

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4146 of 1992
T No. 2225 of 1989
T No. 2311 of 1990

IN THE MATTER OF an application by
the Australian Social Welfare
Union to vary the Community
Services Award

re making of a new award

COMMISSIONER GOZZI

HOBART, 10 May 1994
continued from 10/3/94

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: I'm sorry to keep you waiting but it's normally the course that just as you walk out you get a phone call and this one was one that I couldn't let slide, so I apologise for keeping you waiting. Any changes in appearances? If not, who'd like to report on the progress in this exercise?

MR PATERSON: If the commission pleases, it gives me some pleasure to put up the next stage of the Community Services Award which I'll hand up as an exhibit.

COMMISSIONER GOZZI: Can we mark them all as - oh, well, ASU.4 - ASU.3, I'm sorry, for this one.

MR PATERSON: This is actually - on the front page a slight amendment to the terms of employment that previously made clause No.24. One of the concerns I have is addressed - or have had - is addressed by the first variation which is just to add to the first paragraph of 24(a), the words as presented there, 'being an employee engaged on a regular and continuous basis shall be a permanent employee'. That will make the full paragraph read: With the exception of casual employees, employment shall be by the fortnight; an employee engaged on a regular and continuous basis shall be a permanent employee; any employee not specifically engaged as a casual shall be a permanent.

The second part of that clause that's added there as variation to clause 24 arises from our discussions on the questions of hours and an agreement that this particular clause probably sits most comfortably with the terms of employment. It provides for the specification and agreement of the ordinary hours of part-time employees. There's a minor handwritten change which was a last minute amendment, so that the last paragraph of this proposal which is intended to deal with a measure of flexibility around ordinary hours of part-time workers and yet provide for circumstances in which a requirement that a part-time worker work additional hours above their normal is - creates an entitlement to overtime. The clause - the second paragraph would read as hand-amended there: Any - sorry - additional ordinary hours may be worked by mutual agreement provided that a maximum number of ordinary hours are agreed and specified and that all hours in addition to maximum ordinary hours as agreed are paid in accordance with subclause (c) - Overtime. Where there -

COMMISSIONER GOZZI: Mr Paterson, what normally happens with part timers in respect of exceeding their part-time hours?

MR PATERSON: My understanding both from the industry and the one award that we have - a federal award - and also from a document I have on the ACTU's negotiating position on part-time and casual workers is that there is an increasing a trend to identify circumstances in which part timers work

overtime and that that would include where they are required to work in excess of their usual contracted hours. The circumstances in which that would arise, I think, are probably various, and not unreasonable to consider that part-time workers would hold two jobs and that the requirement to work extra hours on one job would create a problem for their other job or their domestic relationship - domestic responsibility.

COMMISSIONER GOZZI: You're probably going to tell me different, that - and I don't know the answer to it - it's always dangerous to ask the question if you don't know the answer - but I'm not aware of that sort of provision in this jurisdiction. That's a fairly significant change to what normally applies in respect of part-time employment -

MR PATERSON: What this -

COMMISSIONER GOZZI: - within - you know - within the ordinary spread of hours. I mean it's normally ordinary time. I'm not sure.

MR PATERSON: What this does provide is that if that expansion of hours is on a regular basis then according to the first paragraph if that's going to be either for six, 3 month or 12 month period or as a permanent change to the arrangement then presumably the employer would renegotiate within accordance of the first paragraph and effectively vary the contract of employment they have with that individual. So if somebody worked 20 hours and for - and the job was proposed to become a 30-hour job, then that would be - effectively could be done within this -

COMMISSIONER GOZZI: Yes, I can see -

MR PATERSON: - clause as a variation to the contract of employment. The overtime is meant to deal with specifically circumstances that are those which would normally attract an overtime entitlement being unusual and unpredictable and in excess of what is agreed as normal.

COMMISSIONER GOZZI: Well, look, as I say, it certainly appears to be a significant variation to what generally applies to part-time employment. I mean, for instance, just recently a full bench of this commission determined that part-time hours - and I'll give you the example - TAFE teachers commencing work at 6 o'clock at night going through till 10.00 pm at night you work at ordinary time.

MR PATERSON: Well that's -

COMMISSIONER GOZZI: At - at part-time hours.

MR PATERSON: That matter is dealt with in terms of the subsequent provisions in terms of hours of work in a

comparable way. I think that probably if you scratched hard enough you might find that these things have just not been dealt with at all and that you may well define increasing with - with a recognition of the increasing prevalence of part-time work, particularly in this industry where we're talking about a third of workers, by our survey, and something comparable by ABS figures for a broader industry, only a third being full-time employees. We're talking about an industry that is predominantly part time.

And I think you'll find that what's happened is that part-time provisions have gone into awards without changing overtime provisions and it probably left it unclear and undetermined as to how overtime provisions relate to part-time provisions. If an award defined a part-time employee as working less than full time hours and left unchanged overtime provisions, I think there would still arguably be a case that overtime was there where they were required to work on a day or at a time not - without notice - without, you know, the usual notice which could be taken to be the varying of an agreement. I think you've - you've got a problem that exists with part-time being written in without something like this to deal with - the overtime situation. And we're happy to set new ground.

COMMISSIONER GOZZI: The other part to terms of employment - how does that fit with the definition of permanent employees? Is there a definition of permanent employee in the award?

MR PATERSON: No, the only - the only definition that currently appears - oh, there's - no - to my reading of it, and it was why I proposed something like this, it only - it only defined by - by saying that a - someone - an - any employee not specifically engaged as a casual shall be a permanent. This is turning it around and saying it the other way in the first instance.

COMMISSIONER GOZZI: Yes. You may need a consequential adjustment to the definition that's -

MR PATERSON: I'm proposing that that - the first point on this page which is proposing to add to (a)(i) or (a) roman (i) - occur within that paragraph so that the paragraph Terms of - clause 24 - Terms of Employment (a)(i) would read: with the exception of casual employees, employment shall be by the fortnight - then - an employee engaged on a regular and continuous basis shall be a permanent employee and then any employee not specifically engaged as a casual shall be a permanent employee.

It does then go on in subclause (c) of that - that clause 24 to further define a casual employee and in subclause (d) to further define a part-time employee.

COMMISSIONER GOZZI: And is all this by consent is it, Mr Paterson?

MR PATERSON: That's the case. We did have some - two or three last minute amendments to this document which I'll talk to but it is presented by consent.

COMMISSIONER GOZZI: Right. We'll go to the next -

MR PATERSON: With consent.

COMMISSIONER GOZZI: Thank you. What else have we got? Oh, just before you go on to the next clause, in that verbiage on page 1 - Terms of Employment - where you're talking about, in the second-last line, addition to maximum ordinary hours -

MR PATERSON: As agreed.

COMMISSIONER GOZZI: They - they're not the ordinary normal working hours of 38 hours a week - it's the maximum ordinary hours agreed to be the part-time contract.

MR PATERSON: The intention in drafting this is -

COMMISSIONER GOZZI: Is that it?

MR PATERSON: - to - is to refer within these two paragraphs to the ordinary hours of a part-time employee.

COMMISSIONER GOZZI: Yes, okay.

MR PATERSON: So in the second paragraph the ordinary hours referred to are by reference to the preceding paragraph.

COMMISSIONER GOZZI: Okay, so in a practical sense if the contract for part time is 20 hours, if it's extended to 21 hours or if there's a need to work that extra hour, it's paid for at the overtime provision at subclause (c) - overtime is what, time and a half for the first two?

MR PATERSON: That's correct.

COMMISSIONER GOZZI: And double time thereafter.

MR PATERSON: It'll - but - but more to the point, it provides that a part-time employee could enter an agreement with their employer, that they're ordinary specified hours are 20 and they could agree that would work up to an additional 5 hours at ordinary time and so the overtime entitlement wouldn't come in until after the maximum ordinary hours as agreed.

COMMISSIONER GOZZI: You'd have to be absolutely lunatic to agree to work 5 hours ordinary time if you can get it at overtime rates.

MR PATERSON: But you may not in fact get it at overtime rate - they may in fact be saying, well, it's only on offer as ordinary time or we'll be putting on a casual employee at 20% loading if you don't want do it at ordinary time.

The point really is to make that - that a part-time employee's hours cannot be shunted up and down and they can't be bused around the place at the will of the employer. That's - that's the purpose and intent of this provision is to prevent that -

COMMISSIONER GOZZI: Well -

MR PATERSON: - from happening without penalty incurred on the employer.

COMMISSIONER GOZZI: - I'll look forward to hearing what the - Mr Fitzgerald's got to say about this as well - it would be interesting.

I mean I must I am concerned that in the normal course of events if there is a requirement to work reasonable overtime even for a part timer, that that now would attract an overtime component notwithstanding it's within the ordinary spread of hours.

MR PATERSON: But my argument would be that that is within the ordinary spread of hours, a full timer who worked more than 38 hours would have an overtime entitlement - is - is - by reference to the contracted -

COMMISSIONER GOZZI: Well certainly a full timer has, yes.

MR PATERSON: - number of hours and that if a part-time employee has a contract to work regularly for a set number of hours and then is required for reasons of crisis in the service or ongoing work to extend their working day or week, I believe that's a situation which is either dealt with by the variation to their contract of employment which makes them a permanent employee on new agreed hours or in this manner here.

COMMISSIONER GOZZI: But you couldn't do that - yes - but you couldn't do that in the context of the type of ad hoc arrangements that may arise from time to time.

MR PATERSON: No that's correct.

COMMISSIONER GOZZI: In which case the overtime provision would apply.

MR FITZGERALD: Mr Commissioner, I just wonder if I could make a suggestion; given your concerns which you've expressed, I wonder whether it may be more practical that we go off record and discuss this rather than proceed with - on the basis of consent and then I suppose run the risk of it being rejected by the commission. I see it as probably more appropriate if we do.

COMMISSIONER GOZZI: Well I'm taking a deliberate line of running Mr Paterson through it and then I really want to hear what you've got to say about that because -

MR FITZGERALD: Certainly.

COMMISSIONER GOZZI: - because I want to come to a view about it.

MR FITZGERALD: I just wonder if it's more expeditious to do that off record. I'm happy to respond.

COMMISSIONER GOZZI: Well I want to write a decision on it either endorsing it or rejecting it, so I'd probably prefer to have it on the record.

MR FITZGERALD: Yes, well I think rather than - we would prefer I think - well certainly from an employer point of view that proceed by a consent, but if there's some doubt to that being ratified, we would like to reconsider the position and I'm sure Mr Paterson would too, but rather than - than have a risk of it being rejected by the commission.

COMMISSIONER GOZZI: Well that's up to Mr Paterson and his -

MR FITZGERALD: Well that would be my suggestion.

MR PATERSON: Just one other aspect of this that it is in a sense an alternative to other ways of shaping the same provisions which would provide for a specific and definite limit on the number of hours that can be worked at ordinary time and without having the document at hand, it's my understanding that the Skillshare Award provides for something like 2 hours. So part timers - permanent part timers regular hours can be moved within a 2 hour range before incurring an overtime entitlement. And I believe that this provision here delivers the sort of flexibility which would be dependent on the basis of the mutual agreement. The mutual agreement in the framework of the structural efficiency workplace agreement type clause that we already have in the award would allow an employee and an employer to come to an agreement which spelt out fully the circumstances in which the work up to the maximum number of ordinary hours could be dealt with.

I believe that this provides a flexibility that - that is warranted in the industry and I believe that if there is any

concern in what to this point in time has been a consent position, that those concerns should be placed on the record. But I am not aware of any problems - well there have been no problems raised with this other than clarifying that the ordinary hours specified in the second-last line of this proposed variation are in fact the maximum and not the ordinary ordinary hours as in the first paragraph and we've done that by amendments - an amendment that is there as a handwritten amendment to this provision.

I can leave my submission there for the moment or move on to the hours, shift and overtime provisions.

COMMISSIONER GOZZI: Mm.

MR PATERSON: As you prefer. Will I proceed through with the document?

COMMISSIONER GOZZI: Oh look, it's not up to me to torpedo your -

MR PATERSON: Well I shall proceed through then in that case.

COMMISSIONER GOZZI: - torpedo your consent but I certainly want to understand what it is that you're doing because obviously I want to come to a view about it.

MR PATERSON: I think it's -

COMMISSIONER GOZZI: So I'm raising - I'm raising the concerns to give you and indeed Mr Fitzgerald and Mr Kleyn and anybody else the utmost opportunity to put their - put your thinking on the record and for me to come to a view about it. I mean quite clearly - and that's why right at the start I've indicated it - you know, I may be wrong - but quite clearly I'm expressing to you that as far as I'm aware it's a new way of looking at part-time provisions in this jurisdiction.

Now I'm not going any further than that, I'm just simply saying that's the case and -

MR PATERSON: I've no problem at all in any way with what you've said, and I think if there is to be an interpretation matter at some later stage as to what the consent position in the award really means, then the only point of reference that we're going to have is what the parties place on transcript or what you yourself write in your decision.

COMMISSIONER GOZZI: Mm.

MR PATERSON: And I believe for that reason to the extent that there is any concern, or - or not to the extent there's any concern - to the extent that any clarification of the

position is needed it should be on the record from our point of view.

COMMISSIONER GOZZI: yes.

MR PATERSON: What I was asking in fact was, would the commission prefer me to progress through the full document or to take the responses and replies to that first provision.

COMMISSIONER GOZZI: It's probably -

MR PATERSON: I'm happy to proceed straight through.

COMMISSIONER GOZZI: - it's probably easier if it's all the same to you to do it.

MR PATERSON: I will - I will go straight through in that case and, what we've done -

COMMISSIONER GOZZI: Well -

MR PATERSON: - next section -

COMMISSIONER GOZZI: - we might do that after lunch can we. I think we're going to be a little while.

MR PATERSON: In terms of going into the detail - yes, I suppose that's quite correct.

COMMISSIONER GOZZI: I think something - yes - I mean if the first provision is anything to go by we could be here for quite a little while. I mean I'm not trying to indicate anything more than the fact that there should not be an expectation that the commission ought to automatically endorse consent arrangements and I want to give you every opportunity to put reasons as to why this consent arrangement ought to be endorsed given that a different way of working part time arrangements than ordinarily is the case - or what I believe to be the case - in this jurisdiction.

I mean it really does provide a new arrangement and I want to be mindful as to what the thinking is and then weigh it all up at the end of the day.

MR PATERSON: Well I'll just reiterate on that; I believe that it is important because of the casual and - well not the casual - the part time nature of employment in the industry. I believe it is an issue in terms of the entitlement to somebody - that somebody has, who works more than their

contracted hours of employment. I believe it's an issue that other awards have probably failed to deal with by omission in that where part time provisions have been inserted into awards to recognise and establish the existence of permanent part-time work - and I suppose you don't have to go back too far in industrial regulations to find that the only permanent work was full time permanent work.

The recognition of permanent part time work has not been dealt with in terms of overtime, that overtime clauses have tended to stay as they were and have not dealt with this question. And as I said before, the principal issue is one for me and for our members of part timers not being expected to work more than the hours they contract for given that they have another contract of employment that sits alongside a part time one, given that they may have domestic or other responsibilities, voluntary responsibilities they attend to with their other hours, that requiring somebody to work more than the hours they usually work does impose a burden of the sort that would normally be remunerated by overtime.

If the commission pleases I'm happy to leave that there if you wish to break before moving on to hours, shift work, overtime and the other matters.

COMMISSIONER GOZZI: Yes, I think we will. We'll be back at 2.15. Thank you.

LUNCHEON ADJOURNMENT

COMMISSIONER GOZZI: Just before we get going, Mr Paterson, with your further comments in respect to the other clauses, I did take the trouble to check around the commission just to see what the various award provisions were and without going into too much detail about the various award areas, one award that's definitely got it in is the Retail Trades Award, the part time provision that you're looking for.

MR PATERSON: In terms of something similar to this or in terms of an entitlement?

COMMISSIONER GOZZI: Well I think it applies the overtime provisions to part timers.

MR PATERSON: Mm. That was my quick look at that award -

COMMISSIONER GOZZI: Which was again a consent variation, I believe, as I understand it but I'm just indicating rather than me saying that it wasn't in the awards of the commission there is an example of at least one award where it is in.

MR PATERSON: I'll leave any further comment on that until after Mr Fitzgerald has responded and if there's a need then I'll come back to it.

COMMISSIONER GOZZI: Yes, okay.

MR PATERSON: The second major section of this document again in a slightly different way to the standard conventions of awards of this commission, brings under one clause hours, shift work and overtime provisions. I believe that that is a more useful way to present those matters given that people will often want to be able to see, in using the award, those provisions simultaneously, if you like.

So it seeks to do that by putting hours of work, shift work and overtime as subclauses of one clause. I'll just go through the hours of work and initially just the brief points, and if it does essentially define an 8.00 to 6.00 Monday to Friday ordinary week provides that ordinary shift hours may be rostered however Monday to Sunday, provides that ordinary hours may be worked between 8.00 a.m. and 10.00 p.m. provided that not more than 10 hours are worked on one day and not more than 20 hours in a fortnight. The average effect of that I believe would be to say it's the same as a flexible 8.00 to 8.00 span on average.

In terms of maximum hours a last minute variation to this document is to delete the reference to 19 days in each 4 weeks. That was agreed to in terms of an issue raised by the employers that that may in fact worked - prescribed people working 20 shorter days and that was agreed to with a reservation that we may want to come back to that at some later date. But in principle the hours of 152 on average in 4 weeks is the full time weekly hours are agreed.

Excluding shift work no more than 10 hours as ordinary hours in any day.

COMMISSIONER GOZZI: Just before you get into that shift work one, just in (a)(i) last sentence:

Provided that ordinary hours shift work may be rostered Monday to Sunday in accordance with this clause (b)(c).

What's all that mean?

MR PATERSON: Oh, in accordance with the shift work provisions below and the -

COMMISSIONER GOZZI: In (c), is it?

MR PATERSON: - overtime provisions below. There may need to be some - I mean, this clause being the clause which would be

numbered by the commission presumably as, let's say, 18 - Hours, Shift Work and Overtime.

COMMISSIONER GOZZI: Oh yes, I was just wondering about the penalty, you know, what the payment is.

MR PATERSON: No, that comes into - in terms of shift penalties in (b) Shift Work, or in terms of overtime penalties, it comes into Overtime (c).

COMMISSIONER GOZZI: What's the proviso really mean:

Provided that ordinary hours shift work may be rostered Monday to Sunday in accordance with this clause -

MR PATERSON: What that effectively says is that Monday to Friday is the ordinary working week except for shift workers who can work their ordinary time Monday to Sunday.

COMMISSIONER GOZZI: Is that - I don't read it that way. Are you saying ordinary hours shift work can be rostered Monday to Sunday in accordance with clause (b), which is shift work and (c), which is -

MR PATERSON: Overtime.

COMMISSIONER GOZZI: - overtime. How does -

MR PATERSON: Well overtime effectively sets some of the limits on the overtime clause I believe.

COMMISSIONER GOZZI: So you mean that they work shift work but if they work more than their shift work -

MR PATERSON: If they don't have their break of -

COMMISSIONER GOZZI: Right.

MR PATERSON: - or if they don't have their breaks between shifts or they don't have their equivalent of 2 clear days off in a cycle or 4 clear days off in a cycle.

COMMISSIONER GOZZI: It's not saying that shift work in those ordinary hours Monday to Sunday will be paid in accordance with the overtime provisions?

MR PATERSON: No.

COMMISSIONER GOZZI: No.

MR PATERSON: That's not the intent.

COMMISSIONER GOZZI: No, right.

MR FITZGERALD: I just wonder if I could be of assistance, Mr Commissioner. I wonder whether in fact (c) should be there. The clause - the proviso does talk about the rostering of shift work which is in fact subclause (b).

So it would be probably be our preferred position that mention be made of subclause (b) only.

MR PATERSON: Given that that doesn't change the limitations imposed by the overtime clause I don't see a particular problem with that, but -

COMMISSIONER GOZZI: Okay, I think it's clear if you take the (c) out.

MR PATERSON: (c) does impose some limitations but they stand aside from whatever is in this sentence I believe.

COMMISSIONER GOZZI: Yes, I think (c) should come out and you've got overtime covered in respect of the shift work provisions anyway as I look at the clause.

MR PATERSON: Yes.

COMMISSIONER GOZZI: Okay. Thank you.

MR PATERSON: So the - I mean, the core flexibility within that provision is the expansion of ordinary hours out till 10 o'clock at night with restrictions.

The provisions for shift work I believe are in effect fairly standard up until (iv). (i), (ii) and (iii) define day shifts, afternoon shift and night shift, provide for shift loadings and provide for weekend loadings that substitute for and are not cumulative upon shift allowances. And further provides that where those loaded rates apply Saturday, Sunday and public holidays that can be compensated by a combination of payment and time in lieu.

COMMISSIONER GOZZI: Now - yes look, I understand that. I just again - I'm sorry to keep back tracking. I was just looking at the: 20 hours shall be worked between 6.00 p.m. and 10.00 p.m. in any fortnight. That's the last paragraph in the ordinary hours section.

MR PATERSON: Mm.

COMMISSIONER GOZZI: Now in that context I think it's just sufficient to put it in the transcript that the 20 hours in the fortnight means a fortnight as opposed to a fortnight starting every week. At the end of each week you could say the second week of the first fortnight is the first week of the second fortnight. You're really meaning to say, for

clarification purposes, that it's 20 hours between 6.00 p.m. and 10.00 p.m. in any fortnightly period, i.e. 2 week period, and each of those 2 week periods stand alone, they don't go on the basis that, as I say, the second week of the first fortnight being the first week of the second fortnightly period.

MR PATERSON: The intention both here and in other places where a limitation or a constraint is expressed in any fortnight is to relate it back to the terms of engagement and the engagement period being by the fortnight.

COMMISSIONER GOZZI: Right.

MR PATERSON: Some of the earlier provisions provide for limitations on a weekly basis. Certainly my intention in doing that is to relate that fortnight to a fortnight's period of engagement and payment for work done.

COMMISSIONER GOZZI: Right.

MR PATERSON: Subclause (iv) provides for more flexibility in terms of length of shift than is commonly accepted. My understanding of the movement from standard 8 hours to 12 hours shifts has involved some considerable flexibility in standards. What's proposed here recognises the reality that in this industry there are a number of services that choose, employees that choose to work short shift day/long shift night. The examples I know are 16/8 and 15/9 shifts.

So this clause basically sets a limit on the number of longer shifts and the most recent variation in terms of producing this consent document is the last or second last paragraph of (iv) that allow for shifts of between 12 and 16 hours may be worked provided that not more than 2 are worked a week and on average the length of shifts not more than 12.

That in one sense is to preclude the possibility of somebody just being given the long shifts and not being given the short shifts and getting the short end of the short shifts stick.

COMMISSIONER GOZZI: That's a fair shift, isn't it, 16 hours?

MR PATERSON: It is a long shift but where they work they would intend to include a sleepover. It is longer than I believe - I mean, I believe that a 12 hour shift is more than enough for people to work. The argument put to us was that some services, I think in particular ambulance services they found the 14/10 split to be an agreed and acceptable arrangement. And the other reality in this industry is that we have people who work 16/8 back to back.

I think the limitation that not more than 2 shifts are worked per week and on average the length of shift is not more than 12 is a measure of protection.

COMMISSIONER GOZZI: Sure, it is. However the working of 12 hour shifts is quite commonplace these days. But 16 hour shifts is certainly a new approach and I'm not sure whether it would be reasonable or indeed desirable. I mean, as I say, it's a consent document. To limit the working of 12 hour shifts which, as I say, is quite common and lump them in together with 16 hour shift, and there's nothing in there to say - and because there's nothing in there to say to the contrary 12 and 16 hour shifts in your submission need to be accompanied by sleepovers.

And I don't think it's probably necessary to have a sleepover in respect of a 12 hour shift but you might certainly say that in respect of 16 hours that might contemplate sleepovers. I don't know. I mean, I think as much as anything with these arrangements the parties need to be clear what they've got in mind. Because I could see an argument on the horizon in respect of saying: Look a 12 hours shift comprehends a sleepover, as opposed to that being said in respect to a 16 hour shift where it might be quite reasonable.

The view might be in respect of your consent that sleepover should apply in both circumstances. And what about shifts in between? I mean, does that imply the spread of shifts, 12 to 16 hours or is it a 12 hour shift or a 16 hour shift and nothing in between?

MR PATERSON: No, it implies between 12 and 16. In fact the -

COMMISSIONER GOZZI: Yes, so it can be any number.

MR PATERSON: - example that I worked from in the case was a service where people do in fact work - workers do in fact work continuous hours and work a 15/9 roster and work a continuous 15 hours, have more than a clear's break - a day and a half's break in effect to the next 8 hour day shift. A 9 hour day shift they work their 38 hours on a 15 - three 9's and a meeting and crossover time.

I think that -

COMMISSIONER GOZZI: I don't want to get over pedantic on it either, I have to say, but you need to know what it is that you want.

MR PATERSON: The writing in of a requirement of sleepover may in fact be - well against the flexibility that services ought to have to choose between sleepover or paid shift.

COMMISSIONER GOZZI: Yes, I don't disagree with that. It's just that 16 hours is a fair whack for somebody to work in straight.

MR PATERSON: Well the 15 hour shift that I'm thinking of is a 6.00 to 9.00. And that may in fact be the upper limit but apart from one or two that I know are most peculiar.

COMMISSIONER GOZZI: Thank you.

MR PATERSON: The next paragraph provides that where overtime is worked that where practical employees - it's arranged so that employees have at least 8 hours off duty. The previous position there would have provided for at least 10 but the consequence of accepting a span of hours that - a length of shift that is greater than 12 is that it may create circumstances where more than 8 hours is an impossibility. But provides then that where an employee does not get their 8 hours off duty they're released after the completion of the overtime until they do have 8 hours off.

The broken shift arrangement caused me some concern because I don't believe it is - I don't know of any evidence for the need of such arrangement. However we have consented and agreed to what is fairly consistent with what's in the Welfare and Voluntary Agencies Award that does allow a shift to be worked in two periods provided that it's within that span and the break is not beyond 4 hours. I don't believe it will be a very much used provision at all.

In respect of overtime the overtime provision provides for time and a half for the first 2 hours and double time thereafter providing further that where an employee doesn't have their 8 hours break between each day's work that they're straight into double time. A shift worker returns to work without having a break of at least 96 hours in any fortnight taken in no more than two periods the more standard or the -

COMMISSIONER GOZZI: How would you get 96 hours break in a fortnight?

MR PATERSON: Four days. It's the equivalent of saying 2 clear days off in any seven.

COMMISSIONER GOZZI: I was equating that to -

MR PATERSON: And tying that to fortnight.

COMMISSIONER GOZZI: You're just talking about hours - I was equating that to working hours.

MR PATERSON: No, if it's necessary to say continuous hours -

COMMISSIONER GOZZI: All right.

MR PATERSON: - but I think a break of 96 hours says in no more than two periods. It's meant to mean 4 days, effectively two weekends in any 2 weeks. And the point (c) of double time after 10.00 p.m. then further providing double time for Sundays and double time and half for public holidays. Then providing for time in lieu which has never been a problem for us in terms of overtime. Workers in this industry are not accustomed to being paid and time in lieu is by far the standard agreement. But the time in lieu is time in lieu proportionate to the overtime entitlement. So that if somebody works overtime that would attract time and a half pay they get time and a half overtime.

The point (iv) is not a prescriptive subclause but an indicative one, I think, as indicating the ways in which TOIL can be most usefully used rather than just frittered. But certainly in no way prescribes. Further providing that time in lieu that is accumulated is payable on termination. And then providing that once ordinary weekly hours are exceeded so that if somebody is engaged on a full time basis once their time in lieu credit exceeds 38 hours there's an entitlement to be paid that, paid for any overtime beyond that provided that they can reduce that credit by adding it to their leave entitlement.

Yes, but if you reach agreement to take it in accordance with annual leave, then you immediately run into the problem with 6 don't you?

MR PATERSON: I'm not clear on - if I can see the problem in that.

COMMISSIONER GOZZI: Well once time off in lieu credits exceed ordinary weekly hours - so if you - if you've accumulated -

MR PATERSON: - working full time and you've accumulated 38 hours off -

COMMISSIONER GOZZI: Yes.

MR PATERSON: - you then bank that to your annual leave and reduce your time in lieu credit to zero was the intent.

COMMISSIONER GOZZI: Yes - - overtime should be paid in accordance with 1.2 - right? So that means that - does that if you accrue 38 hours time off in lieu -

MR PATERSON: And there's no agreement to add it -

COMMISSIONER GOZZI: - so that you'll be -

MR PATERSON: - to annual leave and there's no agreement - there's no -

COMMISSIONER GOZZI: All other ordinary hours are then paid for at overtime rates - is that what that means?

MR PATERSON: No, not all ordinary hours - no. No, it means that all overtime is then paid.

COMMISSIONER GOZZI: Once time in lieu credit exceed ordinary weekly hours -

MR PATERSON: Exceed the number of ordinary weekly hours - so if you work 38 you've got an additional 38 hours time in lieu you owed and then in the next week you work another 10 hours overtime you're entitled to be paid for that 10 hours overtime.

COMMISSIONER GOZZI: So you can only accrue it -

MR PATERSON: You can only - you can only accrue up to a maximum -

COMMISSIONER GOZZI: - accrue it to a maximum of 38 -

MR PATERSON: - equivalent to your ordinary hours. Then you have the option of banking it and reducing that credit by adding it to annual leave. If it's not - if there's no agreement or it's not possible to do that, a person may not in fact have a -

COMMISSIONER GOZZI: Yes, but that clause talks about payment. You know, I don't understand it to tell you the truth.

MR PATERSON: What it's - what it's seeking to do is to set a limit on the amount of time in lieu that can be accrued and once that limit is exceeded overtime shall be paid. And it's in the interests of ensuring that people in fact - workers do in fact get the opportunity to take their time in lieu and it doesn't build up to the point where it's - it's unattainable - undeliverable.

COMMISSIONER GOZZI: But however you've got an out here.

MR PATERSON: Maybe it could be worded - Mm?

COMMISSIONER GOZZI: There's an out there too isn't it, that you can add it on to annual leave.

MR PATERSON: And that's the out that's expressly intended to be there. It may be that the intent can be worded differently but I don't think there's any disagreement as to the intent.

COMMISSIONER GOZZI: But to add it on to - but to add it on to annual leave, that's got to be subject to agreement.

MR PATERSON: Yes. And as such is subject to agreement and I would see that in fact the promotion of the award as envisaged by the parties with a supplementary document we'll talk about how the flexibility provisions within the award such as these are given effect by mutual agreement and the - and the best practices, if you like, of how such agreements should be framed to make the intentions of all parties clear to each other.

COMMISSIONER GOZZI: So after your - you've got 38 hours up by way of time off in lieu credits which is built up through overtime -

MR PATERSON: Mm.

COMMISSIONER GOZZI: - and that would be the first 2 hours at time and a half, which is 3 hours, and it would be 17 by - by two.

MR PATERSON: Seventeen and a half - eighteen.

COMMISSIONER GOZZI: Or 17.1/2 which is 35 - so after you've physically worked 19.1/2 hours, beyond that -

MR PATERSON: Overtime must be paid.

COMMISSIONER GOZZI: - the overtime must be paid. However, by agreement the additional time -

MR PATERSON: That balance - by agreement that balance of all or some of it - the 38 that you got for -

COMMISSIONER GOZZI: No, the 19.1/2 hours.

MR PATERSON: - 19.1/2 hours work -

COMMISSIONER GOZZI: - for the 30 - yes -

MR PATERSON: - could be added as an extra week to annual leave.

COMMISSIONER GOZZI: Right. But it doesn't have to - the 38 hours which are produced from 19.1/2 hours work - you might tack 19 hours to annual leave and - and then build again onto the 19. Right - okay.

MR PATERSON: In fact that's my own practice in terms of my time off in lieu is taken in school holidays times and I reduce my balance down to zero at the end of every school holiday.

COMMISSIONER GOZZI: I'll get you to write a commissioner's award, Mr Paterson - it sounds great to me.

MR PATERSON: And the final clause there in terms of overtime arises from circumstances that I have personally had to deal with where one of the difficulties can be that there is a service driven - client driven need for overtime to be worked. There may not be somebody around to authorise it. It provides that an organisation can have an overtime policy or established guidelines or recognise that emergencies may give rise to situations where people have to work extra hours or outside normal spans.

The next page, I think is certainly in terms of shifts is one of the - one the difficult issues that has been put to me by services both in which have members and ones in which we don't have members. There are people - there are services that run on what I believe is exceptional and in principle unacceptable practices of very long shifts. For instance one service that I know of the north coast works - the workers work 2 days straight. They work a straight 48 hours which does include sleepover. I don't think it's practical or reasonable to impose in the making of this award something that says you must change your practice immediately, so on those terms I've put up this as a - an exceptional provision which in effect would have a sunset clause on it of 12 months.

The final point there is to - and this arose from discussions with people from a committee of management who said - I raised it as a problem with these long shifts - what if somebody actually had to work through their sleepover - they would in fact work 24 hours straight and may have to turn around and work another 24 hours - or another day shift and evening shift or a day and night shift. And they said, well if that happened their practice would be to - to get somebody in and fill that position with somebody else and to let that person off duty.

So it's a provision that doesn't sit particularly comfortably with me, but I think it is appropriate.

COMMISSIONER GOZZI: It doesn't sit comfortably with me either, I'd have to say. I mean it proposes to have shift longer than 16 hours - so you can have three shifts of 16 minimum - or two shifts of 24 or one of 30 and one of 18 provided that it includes a sleepover and you mightn't - depending on the circumstances that might be minimal depending on the sorts of problems that arise.

MR PATERSON: But the last paragraph in effect would -

COMMISSIONER GOZZI: Oh yes, that's a limit - a limiting factor.

MR PATERSON: It would in fact limit - limit it by relieving an employee who had to work more than effectively a 16-hour shift with 2 hours overtime, would in effect be relieved from the next 24-hour period without loss of pay. So where an employee did in fact have to work there, let us say for example, sleepover, and had to work 2 hours in their sleepover, on top of a 16-hour shift, then they would be relieved.

COMMISSIONER GOZZI: Yes. Look I don't know, I can't think of any of place - I mean you obviously can - and others - where that sort of arrangement would apply currently.

MR PATERSON: The two particular services I know of that do something like that are the Warrawee Women's Shelter at Ulverstone which works a 48-hour straight.

COMMISSIONER GOZZI: I mean that's just -

MR PATERSON: People choose to work all their work in 2 days to get 5 days off. The other service I know -

COMMISSIONER GOZZI: Oh, yes but gee - that's ridiculous.

MR PATERSON: - a 16 hour shift including -

COMMISSIONER GOZZI: I mean there's such a thing - there's such a thing as a duty of care that an employer has to an employee and it's often argued from the other side. I mean I think if anybody can't organise their workplace a bit better than that - I mean - I mean that really creates a bit of a problem. I mean it's a long time be on shift - to be on foot quite honestly.

MR PATERSON: The other service that I know of -

COMMISSIONER GOZZI: - and the - the corollary to the argument is that, you know, just because people agree to do something it doesn't make it legally right.

MR PATERSON: No that's quite true.

COMMISSIONER GOZZI: Or morally right.

MR PATERSON: Well the other service I know of is a 16/8 where a worker works a 16 hour shift including a sleepover and an 8-hour day shift alongside of it, so effectively works a 24-hour shift - and again for -

COMMISSIONER GOZZI: You could work -

MR PATERSON: - reasons related to domestic responsibility.

COMMISSIONER GOZZI: - on this basis though, you could work 36 hours in a 48 hour cycle.

MR PATERSON: If there is a problem with it, I mean I'm quite happy to see us have some further discussions about this.

COMMISSIONER GOZZI: Oh, well, I mean look, I just want to raise the issues on the way through. There are other submissions to be made and I'll take it on board from there.

MR PATERSON: It may -

COMMISSIONER GOZZI: But some of them are sort of not - are hitting a little bit of a rust spot on the way through, I'd have to say.

MR PATERSON: It may be that the - that the transitional period needs to be a shorter one and maybe a period of, you know, 3 to 6 months is more appropriate than 12. I mean it will - introducing something like this on an operative date that was in the very near future would create difficulties for those particular services.

COMMISSIONER GOZZI: Oh look, I understand that. If they're doing currently -

MR PATERSON: And I'm mindful of that and I'm not intending to institutionalise unacceptable practice but -

COMMISSIONER GOZZI: Well let's move on with it then.

MR PATERSON: Quickly moving on then, in terms of the on-call and recall rates, the on-call allowance is tied to a dollar amount to make it, in effect, the same availability allowance that applies in a sleepover period of \$15 in Part 1 and \$30 in Part 2. The recall provides that an employee recalled to duty on - implicitly on - some - on an on-call roster, is paid from the time of receiving the call until they return to where they were recalled for a minimum of 2 hours at overtime rates recall, and in excess of 2 hours' work paid whether the work is performed or not, relative overtime rates.

The telephone duty is - is a circumstance where the sort of work done on telephone duty may be quite basic or extended. The provision there is the payment of a minimum of 1 hour and for subsequent disturbances to be paid in 30 minute quantum.

COMMISSIONER GOZZI: Okay. The on-call - is that currently the practice - that you've got people on call?

MR PATERSON: Yes, yes.

COMMISSIONER GOZZI: In other words, they're standing by to - by the - to be called.

MR PATERSON: Some of the - those women's shelters that have found that they haven't needed to have somebody on the premises where they have a relatively stable group of clients in a house, would have an on-call roster. One of the workers would be on-call to receive, usually on a beeper system, usually not on a direct phone call, and for example, they may get a call from the police that they've just taken somebody from a domestic violence situation and were bringing them around to the shelter.

The other service I know of specifically is the sexual assault support service which actually runs an on-call counselling service which may and does extend into accompanying victims of sexual assault to the Royal Hobart Hospital or to various processes, and in that case they would perform both - the majority of their work would fall within telephone duty but on unfortunate occasions they are called out to accompany a victim of a sexual assault.

They're the two specific ones that I know of.

COMMISSIONER GOZZI: And this is a cheaper more efficient arrangement than having somebody there.

I mean the -

MR PATERSON: In respect - in respect of the latter the service is not set up to operate out of its office in evenings and it's not something they've ever envisaged or chosen to do. There may arguably be a risk for a service like that being open at night at a place that came to be known as their public work place. So for various reasons they've chosen to operate that way.

COMMISSIONER GOZZI: Yes, but of course the award provision applies to all services - there's no differentiation of services here.

MR PATERSON: That's right.

COMMISSIONER GOZZI: Is there?

MR PATERSON: So any service that required one of its - one or all of its workers to be on a roster to receive a call either to perform duties over the phone as in the telephone counselling service or to be available to be recalled for work in the event of a crisis of some sort which is usually the characteristic of it, would access these provisions.

The other major telephone counselling services outside of this being Lifeline whose telephone counselling is actually performed by volunteers. They're paid staff coordinate, but the Lifeline telephone counselling service is run by

volunteers, so there's no employment relationship and no issue.

COMMISSIONER GOZZI: I mean, I don't understand why you have an off-roster provision. I mean if you're going to have people on call then why wouldn't you have them on call on a rostered basis - why would you have - I can understand the rationale about the weekend aspect but why would you have an off-roster provision?

MR PATERSON: This services the -

COMMISSIONER GOZZI: I mean if you're going to pay for it, you might as well roster to be on call wouldn't you? I mean what's off roster?

MR PATERSON: Well if that creates a confusion we can delete 'off-roster and', but those who are off roster -

COMMISSIONER GOZZI: Well operationally I'm just asking the question really.

MR PATERSON: Those who are off roster I believe would be as in somebody who worked a shift - an evening shift in a shelter and then went - you know, was off roster being off the shift work roster and on a recall - off their usual fully paid work cycle roster.

COMMISSIONER GOZZI: I don't know what you'd do. I mean I'm just really asking -

MR PATERSON: Well the intent of -

COMMISSIONER GOZZI: - you know, where is -

MR PATERSON: - that paragraph is to say, whatever - whatever it's called, that the allowance is in respect of any other period, is \$30 other than the period defined above. So if that's just called a weekend allowance, that's fine.

COMMISSIONER GOZZI: What's the rationale for that? Why - why double?

MR PATERSON: I suppose in effect for the same reasons that there are penalty rates for working weekends - with somebody who makes themselves available on the weekend -

COMMISSIONER GOZZI: There's a differentiation between a Saturday and a Sunday weekend though.

MR PATERSON: It could be.

COMMISSIONER GOZZI: You've lumped - you've lumped them all in together.

I mean - alright, well, yes I'll look at the off-roster part of it.

MR PATERSON: The wording 'off roster and'?

COMMISSIONER GOZZI: Mm.

MR PATERSON: The sleepover provision -

MR FITZGERALD: Could I just - just say there - these provisions were produced to us this morning and we seemed to have overlooked one aspect relating to the recall which probably would be best to go off record to discuss briefly if we could.

COMMISSIONER GOZZI: You might want to take the lot away and have another whack at it in light of the conversation we're having, but really it's a matter for the -

MR FITZGERALD: Well if that's what the intention of the commission is then that's fine.

COMMISSIONER GOZZI: - for you to - I mean it's up to you.

MR PATERSON: Well there's either consent or either - we either have consent on a document that we're producing to the commission - presenting to the commission - or we don't and if we don't we're not putting it up.

Obviously we're prepared, and have been prepared throughout this whole process, to amend for the sake of clarification. There have been other occasions on which last minute misunderstandings have qualified the consent to the extent that that particular provision or subprovision has not been put forward - I would believe we'd proceed in the same way.

COMMISSIONER GOZZI: Well-

MR PATERSON: And so that I'd just like to, you know, be fairly - I mean I think you can come to those issues where there have been misunderstandings in terms of this document given that I've talked my way through it, put on the record our intent - you can do the same likewise and then mention any of those problems. If we don't have consent at that point in time, then those matters won't proceed. If there's -

COMMISSIONER GOZZI: Well look, let's just keep going for a moment.

MR PATERSON: Yes. I mean I am up to the last stage -

COMMISSIONER GOZZI: Yes.

MR PATERSON: - of specifically talking of the sleepover. The conditions of sleepover up to - well the conditions of sleepover in respect of (a), are basically the setting in which sleepover takes place, (b) confines the conditions under which a sleepover takes place - that there's an agreement - there is an agreement between the employee and the employer in respect of sleepover periods. The period is a maximum of 8 hours of a 12-hour shift - the remaining four paid at night shift - that effectively prevents the sleepover period from standing alone. The sleepover period counts as night shift hours for the purposes of entitlements and limitations on night work. And then the allowances provided on the basis of effectively an availability allowance of \$15 and then a payment of an hour's work at time and a half.

Then where an employee is required to perform duties, each disturbance is recorded and paid in multiples of one half hour's work and that the payment is remuneration for an hour's work whether as a single disturbance of 1 hour or two of the maximum of 30 minutes. Subsequent disturbances paid in multiples of 30 minutes at the appropriate overtime rate.

I believe that takes account of the two factors in - that are commonly lumped together in a sleepover - that is one of availability and one of compensation for time worked or potential time worked - whether it's actualised or not.

Notwithstanding any last concerns or variations -

COMMISSIONER GOZZI: You see, I don't want to keep picking holes in this, but honestly there are some glaring matters that need to be at least tidied up. Now - you know, in (b) - just without reading it line by line, in (b) - that's the sleepover section - in (b) Roman Numeral (ii) you got:

A "sleepover" period shall consist of a maximum of 8 continuous hours of a 12 hour night shift, the remaining 4 hours to be paid at night shift rates.

Now there's nothing wrong with that as it stands, however, there is no cross-referencing at all I don't think - there may be, but just going through - to the sleepover provisions that we talked about earlier on.

MR PATERSON: Shift provisions.

COMMISSIONER GOZZI: Yes, I think so - where, you know, sleepovers are comprehended wherever that is, and I just think in terms of efficiency and clarity, those type of matters probably need to be looked at. I mean, you've placed great

emphasis - and correctly so - on the need for this document to be user friendly and in that context, I think the cross-references need - you know, are important and just the actual, physical workings of the provisions that there is clarity about how the provisions really apply in a practical sense.

MR PATERSON: Yes, I take that on board and easier way to solve that particular one, but -

COMMISSIONER GOZZI: I mean, there might be other queries in the context of -

MR PATERSON: I think the intent that I would present on that is that a - the shift would be a minimum of 12 hours and the minimum of 8 hours would be - a minimum of 4 hours would be paid. So if it was longer than 12 hours -

COMMISSIONER GOZZI: ell -

MR PATERSON: - then - if the 8 is the - a maximum of 8 continuous hours is the reference point. The intent is to have that embedded in a paid shift. If the paid shift stretches beyond 12 hours then it would be the remaining paid hours, so a minimum of 12 hours with the remaining hours paid at night shift rates would I believe clarify that.

COMMISSIONER GOZZI: Whatever, it needs to be amended.

MR PATERSON: But -

COMMISSIONER GOZZI: We'll just go off the record for a minute.

OFF THE RECORD

COMMISSIONER GOZZI: All right, Mr Paterson. I propose that perhaps you - the parties may wish to rework that agreement. Fundamentally you have indicated that you are in agreement with that, unless there are some specific issues that want to be raised by any of the parties. Mr Kleyn, do you want to raise any specific issues?

MR KLEYN: Not at this stage, Mr Commissioner.

COMMISSIONER GOZZI: Thank you. Mr Fitzgerald?

MR FITZGERALD: No, thank you, commissioner.

COMMISSIONER GOZZI: All right. Ms Pammenter, are you in these proceedings, without going back to the transcript? I think you sought leave to intervene at one stage.

MS PAMMENTER: Not officially at this stage.

COMMISSIONER GOZZI: All right. Well then I won't ask you to comment. Probably just as well according to everyone - the looks I had up from the bar table. We'll keep you quiet and I won't recognise you.

All right. We'll adjourn these proceedings to tomorrow morning and - okay - just before you go - we'll go off the record.

OFF THE RECORD

COMMISSIONER GOZZI: These proceedings are adjourned to 10 o'clock tomorrow morning. Thank you.

HEARING ADJOURNED