I'll quote
35 from that paragraph:

- or services which provide personal support and/or personal care to persons with intellectual, sensory or physical disability -

Now, those words, we would submit, Mr President, do stand alone in terms of the scope clause. They are not subject to any cross-referencing to other clauses or any
40 other parts of the scope clause, because it says, 'or services which provide' and then it goes on after that to say, 'or the child care industry', and again it says, 'without limiting the foregoing'.

So, we would say that that particular form of words, 'or services which provide personal support and/or personal care to persons with intellectual, sensory or physical disability' stand alone and must be read as a stand alone statement because of what it says before the words and what it says after the words.

5 Of course, the introduction to that says that the award shall not have incidence on the following services. So, that basically is where we're coming from in terms of our argument, that those words, we would say, are absolutely clear and I'll come to that in a bit more detail.

10 If we match those words against the particular parts of the Family Based Care Handbook that has been handed up as an exhibit, we would submit that it is absolutely clear that this award does not apply to Family Based Care (South) Inc.

15 Now, the words used in that part of the scope clause, as I said, in our view are absolutely clear, are unambiguous and are certainly capable of being given their true meaning in an intelligible way, as suggested by ordinary English usage. It is for this reason that we say to you that you should dismiss any submission put to you. That you should go to the issue of intent, which I would submit, is exactly what Mr Brown was putting to you because he went to the full bench decision, other decisions, other scope clauses and in fact was saying what happened, what the reasons were and how it all came about but that in fact goes to the issue of intent, not actually what the words say.

20 If I could just refer back to the decision T4715 of 1993, which was exhibit W.3. On page 4 of that decision, in the second paragraph:

25 *It seems to us, from studying the transcript of the original hearing, that the parties, on a number of occasions, made submissions on the question of merit and intent and the work undertaken by a certain individual, (who was the subject of a dispute application being heard under another section of the Act), as opposed to the meaning of the words actually used, even if those words may not have achieved what was intended.*

30 So, the point the full bench is making there, Mr President, is that intention is not a relevant consideration in interpretation matters unless you have a sufficiently ambiguous clause, where you need to explore further options. That particular quote there, again, is not unlike this situation because this matter that has come before you, as you are probably aware, is also the subject of a section 29 application from the applicant union, HSUA, which was in fact the catalyst that led us to this interpretation.

35 PRESIDENT: Who's dealing with that?

MR WATSON: Deputy President Robinson, and that matter in fact - what happened here was that we in fact agreed that we make it into a situation where Deputy President Robinson may be a little bit hamstrung in what he could actually do so therefore the best option would be to interpret the award because the dispute before Deputy President Robinson would have in fact gone to an interpretation, in my view, in any case. So, that's how it got to this stage.

45 We would submit, Mr President, that a good test in relation to the clearness and non-ambiguous nature of the words in the award would be to apply the rules of interpretation as per principle seven of the principles of interpretation and that rule basically says, that the award being a document which is to be read and understood by persons not skilled in law or versed in subtleties of interpretation. And that's the point that I'm making.

So, really what that says is that if somebody picks up the award as a layperson, who is not skilled in law or the subtleties of interpretation, or in fact any background in dealing with awards, they'd pick up the award and say, okay, well Family Based Care, they provide a personal care and respite service to people in the community with disabilities. They might be reading from the handbook, or they might have personal knowledge of the situation. They then look at the award, go to subclause (b) where it specifically excludes services who provide that type of care because that's exactly what the words say.

We don't believe that there's really any other interpretation that could be put on those words, other than to say that they are simply as they read, as they mean in normal intelligible use of the English language, exactly what they say, which we would say matches exactly what Family Based Care does.

I don't believe that it could in fact be any clearer in relation to the circumstances of this case, even if we sat down and tried to draft an exclusion clause, save, for it actually saying that the employer, Family Based Care, is excluded from the award.

Now, if I can just go back to exhibit B.2, which was handed up by Mr Brown, page 4, where it talks about the agreement that was reached, in the second paragraph:

Firstly, the making o the Community Services Award with an extremely descriptive scope; the wording will be -

PRESIDENT: Sorry, I haven't got the right page.

MR WATSON: Page 4 of B.2.

PRESIDENT: I see.

MR WATSON: In the quote.

PRESIDENT: The quote, yes.

MR WATSON:

Firstly, the making of the Community Services Award with an extremely descriptive scope; the wording will be devised to eliminate any confusion for award users and it is not intended to cut across any awards already in force.

So, the point that we make there, Mr President, is that even if you go to intent, which we would say is in fact not a relevant consideration, but I just intend to make a comment on that

It even says in the agreement the wording will be devised to eliminate any confusion for award users. Now I would suggest that because the words are so clear it just doesn't jell that there would be confusion for award users if that was in fact the original intention of the parties in relation to the scope clause itself.

Now with this case we have a situation where it's fairly clear cut; the application - HSUA - says that personal care workers employed by Family Based Care (South) are covered by the Community Services Award, and of course the employer believes that they are not covered by the award.

Now the point needs to be made here that in determining "respondency" - and respondency I'll put in inverted commas - to this award, one must look at the

business or the industry of the employer, not in fact the individual occupation of the employee.

5 Now this award is a bit of a mixed bag in that respect in that it does talk about the industry of the employer. It also talks about exclusions both on an industry basis or services provided and on the basis of specific occupations. But we would say that even though it excludes certain occupations that is where it would stop and that is, that in determining whether or not the award applies, if we're not talking about an excluded occupation which we're not in this case, you would then have to look at the industry of the employer in determining the scope clause and the applicability of it.

10 Now as I said -

PRESIDENT: And so what is the industry of the employer?

15 MR WATSON: Well the industry of the employer would be broadly I suppose, without conceding, fit into the community services type industry, and that's in a broad sense because it is a fairly complex question. But again, we would say that in looking at that you have to have regard to subclause (b) in the scope clause where it specifically excludes the employer based on the services that they provide within that industry.

PRESIDENT: And the - would the provision of personal support and personal care to intellectual sensory and physically disabled persons be the bulk of the work of Family Based Care?

20 MR WATSON: That's exactly what they do, Mr President. That's exactly what they do. And that is why - that is why that we're so - so firm in our view that the award does not apply, because as I said before, it could not have been drafted better to actually fit exactly what Family Based Care does.

25 PRESIDENT: Well can you tell - and you don't have to respond if you don't want to - but is - can you give me any indication as to the other areas of activity for personal carer-type individuals employed in similar activities that might be covered by this award?

MR WATSON: Well, not talking about Family Based Care -

PRESIDENT: No.

30 MR WATSON: - you mean other than? Yes. Well I guess personal carers, perhaps not necessarily that title, but that sort of work would be provided by Community Health Services, and that -

PRESIDENT: What do you mean - the government agency?

MR WATSON: Yes, yes. Or -

35 PRESIDENT: What about -

MR WATSON: - but there are some -

PRESIDENT: - in the private sector.

40 MR WATSON: - there are some organisations out there in the private sector that may contract their services out on that basis, so they - they would also provide personal care type services through home and community care programs and that sort of thing. I mean I can't be more specific than that, but -

PRESIDENT: No, no - it's probably an unfair question, but I'm just -

MR WATSON: Yes.

PRESIDENT: - looking for some help to understand -

MR WATSON: Yes, where - yes, yes. Well -

5 PRESIDENT: - I mean I accept your - not admonition - but your comment that I can only deal with the words and I think I made it clear earlier - that's - that's always been -

MR WATSON: Yes. Yes.

10 PRESIDENT: - the purpose of interpretations, but I just have - I'm just interested as to why a full bench would talk about personal carers if this is probably the only area where they're employed?

MR WATSON: Oh well - I don't -

PRESIDENT: And I know you're telling me - I shouldn't really think about it -

MR WATSON: Yes.

15 PRESIDENT: - but for the benefit of the parties I'm - and in finding a resolution to the dispute because obviously my - whatever I determine today will not end your dispute.

MR WATSON: No, I'd suggest not - no.

20 PRESIDENT: And to help the parties it might be worthwhile examining just why personal carers were expressly referred to in the full bench decision, and I can add from my own research there was a correction order made to clearly remove personal carers from an order which had excluded them from the operation of the award.

MR WATSON: Yes, yes.

PRESIDENT: And I find it intriguing.

25 MR WATSON: Mm, Mm, yes. Well if I just put a comment to you with the preamble that I don't believe it's a relevant consideration in this matter, in our submission.

PRESIDENT: No, well I won't allow that to get in the road of whatever I determine -

MR WATSON: Yes.

PRESIDENT: - but I'm just interested to hear what the parties have got to say.

30 MR WATSON: So if we can just, I suppose, get off the track a bit for a moment, I would suggest to you that out there in the community there would be employees who work in that type of capacity, that is, as a personal carer - providing personal care services to people, as I said, through a community service - community health service or some of the HACC programs, which is Home and Community Care, who may not be
35 dealing with somebody who has got a disability as such, but somebody who just needs help and care, whether they be young people, middle aged or elderly people. But those people would be out there in the community. But again, it - and some would be in the public sector and some would be in the private sector. But again, I'm not sure that we need to spend a lot of time on that -

PRESIDENT: No.

MR WATSON: - because I just don't think it's a relevant consideration in this matter.

PRESIDENT: No, I agree.

MR WATSON: And -

5 PRESIDENT: I'm only dealing - I want to deal with the words, but I -

MR WATSON: Yes.

PRESIDENT: - as I say, I'm just intrigued by the - by that set of circumstances.

10 MR WATSON: I'd have to say being honest that it is something that we - that intrigues us as well not having personally been involved in the development of that scope clause and through all the hearings, but it does remain a mystery, but even so we believe that the words are clear in any case.

Now, Mr President, the union is relying, in our view, on intention of the parties and/or the commission when the scope clause was made by the full bench and we were in fact relying on what the words actually say in the award.

15 Now we would submit to you that our position in relation to what the words actually say and mean is where the interpretation must stop if the words are clear and are intelligible by the use of normal English language.

20 And again, I'm repeating myself, but it's only situations where the words are unclear or ambiguous that you would possibly then go to the issue of intent, but we would submit that this is a case where you would not even consider intent as the words in the award are absolutely clear.

25 Now we're not suggesting that this is the case but in fact if - if you are of the view that something needs to happen to the award after hearing both parties, we would suggest that the appropriate course of action would be to refer the matter back to the parties and then issues of merit, equity, intent, et cetera would be relevant considerations - in fact probably the only considerations. However, again in accordance with the principles of interpretation, again if the words are clear, we'd submit that you would not have any option other than to simply declare what the words mean and then leave the next move to the parties. And I can assure you, Mr President, that there will be a
30 next move, so I wouldn't fear about leaving it at that.

MR PATERSON: Just move that federal award along.

35 MR WATSON: Now if I can now go to the principles of interpretation, that is the seven points specifically as they relate to this particular case. In relation to the first point, which talks about construction or interpretation of award provisions can only be made by considering their meaning in relation to specific facts, we've attempted to put to you the specific facts of the case through that handbook that's been tabled as an exhibit and matching what Family Based Care does and the services they provide against what the words in the award say.

40 The second point, where it talks about there must be understood that in presenting an argument in support of or in opposition to a disputed construction relation to an award provision it is not permissible to seek determination in the matter on merit. First of all we have an argument merit: we would suggest that the union's argument to a certain extent has gone to merit because they've touched on intent but the other point that we would make is that we in fact do not even believe that we have a

disputed construction of the words. I don't believe that the submissions that I've heard from the unions are in fact in any dispute as to what the words actually say and mean, it's simply the matter of intent.

Thirdly -

5 PRESIDENT: We might hear a bit more on that.

MR WATSON: We may do. Thirdly, provided the words used are in the general context of the award and its application to those covered by its terms capable of being construed in an intelligible way, there can be no justification for attempting to read into those words a meaning different from that suggested by ordinary English usage.
10 Again, we believe that the words are capable of being construed in an intelligible way.

Fourthly, an award must be interpreted according the words actually used even if it appears that the word - that the exact words used do not achieve what was intended, the words used can only have attributed to them their true meaning. Now this, in our view, Mr President, is the critical point in relation to this matter. We believe that the
15 words used are clear albeit whether or not there was other intent. And in fact we would believe that the fourth principle of interpretation would in fact deem the union argument fatal simply because their argument has gone to intent.

Five, if a drafting mistake has been made in not properly expressing the intention of the award maker then the remedy lies in varying the award to accord with the decision
20 given. Now we would say that in relation to point 5, this is where you would go into the issue of intent if there was sufficient ambiguity to then lead you to that option. We would say that there is no ambiguity and in fact point 5 would not apply in this case.

PRESIDENT: It doesn't actually refer to ambiguity in point 5 though.

MR WATSON: No, I know it doesn't but it would be our submission to you -

25 PRESIDENT: It just refers to the possibility of a drafting mistake.

MR WATSON: Yes, that's right, but I would submit to you, Mr President, that in fact point 5, if one looks back through the decisions of the commission in relation to interpretations and tries to get a feel for the general principles, that point 5 would in fact be used where there is ambiguity and where a defect in the award needs to be
30 rectified.

In relation to point six, where genuine ambiguity -

PRESIDENT: Yes, well just on that point, it's not so much a matter of ambiguity arising out of the mistake but whether or not there's a defect in the way the words might operate within -

35 MR WATSON: Yes.

PRESIDENT: - construction of those words, not -

MR WATSON: Yes.

PRESIDENT: - so much the decision.

MR WATSON: Yes. Yes, that's right. And a good example of that, Mr President, would be - and that I guess also touches on the doctrine of generous construction as well - where I think in one of the decisions of President Koerbin he referred to an
40 example - I can't quote it exactly, but it was something like: if there were penalty rates

in the award where it went from, say, 15 per cent to 200 per cent ranging for an afternoon shift through to Sunday work, if an interpretation in fact deemed that an afternoon shift on a Monday gave you 500 per cent penalty and then working on a Sunday gave you 15 per cent, then that would obviously be something that couldn't be contemplated even through an interpretation matter, you would then go to the doctrine of generous construction to try and sort your way through the maze. So I'd suggest that that would also come into point 5 as well.

In relation to point 6, where genuine ambiguity exists, resort may be had to the judgment accompanying the award as an aid to discovering its true meaning. Again, we don't believe that there's any ambiguity let alone genuine ambiguity - whatever that means.

PRESIDENT: Yes - good question.

MR WATSON: I mean ambiguity must be ambiguity whether it's genuine or not.

PRESIDENT: Well, you know, the whole notion of ambiguity is something that's always raising arguments because -

MR WATSON: Yes.

PRESIDENT: - at the moment you have a dispute you've run into ambiguity.

MR WATSON: Mm - yes.

PRESIDENT: And you won't have a dispute unless there's ambiguity.

MR WATSON: Yes, although I think the point that we make in this particular case is that the parties are not necessarily disagreed on the words in the scope clause that we've referred to which is often the case in interpretation matters. You will find too, competing arguments about one set of words which I don't think you'll find in this particular case.

And the seventh one: it is not permissible to import into an award by implication, a provision which this language does not express the award being a document which is to be read and understood by person who is not skilled in law or versed in subtleties of interpretation, any omission or imperfection or expression - oh sorry - of expression should be repaired by amendment rather than by implying into it provisions which are not clearly expressed by its language. Again, we don't believe that that is a relative consideration because, in our view, the words are clear.

And again, in relation to the doctrine of generous construction, I've covered that, on the basis that we don't believe that that's a relevant consideration in this particular matter.

It's our submission, Mr President, that the words in the award that have been quoted numerous times in my submission should be declared as meaning that the employer in this case is not bound by this award because Family Based Care (South) Incorporated provides services which are strictly, clearly and unambiguously excluded from the award by the scope clause, namely the words - and again I quote: all services which provide personal support and/or personal care to persons with intellectual, sensory or physical disability. When matched against the services that Family Based Care provides as per the handbook that we passed up to you, we would submit that those words could lead to other conclusion.

We'd submit to you, Mr President, that you should in fact declare under section 43(1A)(a) exactly that which I've just put to you. We'd further submit to you that this

is where you cease in relation to this matter as there is no defect to be remedied. The words are clear, they are unambiguous and any further moves in relation to this matter should be back to the parties in our submission.

5 Just in conclusion, in relation to effective date, we would submit that first of all we don't believe that you could be minded towards the union's submissions, but if you were we would submit that you would declare in support of the union's position from a prospective date. The reason for that is that there are public interest considerations here. Family Based Care is a partly government funded organisation who do not have income generating or capacity to generate income as such therefore if a decision went
10 against the employer in this case there would be hopefully some government funding to make up the shortfall but the rest of it would not in fact be covered by government funding and therefore they would have to find the money from their own resources which would be extremely difficult.

PRESIDENT: Does the organisation collect fees or charges for offering services?

15 MR WATSON: There have been monies collected - there are fees collected, Mr President, through full cost for government services provided but - I'm sorry, I got that wrong - there are where government - where non government services are provided, that is, services which are not funded by the government, they do recover or charge fees for the services provided, but those fees are being charged on the basis of what
20 they're paid back in time on the basis that they believe they are award free. So what I'm saying is, that if -

PRESIDENT: Sorry - the fees are calculated based on?

MR WATSON: The fees are calculated on monies or salaries and on-costs paid -

PRESIDENT: Right.

25 MR WATSON: - on the basis that they've been running along on the basis that this award didn't apply.

PRESIDENT: So it's a charge out of actual costs.

MR WATSON: Yes. Yes, that's right.

PRESIDENT: Right.

30 MR WATSON: So we would submit to you, Mr President, that - that if -

PRESIDENT: And then that would include salaries.

MR WATSON: Yes. Yes. But if - if you were minded to the union's submission - and I make the strong submission to you that I really don't know how you can be based on the principles of interpretation - that you give a prospective effective date to any
35 declaration, because the public interest consideration is in this case are quite real.

In relation to submissions made by the unions, I just want to - wish to make a couple of comments. I know I've got nothing to back this up with however I'll make the comment. Inspections were undertaken at Family Based Care by Commissioner Gozzi after the scope clause was determined, however Commissioner Gozzi was supposed to
40 have made the comment that he didn't think that they'd be covered. So I know -

PRESIDENT: Ooh, that's a bit rich isn't it Mr -

MR WATSON: I know I've got nothing to back that up with -

PRESIDENT: No, well -

MR WATSON: - however, -

PRESIDENT: Well I'll disregard that if you can't back it up.

MR WATSON: In the handbook -

5 MR BAKER: He said - he did say lots of things.

MR WATSON: - in the handbook on page 4, Mr President, in the handbook -

PRESIDENT: I don't - I can't remember anybody ever taking more latitude actually, Mr Watson, it was a good try.

10 MR WATSON: Yes. In the handbook, Mr President, on page 4 - that's exhibit B.7 - Mr Brown quoted from the subclause there which talks about host family scheme respite care on page 4. That service is, in fact, provided by volunteers, so just for the purpose of the record we need to make that point clear, that that service there is provided -

PRESIDENT: I am sorry, which exhibit is this in?

15 MR WATSON: Page 4 of B.7.

PRESIDENT: B.7, yes.

MR WATSON: Where it talks about host family scheme in the middle of the page.

PRESIDENT: Yes, that was something that you referred me to?

MR WATSON: Yes, that is right.

20 PRESIDENT: Yes.

MR WATSON: So that, in fact, just for clarification, is in fact a service provided by volunteers, not actually employees of family-based care. I am not sure that anything necessarily hangs on it, but I just make that point.

PRESIDENT: Well, because the person is being accommodated in a host home.

25 MR WATSON: No, not - there is no specific science or reason to it, Mr President, I just simply make the point that they are volunteers who provide that service.

PRESIDENT: Yes.

MR WATSON: In relation to the point made by -

PRESIDENT: Do they get paid for anything?

30 MR WATSON: I beg your pardon?

PRESIDENT: Do they get paid for anything?

MR WATSON: They do get paid a fee, but it is not taxed. It is just -

PRESIDENT: You mean, they are not treated as an employee?

MR WATSON: No, that's right.

In relation to the points made by the union in terms of functions and industrial pursuits, specifically referring to the scope clause in the award, we would make the point that anybody who receives a service from family based care in order to qualify for assistance people must first require either personal care or respite care.

So that is the initial - I suppose the first step in relation to the process. That they must actually require personal care or respite care before they get any assistance. And the point that I am making is that ties into subclause (b) in terms of the services that family-based care provides.

In relation to Mr Paterson's comment about operative date maybe being before 1 July '95 I would make the point that - well, it is our submission, and obviously this would be a fairly extensive argument, but it would be our submission that the award was not effective until 1 July 1995 - because it didn't have a classification structure in it and, therefore, you can't determine who is in fact covered by the award, so what you had was an award which had conditions in it and a scope clause but no classifications, and no descriptions of work, so therefore -

PRESIDENT: Except that wasn't there a general savings provision that said that all employees in this particular industry would have their rate of pay saved?

MR WATSON: Yes, but there was no classification structure in the award prior to 1 July '95 which would determine who was actually covered by it - sorry - would determine which particular descriptions of work were covered by the award. I am not saying it is an open and shut case, but I just make the point that the issue of whether or not -

PRESIDENT: I would have thought that if the employer was covered by the scope then all the employees would be picked up by that savings provision.

MR WATSON: I don't necessarily disagree with that, Mr President, but it is an issue that is not entirely clear. I don't know whether it has ever been tested as to whether or not an award without a classification structure and rates of pay can in fact apply.

PRESIDENT: I think - well, yes - I suspect that was the purpose of the savings provision -

MR WATSON: Yes.

PRESIDENT: - to do that.

MR WATSON: So I just make that point in relation to operative date. And, again, just in closing, in relation to the exclusions that have been put into the scope clause it is fairly clear from (b)(i)m (ii) and (iii) of the scope clause that the award excludes the Disabilities Service Providers Award which is the old WAVA Award and that scope, the Nursing Homes Award which is, well, simply that, and the Child Care and Childrens Services Award which is encapsulated by subclause (b)(iii).

So the question is why if those three awards are excluded is there also a subclause in paragraph (b) which also excludes, in our view, family-based care, if in fact the original intention was not to exclude them.

Now again that is also going to the issue of intent, but I just make that comment; that, in fact, family-based care is not covered by one of those three awards that I just cited, however, it does go further than that to exclude them in their own right, or that service provided.

And, finally, Mr President, this particular dispute - and there are other bits to it, I suppose, if you like, and that there is also an enterprise agreement under section 4(a) of the act -

PRESIDENT: Should I concern myself with this?

5 MR WATSON: No. I will come to the point that I am trying to make. There is a section 4(a) enterprise agreement pending under the enterprise bargaining legislation which has in fact been to Commissioner Johnson once and it has been referred to another secret ballot and that ballot is due to be conducted on 1 April and, therefore, it would assist both the employer, the employees and the union if it were possible to
10 get a decision prior to 1 April in relation to this matter.

Now that may not be possible, but I simply put that request, if it is at all possible.

On that note, that concludes our submission, Mr President.

If the commission pleases.

PRESIDENT: Yes. Thanks, Mr Watson. Mr Brown, do you want a break?

15 MR BROWN: Yes, please, Mr President. Perhaps we could - I need to confer with Mr Paterson for 10 or 15 minutes but that would take it up to 12.30. Is it your intention to proceed with the hearing then or adjourn until after lunch?

PRESIDENT: Well, would you imagine that you would take more than half an hour after that time?

20 MR BROWN: There are a few matters that Mr Watson has raised and I would like address. I can't imagine that my submission in response will be more than about 15 to 20 minutes, if that.

PRESIDENT: I mean, I am happy to allow you to come back at 2.15 if that's what you want to do. I mean, it doesn't bother me unduly.

25 MR WATSON: I have got a problem in that I have got another commitment at 2.00 o'clock. The only reason that I did that, Mr President, was that Mr Brown and I in discussions had said that it would probably only go for an hour or so.

PRESIDENT: Yes.

30 MR BROWN: If we could have just a short adjournment, I'm more than happy to respond.

PRESIDENT: Yes. Well, you tell me when you want to resume then.

SHORT ADJOURNMENT

PRESIDENT: Mr Brown?

35 MR BROWN: Thank you, Mr President. Just a few comments and a couple of points of clarification and I'll be as brief as I can be.

PRESIDENT: I don't want to hurry you. You don't have to hurry.

MR BROWN: I'll make sure I'm satisfied with what I may put. Mr President, Mr Watson, in his submission, focussed in one way very much on the target group of the organisation, rather than the actual primary functions and industrial pursuits and to

that extent, when he went through the handbook for consumers, spent considerable time pointing out the target group being people with disabilities and people who are aged frail people who needed some sort of care and support.

5 Whilst I don't dispute that that in fact is the target group of the organisation - it is not the target group that necessarily defines whether the organisation falls within the scope of this award or not.

10 Mr Watson focussed very much on - as is required, the words of what the scope actually says against the handbook, which is exactly the same as what I also did in my submission, that I went through the handbook and identified those functions and industrial pursuits which matched against the actual words used in the scope.

15 Now, I don't disagree with Mr Watson at all, that intent is not something in this instance that you should take into consideration and even though some of my comments may have gone to that, I'm sure that you will either disregard them or give them whatever weight that you suggest. The whole of my application was not in fact an intent submission. It was looking at the scope of the Community Services Award, in particular subclause (a) and looking at what the words there actually said against what the organisation has described its primary functions and industrial pursuits to be.

20 So, I think it is important that it is actually the overall function of the organisation rather than the actual target group that is taken into consideration. For example, Mr Watson tried to suggest that the host family scheme perhaps should not be taken into consideration because it is an activity that is undertaken by volunteers. Even though it may not be an activity that is undertaken by personal carers, it is still part of the primary function, an industrial pursuit of the organisation and if I could take you to the scope clause, subclause (a)(v):

disability services which are demonstrably social welfare in nature including:

(3) training and co-ordination of volunteers;

30 So part of the function of the organisation does fit within the scope clause of the Community Services Award, pretty much an admission by Mr Watson, which I think establishes that they are part of the social and community services industry.

35 Mr Watson said very clearly, we are not trying to establish whether personal carers fit into the scope of this clause but whether the organisation does, because it is an industrial award and therefore whoever the organisation then employs, unless they are specifically excluded, actually apply, if that can be demonstrated and I think that's what I attempted to do in my submission.

40 Just going to the issue of the operational date. Mr President, this award has been a long time in the making as you are aware. It has taken well over 10 years - considerably longer than that, 16 years to make. Employees within this industry have in fact been hanging out and waiting a long time for it. I don't accept that Family Based Care - that this has come out of the blue for Family Based Care organisation, whether they will or won't be covered by the Community Services Award.

45 We have in fact, over quite a considerable length of time, communicated that we certainly believe that the organisation was covered. The fact that Commissioner Gozzi, in spite of what Mr Watson commented on, included them as part of the visits, I think would have given the organisation at least reasonable doubt as to whether they may have been covered and the fact that the organisation hasn't taken that into account in their funding, I think, is really the organisation's responsibility and not the responsibility of the employees.

The employees, as you are aware - the Department of Community Health Service has in fact employed a consultant, KPMG, to go through a process with all organisations, translating them to the new award. Very few organisations have actually finalised that process. It is something that is under way at the moment.

- 5 On the basis of the recommendations made by the consultants, organisations will be in a position to apply for supplementary funding to the department to cover the cost of translation to the Community Services Award and any back-pay that might be appropriate to the operational date.

10 Now, KPMG has contacted Family Based Care and has requested information and is at least going through an initial process of looking at what translations might be relevant to that organisation. Now, I'm not saying by that, that that therefore proves the organisation is covered by the Community Services Award but in terms - if you do find in our favour, in terms of an operation date, I would strongly suggest that it is only fair and equitable to the employees employed by that organisation that they are
15 treated in the same way as other employees in other organisations that will be translated to the award.

The only thing I would say, just in closing, Mr President, is that the organisation does not - Family Based Care does not solely provide activities which fit within that first part of subclause (b) exclusion clause. If that was all that they did and they did
20 nothing else, then I think Mr Watson might have a bit stronger argument but the organisation undertakes a whole range of activities which, as I have suggested, fall within subclause (a) of the scope clause.

PRESIDENT: Would you take me through them again and more specifically detail them, please, Mr Brown.

- 25 MR BROWN: Yes. If I could take you to the handbook and I don't really mind which one because they are both the same in this regard.

PRESIDENT: Use B.6, the one you used before.

MR BROWN: First of all, if we go to page 3, which is what Family Based Care does - the third sentence:

- 30 *Family Based Care is a service which aims to enhance the quality of life of people with disabilities and the family ...*

PRESIDENT: How would you define what, enhance the quality of life, means?

- MR BROWN: Well, using their own - and I'm trying to refer as much to the document, so if you will bear with us as much as possible - if you go over the leaf to
35 page 6 to Home Support Workers, and as was indicated, this is the principal tool that's used by the organisation, although in fact they would dispute that it's the only tool used by the organisation:

Provide reliable, resourceful direct care and supervision as companions to consumers.

- 40 That is, that they provide companionship to their consumers.

PRESIDENT: Could that be generically - or put under the generic title of providing personal support?

MR BROWN: It could be put under the title of providing personal support, yes. As I understand it, it may be that the person needs to get out of the house for a while and the carer will take them out of the house and take them out et cetera:

5 *Perform other tasks arising from the care of the consumer as would normally be performed by their family or usual carer.*

That probably fits into the definition of personal carer.

Provide transport for consumers as negotiated and approved by service coordinators.

Assume care of other family members e.g. siblings as required.

10 That is members who - people who are not necessarily disabled or frail or aged care at all and it would be interesting to see how that activity of the organisation is accommodated in the exclusion provision -

PRESIDENT: What proportion of the work would that occupy, do you think?

15 MR BROWN: I, personally, couldn't tell you, Mr President, although I know it does go on. It's part and parcel of what they do. In fact in a statement, I think, in here somewhere and I can't refer to it exactly, that's to encourage the carer to deal with the whole family, rather than just single the client out as being someone who needs the care.

20 *Provide opportunities and experiences that will facilitate personal growth and the development of new friendships for consumers.*

Assist consumers to participate more fully in the community.

If you go to subclause [a] of the scope clause, [i] social support and/or the enhancement of social functioning of the individual and the family or community et cetera, et cetera.

25 PRESIDENT: I don't think there's any doubt that this sort of activity could be accommodated in [a](i), (ii) and (v), just off the top of my head. But my concern, which is the one that the employers are raising is that the activities of Family Based Care are embraced by the description in the exclusion paragraph, which is services which provide personal support and/or personal care to persons et cetera.

30 MR BROWN: Some of the activities are.

PRESIDENT: And that's what we're going through at the moment.

MR BROWN: And then, only if you give weight to the concept of the target group that the organisation has, rather than the primary functions and industrial pursuits of the organisation.

35 PRESIDENT: Yes. Well, what else do they do? That's the point I'm asking you to describe to me. If this organisation provides services which aren't encompassed in the exclusion in (b), I would like to know what they are and what weight I can give to them.

40 MR BROWN: For example, the respite care, which is, as I said, the actual activity is provided by volunteers but I'm sure that the organisation actually employs and pays people whose responsibility it is to provide training and coordination of those

volunteers. I'm sure the volunteers just don't get a vision that they've got to go somewhere and do something. That's a coordinated activity by the organisation. Therefore, that is part of the primary function of the organisation and certainly fits more within subclause (a) than it does within subclause (b).

5 PRESIDENT: Isn't it a service that's providing personal support to this group of people?

MR BROWN: Well, all the way through this document, it's not only the disabled person and/or the frail aged person but it's also their families and siblings, in some instances.

10 PRESIDENT: Yes. Well, that's what you've got to draw out for me. You've got to be able to tell me what weight I can apply to that in order to overcome, what seems to me, a fairly damning sort of exclusion in paragraph (b).

MR BROWN: I don't deny that it's an unfortunate exclusion in paragraph (b).

PRESIDENT: The words aren't ambiguous, are they?

15 MR BROWN: If you're talking about the target group, no, they're not ambiguous.

PRESIDENT: So, really, I need to know what the weight is of the two activities which you seem to be able to distinguish, the one being the services provided to the individual who is disabled intellectually or by whatever and the other being the service provided to the family group.

20 MR BROWN: But even the services that are provided to the individual, whether they are disabled or aged, may not necessarily be personal support or personal care type activities, looking at the organisation as a whole and the type of activities that they undertake because there's no doubt that they do provide - and it says it in the book here, social support and that they assist the providing opportunities and experiences
25 that will facilitate personal growth, new friendships et cetera.

Now, the fact that the individuals happen to be disabled or aged, I don't think that that activity doesn't mean necessarily that it can only be delivered to people who are disabled or aged. So, it can just as easily - and in fact I would suggest, more appropriately, fall within subclause (a) than it does fall within subclause (b).

30 PRESIDENT: The point is, it may fall within those. There's no reason to say it can't fall within (a). The question is, whether or not (b) excludes it. (a) stands there quite soundly but (b) takes away certain things.

MR BROWN: I'll leave that there and Mr Paterson has a bit more history and will address that matter.

35 PRESIDENT: Okay, that's fine.

MR BROWN: That's my submission, Mr President.

PRESIDENT: All right. Thanks, Mr Brown. Mr Paterson?

MR PATERSON: Just very quickly and there's a number of things I can say. I was on the inspection at Family Based Care with Commissioner Gozzi and I will say
40 unequivocally, I do not recall him saying anything about it not applying.

PRESIDENT: Well, I can assure you I wasn't going to take any notice of that at all, Mr Paterson. That was an outrageous attempt by Mr Watson to introduce something that just couldn't be acceptable anywhere.

MR PATERSON: In terms of the effective date, I also support the observations made
5 from the bench that the savings clause, together with people's common law contracts of employment created an employment relationship to which all the conditions of the award could be applied even prior to classifications and rates being determined and that if the exclusions are found to be effective, then the award should also be found to have been effective over its entire life.

10 The question of funding, very briefly - in fact, it goes further than the comments made by Mr Brown. We certainly, as a union, do not accept in any way that the funding process determines or predetermines industrial realities but Family Based Care was in fact the pilot for the testing of the whole translation process and the outcome is in no way determined as yet. It is still very much up in the air and subject to, I guess, a
15 whole range of political and departmental decisions yet to be made.

The question I do wish to touch on is to do with this question of intent and I believe there is a more complex issue in this. It is not just a matter of arguing what was the intention and do the words on paper give effect to the intention of a decision but goes to the question of the type of award we're talking about.

20 Where there's a decision made to not include particular words, then that surely must be taken into account and the absence of words, in this case, the absence of the words, personal carer, from the scope clause in the occupational exclusions at (b)(iv), I submit, must be taken into account and that is not a question of intent, it is a question of the effect of the decision. The effect of the decision is not obvious from the
25 scope clause of the award because the words do not appear there but it was a decision of the full bench to not include particular words and as you yourself drew attention to, there was an order that in fact had to correct an earlier mistake.

This is where the ambiguity to the extent that it is relevant begins to surface. It is not just the preamble in clause 2 (b). It is preamble in clause 2 (b) as against the words
30 that were explicitly decided by a full bench to be left out of 2 (b)(iv) and the relevance that I would put on that is that in support - and I will return to some of the finer detail of it very briefly. In support of what Mr Brown has said, and taking up what Mr Watson has said, the personal support and/or personal care is a tool of the organisation in delivering a range of services. Those range of services are not only
35 about personal support, they are also about social support and family support and they are also about improving the social functioning of people by enabling their better access and participation in society by avoiding institutionalisation.

The question fundamentally comes down to, if the work of personal carers or home support workers or however they are titled, are tools that the organisation uses to
40 deliver the services that fall within (a), then those tools are not excluded and are included by virtue of how (iv) is worded. When we are talking about the tools, we are talking about the occupations used to deliver a service, we are talking about the tasks and functions and the tasks and functions relate to the activity of the employee, and I submit, relate to the occupational aspect of the work and therefore connect to the
45 exclusions and, in this case, the implicit inclusions in (b)(iv).

That is one point that I would make quite strongly, to confirm that where we seem to be and I certainly advocate that the broader functions of the organisation fall within (a). That if we are talking about tools being used - the occupational tools, the task tools being personal care and personal support, then they are not excluded by the way
50 the last paragraph of the scope clause is worded.

On a second point, going to the question of the preamble -

PRESIDENT: If I could just stop you there and I understand what you're saying - the preamble in (b) talks about those activities which we've repeated ad nauseam and then goes on and says, without limiting the foregoing shall not have instance of. So,
5 the preliminary part to (b) gives a broad description of the areas that are going to be excluded and then, more specifically, deals with other groups but doesn't say it's only those groups that are chopped out.

MR PATERSON: That's correct and I acknowledge that and in terms of explaining this peculiar quirk of history, the issue is that the services that were covered - and
10 this is really an aside, I suppose, to paralleling your aside earlier, as to your curiosity as to how this arises. It arises because a lot of the services, particularly in the exclusion (b)(i) are changing in nature and that (b)(i) may not have - in fact now could well be found to not be sufficiently inclusive of the services that are intended to be covered. Support and employment has taken over from sheltered workshops. So,
15 that's the origins of that work.

I accept that it is intended to be that those explicit exclusions do not limit. That was a deliberate decision. However, on raising the issue, there is, not so much an ambiguity but a contradiction between the preamble to (b) and the very explicit decision of the full bench as to how (iv) in (b) would be worded and that that is an issue to be
20 addressed.

PRESIDENT: That's what influenced me to ask Mr Watson the question, where else would you find personal carers as a category of employees?

MR PATERSON: In community sector organisations, there are other organisations working in the field of assisting people with disabilities that would employ under
25 particular programmes, as Mr Watson identified, people to do work of that nature.

PRESIDENT: Would they fit in some of these other exclusions?

MR PATERSON: In my view they wouldn't fit into any of the exclusions which are - the specific exclusions are, in effect, statements of existing award coverage which this award was intended to not cross in to.

30 PRESIDENT: Yes. So, there'd be people outside these areas who are personal carers?

MR PATERSON: To exclude personal carers in the private sector, in the community services non-government sector - to exclude personal carers from this award is in fact to leave them award free, unless there is some other interpretation which in fact could turn - some of them may turn out to be domestics if they only ever did domestic work
35 in a domestic setting.

PRESIDENT: Yes, I understand that. My interest really is whether or not there are personal carers performing work similar in nature to the Family Based Care people who would not be covered by any other award than this one.

MR PATERSON: One specific case - or two specific cases I know of are Multiple Sclerosis Society employs well carers, they call them, under a caring programme to deliver comparable services to people with multiple sclerosis.
40

PRESIDENT: And what award are they covered by?

MR PATERSON: Multiple Sclerosis itself, given the full breadth of its activities - unless it is running something that falls within a residential care facility or unless it's

explicitly there, they would be under the Community Services Award. Other organisations like St Vincent de Paul -

PRESIDENT: What did Mr Tubb say? Do you mind repeating it?

5 MR PATERSON: Mr Tubb informed me that that funding in fact now does go to Family Based Care. So Multiple Sclerosis in fact don't do that any more. Mr Tubb informed me that Multiple Sclerosis in fact do it.

10 Another organisation that I know does have that is one that crosses - at last reports, I knew had it - St Vincent de Paul Society run any number of organisations. They run sheltered workshops that fall under WAVA. They run a supported accommodation service and within that they employ -

PRESIDENT: Yes. I'm interested in the ones that don't fall under.

15 MR PATERSON: Well, within that they employ at Bethlehem House, or used to, a personal carer. So, they would employ carers in some of their establishments where they are dealing with homeless men, often without the whole problems and in that setting for them, within the scope of this award -

PRESIDENT: But there'd be very few - very limited?

20 MR PATERSON: Certainly, the majority of them would be in Family Based Care. We are talking of something of the order of - Mr Tubb can clarify. Something like 400 personal carers across the state between the three Family Based Care organisations. They would be the majority of people doing this type of work in the non-government sector.

PRESIDENT: Yes.

25 MR BROWN: Can I just make a statement on that, Mr President? The term, personal carer, is one of those more recent things that the industry has sort of adopted as a generic term to describe a whole load of workers. For example, extended care assistants under the Nursing Homes Award are more generically known as personal carers. Disability service workers under the Disability Service Providers Award are more generically known as personal carers.

30 So, there are a number - in fact, a large number of personal carers that are employed within the industry, some of which by nature of the organisations they work for, would fall under DSPA, some would fall under the Nursing Homes Award and obviously we anticipate some, because of the nature of the organisations they work for, would fall under the Community Services Award. But it looks - well, let's see what your decision is.

35 PRESIDENT: Yes. Thanks, Mr Brown.

40 MR PATERSON: The other aspect that I wanted to touch on is critical to this question, to what extent does (b) exclude all activities. Clearly, it can be interpreted to exclude some activities. It would be my contention that the important thing to appreciate here is the boundary between personal support and personal care and social support and social functioning and that is certainly going back to the intention of the parties in trying to reach this.

45 That was one of the things that people took into account. That was, to draw the destination between those services that were directed at the functioning of the individual, here worded as, personal support and/or personal care and those services, functions, pursuits that have to do with functioning in the community. That was one

of the reasons why the words appear as they do and I'd say that the words clearly here draw the distinction between social support, which broadly understood can also include personal support but it is here drawn to exclude that from the coverage of this award.

5 So, those activities which are conducted by Family Based Care, which fall to the words of personal support and/or personal care, or may fall that way, are not the full and total activity of the organisation.

That there are other activities of the organisation that are social support and family support and again, to go to the handbook for consumers and two references to that
10 that identify - in addition to those points identified by Mr Brown on page 5, Who Does What? The roles, tasks and functions of managers and coordinators, clearly go to the interviewing - and in point 1(c):

Interview and assess people with disabilities and their families -

15 The matching, in fact, between the families and the carers. The tasks that are done by the managers and the coordinators, although they are ultimately a vehicle for delivering the personal care, they are in fact a function which I would say is a discreet function within the organisation, the matching of client and carer, the training of carer or home support workers as they're called in the handbook and that the maintenance
20 of that - ongoing maintenance of that relationship between carer and client is a function in itself which I contend falls outside of personal support and personal care and goes to the question of the social functioning of the family.

The aim - going back to the aim of the organisation and in fact the programme that funds it, being to avoid institutionalisation, which is about maintaining family and
25 community functioning and avoiding institutionalisation. So, those functions which are carried on in the organisation that go to that end extend beyond the exclusion, so I guess the best way to map this is to say there is an umbrella of the organisation which has underneath it a range of activities.

Some of those activities are excluded but the umbrella embraces activities that go
30 beyond the personal care and personal support, particularly those that go to the family support and those - again, in terms of the activities of the people called home support workers on page 6, particularly those points identified by Mr Brown about assisting consumers to participate more fully in the community, go beyond the more narrow aspect of personal support and personal care.

35 PRESIDENT: If you had to - and I'm probably asking you to - could you quantify the split-up of activities as between family and personal?

MR PATERSON: I guess that's a question that really I'm certainly not in a position to answer. The Australian Services Union membership is in fact amongst - or potential and actual membership is amongst the coordinators and managers. Our interest in this organisation -

40 PRESIDENT: And what sort of numbers are you looking at there?

MR PATERSON: Three services, each with a manager and maybe five to ten other positions in each service that would fulfil those functions, as opposed to the 400-odd that are the direct service providers.

PRESIDENT: Yes.

45 MR PATERSON: Just to conclude - to the extent that, Mr President, you find that there is something that requires a remedy, I think the consistent remedy, if there is to

be one that goes to any change to the scope, would in fact be to amend the preamble to (b), to make that consistent with the decision of the full bench in the original decision. If the matter is not concluded here, I quite clearly indicate that that would be the position the Australian Services Union will be adopting. If the commission pleases.

5 PRESIDENT: Yes. Thank you, Mr Paterson. Yes, Mr Watson?

MR WATSON: Mr President, I think Mr Paterson basically put his submission-in-reply - primary submission to a certain extent, because there are a number of matters that were raised by Mr Paterson which didn't flow from my submission or were not raised by him in the first instance.

10 Nevertheless, this issue about -

PRESIDENT: Well, you'll have every opportunity to respond to them.

MR WATSON: Yes, thanks.

15 The issue that you've honed in on, which I think you specifically asked Mr Brown about was, those services that Family Based Care provides which go outside the personal support, personal care role, which you would need to be informed of in terms of giving any weight to it.

20 I am in your hands to a certain extent, but just on discussions with Mr Tubb, it may be appropriate if in fact Mr Tubb tells us exactly what - to clarify this issue because in discussions prior to the hearing, we had agreed that the handbook would effectively be the document that we would use and that would save giving the witness evidence but it appears from what we've explored today, that this issue is not entirely clarified in your own mind, I would suggest. Would that be the case?

PRESIDENT: I'm still waiting to hear your closing submissions, before I know whether it's clear. I know what I have to do.

25 MR WATSON: Okay. Well, if I could just put to you, Mr President, first of all, just to clarify this issue, the government funding agreements for Family Based Care in fact specify that they are funded for two services, that is personal care and respite care. That is what the government funding agreement says. It also states that in Family Based Care's constitution.

30 The issue of the pilot, that Mr Paterson raised in relation to Family Based Care, with the consultants in relation to translation to the award, that is not in fact what happened. The reason for the pilot was because it was agreed - not necessarily agreed, but stated that Family Based Care was not covered by this award, however it was the closest award to what they did. So, therefore, that is why there was a pilot done first
35 because the enterprise agreement was also pending.

Now, in relation to Family Based Care itself, as I said before -

PRESIDENT: Could you go back a couple of steps?

MR WATSON: Yes.

PRESIDENT: Yes, you wanted to say something?

40 MR TUBB: Can I respond to that?

PRESIDENT: The last point?

MR TUBB: The KPMG one.

PRESIDENT: Not at this stage. I want to go back a couple of steps.

5 You referred to the home support and respite as being the two activities, or personal care and respite. How would you define the respite care in terms of the service it provides?

MR WATSON: Well, I think that particular question, Mr President, would be one that would be appropriately answered by Mr Tubb and that is what I was alluding to when I first rose, in addressing this question that we're now getting into. I must admit - well, I can't speak for Mr Brown but certainly my impression was that we didn't think we'd
10 get into this area.

PRESIDENT: Well, it really has come down to trying to work out - I mean, it always was - trying to work out what was covered by your assertion about all the services which provide personal support and/or personal care. I have a view and you'll be able to tell me otherwise, that respite care really is to assist the family rather than to assist
15 the person with the disability because the services provided to the person with the disability are going to be provided anyway and respite is relief to the family. That's my understanding of respite.

MR WATSON: Yes.

PRESIDENT: Now, if I'm wrong, somebody had better tell me.

20 MR WATSON: Well, again, I think for the purpose of clarification, I think Mr Tubb is in the best position to do that.

PRESIDENT: Do you think we should adjourn at this point and -

MR WATSON: Mr Tubb is quite happy to tell us right now, exactly what the situation is.

25 PRESIDENT: What? By the giving of evidence?

MR WATSON: Yes.

PRESIDENT: Look, I think we'll adjourn.

MR WATSON: Can we just go off the record for a moment?

PRESIDENT: Yes, sure.

30 **OFF THE RECORD**

MR WATSON: Just carrying on, Mr President, as I was about to allude - the situation with Family Based Care is that the clients, if you like, must first be assessed in relation to a disability and need personal care or respite care, for Family Based Care to do their stuff, basically. So, that is effectively getting down to the roots of the
35 issue.

My submission is that Mr Paterson's attempt to try and bring ambiguity into the words by saying that - the fact that personal carers are not excluded from the paragraph which excludes some occupations, therefore that brings ambiguity into the subclause (b), the preamble, I don't really think is capable of it being sustained
40 because I just would say that that is an extremely long bow, particularly in relation to the rules of interpretation. I can't really see how that sits anywhere.

In relation to the remedy that Mr Paterson also raised, I would say, as we said before, that the remedy in fact is not, in our submission, a consideration because the words are clear and would simply be a matter of declaring, under your hand, what they actually mean. So, on that note, I just wanted to respond to those points, which I don't believe were in fact raised in primary submission.

PRESIDENT: Yes. Very good. One thing I didn't ask you to comment on, Mr Brown, was the suggestion that operative date was not something that I should address. I think that's what Mr Watson was saying?

MR WATSON: Operative date being?

10 PRESIDENT: Yes.

MR WATSON: I think Mr Brown's submission to you was 1 July 1995.

PRESIDENT: Yes.

MR WATSON: Mr Paterson's submission -

PRESIDENT: You were saying that there was no justification in retrospective date.

15 MR WATSON: Well, I put to you that in the public interest, you should declare prospectively but in relation to Mr Brown's submission of 1 July 1995, I don't have any problems about - whilst it was our submission too that you wouldn't do that, I don't say that that is not open to you.

20 PRESIDENT: Yes. All right. Well, you don't want to put anything more on it then, Mr Brown?

MR BROWN: Except, that if you do find that way, that perhaps it's more appropriate that the wording be an operational date as determined by the Community Services Award, for the operation of that award and that would overcome the problem.

25 PRESIDENT: All right. Well, thanks, for a very confusing morning. As always, interpretations are the worst matters that I have to deal with and - the question I wanted to ask you Mr Brown was, what is your response to Mr Watson's proposition, that an early decision was required?

30 MR BROWN: We'd support that, Mr President, without going into a whole lot of details. Obviously, there is a hearing elsewhere but we believe, depending on what decisions would impact -

PRESIDENT: It seems there are hearings everywhere.

35 MR BROWN: Well, there are. There is a hearing before the enterprise commissioner that obviously relates to an enterprise agreement. As you aware, he is required under the act to satisfy himself that employees are aware of their existing working conditions and the likely impact of the proposed agreement.

Now, given that it is unclear as to whether these workers are in fact covered by the Community Services Award, I think it's - our view certainly is, it's problematic. Also, employees can do a comparison to see what they're actually entering into when they vote, et cetera.

40 I might just very briefly mention the section 29(1). As Mr Watson mentioned, there was - I guess we were attempting in the first instance to try and resolve this matter through the lodging of a section 29(1) application. That has been adjourned and we

agreed to go through this process and then pending the outcome of this process, as to whether that is withdrawn or whether we proceed or whether we make a new application is yet to be considered.

5 PRESIDENT: All right. Well, thanks very much. The hearing is concluded. Decision reserved.

HEARING CONCLUDED