TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3926 of 1992

IN THE MATTER OF an application by the Tasmanian Confederation of Industries to vary the Nursing Homes Award

re wage rates, classifications, definitions and conditions of employment

T No. 3987 of 1992

IN THE MATTER OF an application by the Health Services Union of Australia, Tasmania No. 1 Branch to vary the Nursing Homes Award

re wage rates, classifications, definitions and conditions of employment; restructure award in accordance with the structural efficiency principle

COMMISSIONER WATLING

HOBART, 10 December 1992
Continued from 7/12/92

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER WATLING: No alteration to appearances? No?

MR ....: No.

COMMISSIONER WATLING: On the last occasion we were together Mr Warwick finished his submission in relation to rosters. Mr Targett?

MR TARGETT: Thank you, Mr Commissioner. I will commence by handing up an exhibit.

COMMISSIONER WATLING: That makes - where are we - right - we'll mark it exhibit TCI.11.

MR TARGETT: If I could perhaps briefly, Mr Commissioner, just illustrate what's in that particular exhibit. The exhibit is in two parts. Firstly it is a draft of a - of clause 39 - Rosters. On the second page you will note that I've had to cross out subclause (h) and at the next - the third page is a new subclause (h) to be incorporated into the draft clause. And the fourth page incorporated within that exhibit are some draft definitions which I will address.

Well I commence my submissions, Mr Commissioner, by stating that I have in the intervening period had the opportunity to closely examine HSUA.6 which is the union's proposal to clause 39 - Rosters, following the opening of these proceedings, and with very close examination of that particular document I must make the point very clearly that we are strongly of a view that their proposal is totally inadequate, is confusing, is contradictory and, in my view, would be detrimental to be included into the award.

Having had the opportunity to examine the proposals that they wish to incorporate into the award, the employers have revised their position and are prepared to accede to some of the requests that the union has put forward, and in that vein I have redrafted the document - redrafted the clause which is now contained in TCI.11.

As a result of redrafting clause 39, to accommodate some of those things which the union seek, we - I believe it is necessary to also make some changes to the definitions clause as was put forward in TCI.6, and in that area it is necessary, in our view, to change the definition of a rotating roster and to incorporate a new definition for a non-rotating roster.

We put forward this proposal to the commission in the interests of attempting to expedite the finalisation of this particular award for we believe it has dragged on far too long, and the employers are as anxious, as I am sure the employees are, to have this matter finalised and the benefits which will accrue to the employees to commence. The essential changes other than moving within the clause some subclauses

into different order - the essential changes which we have made to the clause can be illustrated in the following way.

If I firstly refer to subclause (c) on the first page of the document, that clause has been altered to provide a situation where it clearly illustrates within our proposal that for - that a rotating roster is the prima facie position in the award for employees that are on a roster, and by agreement between the employer and all of the employees a rotating roster can be dispensed with and a non-rotating roster implemented. That is slightly different to that which we had in TCI.6 where our proposal was that it be a majority of employees. So we have gone back to the situation of saying all employees in agreement with the employer can move - by agreement can move to a non-rotating roster.

The second part to that also is that, as I said, rotating roster is prima facie the position of the award. There could be circumstances where an employer directs an employee to work in accordance with a non-rotating roster. So you have rotating rosters prima facie, or by agreement between the employer and all employees a non-rotating roster, or, the employer may direct an employee or employees to work in accordance with a non-rotating roster. We see a difference between agreement being reached and direction being imposed upon the employees.

If in the circumstances contained within subclause (c) Roman (i) No.1, which is agreement being reached for a non-rotating roster, if subsequent to that there is a move to change from a non-rotating roster back to a rotating roster, we have provided in Roman number (ii) the facility and the method for which that would take place, and that is, that agreement must be reached between the employer and the majority of the employees. The difference being, to go back to a rotating roster it requires the majority of the employees, to go from a rotating roster to a non-rotating roster it requires all employees. So that particular subclause is an essential difference between that which we had put forward in TCI.6.

We believe that the proposal which is contained within TCI.11 in subclause (c) meets substantially the areas of concern which the union raised in the previous hearing day, but has been put in such a way that provides the proper facilitative provisions or change to be made. The proper facilitative provisions providing the employer/employee agreement but still protecting the employees from undue pressure. And further into the clause if there is pressure or directed to work non-rotating rosters there are some other benefits which accrue to the employee which I'll get to in a moment.

The next essential difference between our previous position and this particular document is contained in subclause (h) which - and I refer the commission to the third page of TCI.11

- and in subclause (h) we've split that into two parts. We've done this once again to try and meet some of the concerns that the union have raised and in referring to subclause (h) I'll do it each item separately.

In Roman numeral (i), we are providing a subclause here which means that if an employee who is engaged to work on a rotating roster and is directed by the employer against their express wishes to go onto a non-rotating roster, which obviously refers back to subclause (c) Roman (i) No.2, then that employee would be paid a 30 per cent loading for the time they're worked under that direction, and that 30 per cent would be in substitution for a 15 per cent roster loading and not cumulative upon it.

The concerns that were raised by the union essentially were, that there may be circumstances where because of specific circumstance arising in a nursing home an employee is unable to get any agreement from an employee to change to a non-rotating roster for a specified period or special circumstances then he may be required to direct them to do so. And if that is the case then they should in fact receive a higher loading. We have put that into this particular provision, but in doing so it must be accepted that - by the union and by the commission obviously - that it now creates implicit within the award the ability for an employer to direct an employee to do so. Whereas under the award as it previously stood it is our submission that the employer did not have that ability. So in asking for these provisions and us trying to comply with those requests we strongly emphasise that it is implicit now within the award that the employer has that ability.

In Roman numeral number (ii) it's a slightly different set of circumstances whereby if an employee is directed by the employer to work on a non-rotating roster against their wishes again, and on - and when they are directed to work on that non-rotating roster, they're directed to work on a work pattern where the work commences between the hours of 4 pm and 6 am, then that employee shall be paid 30 per cent more, once again in substitution for and not cumulative upon the 15 per cent roster loading. If I refer to the old terminology in the award prior to this redrafting exercise, essentially that means that if an employee is directed against their wishes to work the old night shift, then they will receive a 30 per cent loading instead of the 15 per cent.

Once again, implicit within this proposal if it is accepted by the commission and put into the award, that the employer has the ability to direct an employee to do so providing they pay the 30 per cent penalty, wherein our submissions under the award as it previously stood they did not have that ability. And by the union seeking to have these sorts of provisions, although this isn't in identical terms to that which they sought, they are

acknowledging, in our submission, that the employer now has that right; the right to direct people to do so.

The next essential difference, Mr Commissioner, is in subclause (i) which is on the second page of exhibit TCI.11. This clause, in our submission, forms - or takes the form of a savings provision and what we seek to do with this particular subclause is put in place or enshrine those rosters which are already in place in the workplace in this state. So that any roster that is in place in a nursing home as of 9 December, which was yesterday's date obviously, and if that roster does not comply with the new definition - that I will get to in a moment - of a rotating roster, then for the purposes of this award those existing rosters shall be deemed to be non-rotating rosters established in accordance with subclause (c) Roman (i) No.1, which is, they are implemented by agreement.

So they are then in the award, they are deemed to have been - sorry - they're not in the award - they are in place, they are deemed to be in place by agreement with the employees and to move away from that position of it being a non-rotating roster they would then have to comply with the provisions of subclause (c)(ii) which is by agreement with the employer and the majority of employees to go back to a non-rotating roster.

And the reason I seek for that to be incorporated is that the changes that I have put forward in this particular proposal are such that it would substantially jeopardise the financial position of employers if that savings provision was not in place. It would open up the possibility, in our submissions, for the union to go around and attempt then to run an argument with individual employers of saying that the existing rosters were not by agreement and trying to make changes perhaps saying that they're there by direction and getting additional penalties. And we are not prepared to have a situation where that is open to the union to do.

For that reason, Mr Commissioner, I would submit that if the commission found it inappropriate for subclause (i) to be included in this clause we would then ask the commission to reject in its entirety TCI.11. So if subclause (i) is not acceptable to the commission we would ask that the entire proposal be rejected and that proposal contained within TCI.6, which we have previously put forward would be the clause which we believe should go into the award.

COMMISSIONER WATLING: So subclause (i) is an integral part of the part of the package that can't be separated from the package?

MR TARGETT: Cannot be separated as far as the employers are concerned. It is either all or nothing in relation to subclause (i). If that can't go in then we don't want any of

this proposal to go in. We refer to our position contained in TCI.6.

Mr Commissioner, essentially they are the differences between what we have currently put forward to this commission in TCI.6 and what is now contained within TCI.11. It is not in identical terms to what the union is seeking. There are differences for example in that the union sought to have in some circumstances 50 per cent loadings apply. In the union's document it could be that those loadings applied on top of the 15 per cent loading. There was no explicit words within their proposal that the employer also had to agree which we believe to be absolutely fundamental to the operation of the business through the management prerogative. And also they sought to have included into their proposal a number of issues which we have incorporated into the definition which I'll get to in a moment.

Apart from those areas that I've now pointed out as being different, the balance of our arguments which were in relation to TCI.6 apply to this. I do not believe that anything which was put in TCI.6 detracts - or should detract from TCI.11 so those arguments can stand in relation to this particular exhibit, but I would ask the commission to take on board the additional points that I've now raised. Obviously we have retained within the proposal in TCI.11 our desire for the span of hours to be 6 am to 7 pm which was the subject of arbitral proceedings earlier in this particular matter and we still seek that to be contained in the provision.

In moving to the last page of exhibit TCI.11, which are the proposed changes to the definitions clause, if I firstly refer to the definition for rotating roster, the difference between the existing proposal in TCI.6 and that which is contained in TCI.11 are the three Roman numeral points contained within the definition, and what we have attempted to do by incorporating those into that definition is provide some specific requirements to be met if the employer utilises the rotating roster.

Obviously by including them within this definition if a roster is currently in place which in one part does not meet the definition then it is a non-rotating roster. So to be a rotating roster it must meet all three points, but it is not an `or-or-or' it is an `and'; they must meet all three points.

We believe, once again, by incorporating those three points that it picks up a number of the concerns that the union had within their proposal but has done it in such a way that it is quite clear and makes the entire proposal workable which we submit wasn't the case in HSUA.6. As a consequence of changing the rotating roster definition as we have, and the changes I've made to - or proposed changes I've made to clause

39 - Rosters, we believe it necessary to incorporate a definition for a non-rotating roster, because there is reference for clarity purposes in the rosters clause to a non-rotating roster. And in our attempts to ensure there is no confusion after this award is put in place we believe it is best to have that definition there, and we are merely saying that a non-rotating roster is a roster which does not meet the requirements in the definition of a rotating roster. It may seem, I guess, fairly obvious but I think to avoid any confusion it is best to stipulate that within the definitions clause.

COMMISSIONER WATLING: Are we talking about `does not fill all the minimum requirements'?

MR TARGETT: Yes, that is what we're talking about, Mr Commissioner. I accept that point and with your leave would seek to include the word `or' in the definition of non-rotating roster.

COMMISSIONER WATLING: Right. Granted.

MR TARGETT: Mr Commissioner, I don't intend to go on ad nauseam over this particular issue because there have been substantial off-record discussions, but, I would put to the commission that the proposal contained in TCI.11 substantially meets concerns raised by the union, although not all of the concerns. We believe that the proposal that we're putting forward is more than fair and equitable. It provides a clause and definitions for the award which are clear and succinct and are not open to misinterpretation. And with the savings we'd put in subclause (i) protects the employer from being the subject of a - an unscrupulous campaign to try and obtain benefits which people should not obtain and we would ask on that basis that the commission on this issue accept our proposal contained in TCI.11 and reject that which is contained in the union's proposal, HSUA.6. If the commission pleases.

COMMISSIONER WATLING: Thank you. Mr Warwick on that point.

MR WARWICK: Thank you, Mr Commissioner. I'm really not sure what was intended by Mr Targett's comments about - or his use of the word `unscrupulous' but I don't see it as appropriate to - to give it particularly much attention in the circumstances.

On a technical basis, Mr Commissioner, we would seek to withdraw from HSU.6 as our substantial claim on the basis that there has been a significant degree of consent reached in respect to TCI.11 and we would simply seek to endorse that document as our claim with some exceptions I would seek to take you through. The first of those, Mr Commissioner, are -

COMMISSIONER WATLING: Right. Now that raises the question of the status of the submissions that have been put thus far. Are you now starting afresh your argument on rosters?

MR WARWICK: Indeed I think I'll need to for the purposes of the record.

COMMISSIONER WATLING: Right. So should I disregard all the submissions that have put thus far and now concentrate on the submissions that you wish to make in relation to TCI.11?

MR WARWICK: Yes, Mr Commissioner.

COMMISSIONER WATLING: Right. Right, well you take me to TCI.11 then and the arguments that you want me to consider in relation to arbitrating any matters.

MR WARWICK: Thank you. There are a number of matters which I should firstly bring to your attention because they emanate from other issues which are before the commission for decision. They're in the nature of cross-references, if you like.

COMMISSIONER WATLING: Consequential amendments?

MR WARWICK: Essentially, Mr Commissioner.

COMMISSIONER WATLING: Yes.

MR WARWICK: The first of those is the - the arbitration which has - or the submissions that have been put to the commission on the spread of hours. In - for example, in subclause (a), TCI.11 talks about employees required to work ordinary hours outside the span of hours, 6 am to 7 pm. Our submission was that the span of hours for people who are employed on a roster should be 6 am to 6 pm.

COMMISSIONER WATLING: Right.

MR WARWICK: And there are -

COMMISSIONER WATLING: And (d) is it?

MR WARWICK: I think they're the only other - (d) is the only other occasion where that occurs, Mr Commissioner.

COMMISSIONER WATLING: Right.

MR WARWICK: The second issue relates to the question of 10-hour shifts and there is a reference - a cross-reference in subclause (e)(i), which essentially goes to that question.

And, indeed, a cross-reference in (g)(i); this also relates to 10-hour shifts. But they are, of course, consequential only.

COMMISSIONER WATLING: (e)(i) and (g)(i). Right.

MR WARWICK: Mr Commissioner, the first matter with which we have some level of disagreement with TCI.11 relates to the process by which, firstly, a roster may become a non-rotating roster, and secondly by which a non-rotating roster may revert to a roster - to a rotating roster.

As Mr Targett indicated, that matter is obviously inextricably linked with subclause (i) which is essentially the savings provision in relation to existing rosters. It was Mr Targett's submission should clause (a) - oh, subclause (i) not be acceptable to the commission then all of TCI.11 should be rejected. We have no difficulty with the savings provision and subclause (i).

COMMISSIONER WATLING: Right.

MR WARWICK: We do have some difficulty with the concept of the employer being, if you like, able to veto any return to a rotating roster via the process set out in (c)(ii). Now we're not able to reject the employer's rights in that regard but it seems to us that it would be somewhat unfair if the circumstances were that a 100 - 100 per cent of employees wish to revert to a rotating roster after having worked on a non-rotating roster and the employer could simply say no.

We believe it's probably fair to say that even under the construction of the other award the employer would have been intimately involved in any decision to implement a non-rotating roster. Our concern is not so much with that question. The question really is if - if the employees decide for whatever reason they believe that a rotating roster would be more fair, then clearly within the terms of TCI they would - TCI.11 they would not be able to have a rotating roster should the employer not agree.

COMMISSIONER WATLING: So you want to give the power of veto to the employees?

MR WARWICK: I don't believe that that equally would be as fair, Mr Commissioner. We think that -

COMMISSIONER WATLING: Neither do I really.

MR WARWICK: No, I could appreciate that point. I think at the very least there must be in (c) Roman numeral (ii) some provision to say that each of the parties cannot unreasonably withhold their agreement.

COMMISSIONER WATLING: Well how would that work if it says the majority of employees?

MR WARWICK: Well, indeed it may - it may mean that the clause would have to say that where a majority of employees desire a non-rotating roster an employer cannot unreasonably withhold agreement. That would seem to us to be a far more equitable arrangement than what is proposed in TCI.11, and particularly so bearing in mind that that sort of terminology is being inserted into awards generally and it's generally the union who is required to not unreasonably withhold its agreement.

COMMISSIONER WATLING: I am not too sure what it means at the end of the day.

MR WARWICK: Well I'm not too sure otherwise as well, Mr Commissioner, other than that (c) and - subclause (c) and subclause (i) taken together might mean that an establishment which had certain rosters in place and which don't meet the minimum requirements of the definitions shall be rotating rosters and they shall always be rotating rosters. That may be the consequence.

COMMISSIONER WATLING: Non - non-rotating.

MR WARWICK: I'm sorry, non-rotating rosters - that may be the consequence of the two clauses taken together. And we would certainly argue that that is - wouldn't be a provision which would meet the requirements of the structural efficiency principle in respect of flexibility. It would, in fact, make the clause somewhat inflexible in that if you go to a rotating roster that's it you really can't have - if you go to a non-rotating roster that's it you really can't have a non-rotating - a non-rotating - sorry - a rotating roster again. In respect to the other, I guess, significant matter which Mr Targett addressed you upon which is the question of subclause (h) -

COMMISSIONER WATLING: I take it that you're agreeing to that; are you agreeing to that are you?

MR WARWICK: To?

COMMISSIONER WATLING: (h)?

MR WARWICK: Yes, Mr Commissioner.

COMMISSIONER WATLING: Yes.

MR WARWICK: The terms of (h). I simply wish to make some comments in response to - to Mr Targett's view of the world as put to the bench.

COMMISSIONER WATLING: Right.

MR WARWICK: It was Mr Targett's view that these provisions will now mean that the employers have the ability to direct employees to work other than in accordance with a non-rotating roster and that employers didn't previously have that ability. We would say in relation to that, that that is a matter of opinion put by Mr Targett.

Clearly the provisions contained at clause 78(c) of this - of the Hospitals Award as it was - it used to be the Hospital Award - were not at any time interpreted and certainly are before this commission for interpretation. We don't see the - really the point of Mr Targett's submissions other than his expressing his opinion about whether employees did or didn't have the right. I think which it's equally legitimate although probably an exercise in futility for us to say that they probably did have the right.

The point of the structural efficiency exercise is to amend the award so that it is logical and it makes sense to people and that's what we have endeavoured to do. And the provisions we have sought in relation to (h) have done nothing more than that. If I could say, Mr Commissioner, that turning to subclause (g) I'm still not entirely convinced that the mode of expression in that subclause is the best - the best mode of expression possible.

COMMISSIONER WATLING: But you agree to it?

MR WARWICK: I agree to what it means but it does seem to me, Mr Commissioner, that it would be particularly helpful to the award reader if Roman numeral (ii) were to read: where an employee is instructed to work other than in accordance with (i) hereof. He/she shall be entitled to overtime payments in accordance with clause 38.

COMMISSIONER WATLING: Well, what's your submission in relation to the `or' that appears there? It seems to me that it's - the lead-in paragraph talks about: shall be entitled to provisions of this clause with the following exceptions; (i) or (ii).

MR WARWICK: Indeed, the word `or' should be an integral part of - of the clause certainly. My difficulty is not so much with that, it's just when the award reader, in my opinion, after having read all of the preamble and going through all of (i) is left somewhat confused as to the context of (ii) once the reader gets there. I don't believe that - that it's particularly - in terms of the expression it's a particularly clear subclause.

COMMISSIONER WATLING: If we move the `or' to the middle of - of the page in the next line down, would that make it clearer?

MR WARWICK: To the start of Roman numeral (ii)?

COMMISSIONER WATLING: No. After Roman numeral (i) and in the middle of the page another line down the word `or' appeared would that make it clearer? So it was quite obvious that it was, that or that.

MR WARWICK: Well, it would probably assist, Mr Commissioner, but I still believe that the award reader would probably, in the terms of - in terms of the logic of reading through the document, by the time they get to Roman numeral (ii) would read it in isolation, having lost track of all that went before and would be left with, in the reader's mind, with simply what is contained in that sentence which it says, that if an employee is instructed to work gets overtime it seems.

COMMISSIONER WATLING: Yes, well I think I'm going to have some difficulty aren't I in, sort of, educating the reader to read something that clearly says Roman numeral (i) or Roman numeral (ii). There's only so far we can go. But if you're not disagreeing with what it means I'm not too sure what I've got to arbitrate.

MR WARWICK: Pardon?

COMMISSIONER WATLING: I'm not too sure what I've got to arbitrate.

MR WARWICK: Well, I'm just raising with you - the simple fact that I see that as a drafting problem which won't make life easy ....

COMMISSIONER WATLING: And the definitions?

MR WARWICK: The definitions are acceptable, Mr Commissioner, and hopefully will serve the purpose that they're intended to serve.

COMMISSIONER WATLING: Right.

MR WARWICK: Those are the comments I wish to make in relation to TCI.11. Other than those reservations which I've expressed in those consequential matters which I've identified we do no oppose the terms of that clause. If the commission pleases.

COMMISSIONER WATLING: Good, right. Now that brings us to the next matter for arbitration. All right, we'll mark this exhibit HSUA.14 - HSUA.14.

MR WARWICK: Thank you, Mr Commissioner. HSUA.14 is an alternative payment of wages clause which we submit to the commission as being an appropriate and relevant payment of

wages clause. And if I could take you through it, Mr Commissioner. Subclause (a) is not particularly contentious, it simply sets out the terms under which an employee shall be paid. Subclause (b) indicates that where the method of payment of wages is by a direct bank deposit an employee may nominate which bank or financial institution will be - receive the money.

Mr Commissioner, subclauses (c) and (d) I think are the ones that are particularly relevant to the arbitration in question. Subclause (c) deals with the circumstances wherein an employee is kept waiting for their wages as a consequence of an action or default of an employer. And subclause (d) deals with the circumstances where a person is kept waiting for their wages due to circumstances beyond the control of the employer.

Subclause (c) indicates that where it is, if you like, the employer's fault that a person's pay is not forthcoming, that person shall be paid waiting time at the rate of the relevant award rate plus in addition the equivalent of overtime payments for all time kept so waiting. It goes on to say that when -

COMMISSIONER WATLING: So just - let me be sure on that - so that's two and a half times the hourly rate - because it's the relevant award rate plus in addition time and a half - so it's double time and a half.

MR WARWICK: It's not what it's intended to be, Mr Commissioner, it's intended to be 50 per cent more for the first 2 hours.

COMMISSIONER WATLING: Well that's what it - it doesn't say that there.

MR WARWICK: Well I guess it's a matter of opinion, Mr Commissioner.

COMMISSIONER WATLING: Well let me say to you, I am reading it, that it's the relevant award rate plus - it says: in addition to the relevant award rate - right - time and a half, which is the overtime rate. If you say plus in addition to the award rate, you've got the award rate which is $10 an hour, say, and plus - that means you've got to add to it, and in addition to it you've got the equivalent overtime payments which is time and a half isn't it - 150 per cent - so you've got 150 per cent on top of 100 per cent - that's 250 per cent.

MR WARWICK: Well in the interest of clarity, Mr Commissioner, I seek to amend the claim by deleting the words `the relevant award rate plus in addition the equivalent of' - so that it would read: shall be paid waiting time at a rate of overtime payments for all the time kept so waiting.

COMMISSIONER WATLING: So it could either be that or the rate of the relevant award rate plus an additional 50 per cent.

MR WARWICK: Well overtime is 50 per cent for 2 hours and double time thereafter.

COMMISSIONER WATLING: Right. Right. Right - for all time kept waiting. Right.

MR WARWICK: Clearly, Mr Commissioner, it's intended - the clause is intended to encompass overtime payments on a 24-hour basis till the person is paid. We believe that -

COMMISSIONER WATLING: What's your submission in relation to the validity of such a claim? Why should it be on a 24-hour basis?

MR WARWICK: If it's not, mr Commissioner, then there is no penalty for an employee who is not paid on their payday. There is only - there can only be a penalty if a person is employed - is paid on their next day. That means that the employee can be waiting for the whole of the period from when they leave work on the day they're due to be paid until they again return and resume work without receiving any compensation whatsoever. Indeed, Mr Commissioner, in an industry such as this it could mean that a person may be rostered off for a number of days - anything up to 3 or 4 days in the case of a rostered employee as defined. Those sorts of breaks are common in the industry, and indeed -

COMMISSIONER WATLING: Well, couldn't that be catered for if it was to provide for `X' amount per day?

MR WARWICK: But if the person is not rostered to work, Mr Commissioner, how can such a formula provide compensation?

COMMISSIONER WATLING: Well, you can draw up any formula you like.

MR WARWICK: In terms of a claim to put to the commission?

COMMISSIONER WATLING: Anyway, I don't want to impose on your submission. You tell me why it should continue for 48 hours?

MR WARWICK: Well, the purpose of the overtime payment is to ensure that people are paid on time, and without some sort of penalty in the case where it is the employer's fault, and this clause clearly says that `it is due to any action or default of the employer'. The clause doesn't say that an employer shall be penalised when it is beyond the control of the employer.

Clearly all that is required is that the employer do what's necessary to pay the employee. It is open to the employer to seek to obtain cash to pay the employee if there is some difficulty with the pay. The provision that I was referring to then goes on to say that if the person is paid within the first 15 minutes after their usual finishing time, then they should be paid a minimum of 15 minutes in accordance with this provision. Roman numeral (ii) is a clarifying point which says that: No employee shall receive in the aggregate more than the relevant award rate.

COMMISSIONER WATLING: That's two and a half times again?

MR WARWICK: Indeed. I would seek to amend that as well, Mr Commissioner: No employee shall receive in the aggregate more than overtime rates for each hour the employee is kept so waiting, whether the employee is at work or not. So the words, `the relevant award rate (as defined) plus the equivalent' again would be deleted. Roman numeral (iii) is a standard provision, Mr Commissioner, that indicates that allowances shall not be taken into account for the calculation of waiting time.

Subclause (d) deals with the question of an employee kept waiting for wages due to any circumstance which is beyond the control of the employer. In those circumstances, clearly a person shall not be provided - and again I would amend that terminology to take out the words - well, it is a little bit complicated - but I would seek to amend it in a way that would make it consistent indeed with the rest of the document.

COMMISSIONER WATLING: How can you do that?

MR WARWICK: I'd take out the word `not' in `shall not', and a full stop after `defined' and delete all the rest of it, Mr Commissioner.

COMMISSIONER WATLING: So, it will read?

MR WARWICK: `An employee kept waiting for wages for more than a quarter of an hour after the usual time for ceasing work on the normal pay day due to circumstances beyond the control of the employer shall be provided with payment at the rate of the relevant award rate (as defined)', and it should go on to say `for all time worked'.

COMMISSIONER WATLING: What does that really mean, that the penalty is the payment at the ordinary rate?

MR WARWICK: Well, it says that there is no penalty. That's what it means.

COMMISSIONER WATLING: Right. It says, `ceasing of work', `circumstances beyond the employer's control', right; `the employer shall' -

MR WARWICK: The `employee', Mr Commissioner, it should be.

COMMISSIONER WATLING: .... `the employee shall'.

MR WARWICK: `... be provided with payment at the rate of the relevant award rate (as defined) for all time worked'.

COMMISSIONER WATLING: `The employee shall be provided with payment', what does that mean?

MR WARWICK: It means they are paid their normal wages for the normal hours they work.

COMMISSIONER WATLING: What, by cash, or something? We're talking about in circumstances where the late payment is beyond the control of the employer.

MR WARWICK: Well, perhaps we'll forego all that has just been put ...

COMMISSIONER WATLING: You see, (c) talks about where the employer is at fault, and (d) I take from what you are saying is supposed to talk about when the employer is not at fault.

MR WARWICK: I think it would be appropriate to delete all of that which appears after the word `shall' in (d)(i) and replace it with `not be paid waiting time in accordance with (c) hereof'.

COMMISSIONER WATLING: Right. So that will read: the employee kept waiting for wages for more than a quarter of an hour after their usual time for ceasing work on the normal pay day due to circumstances beyond the control of the employee -

MR WARWICK: I am sorry, that should be `employer'.

COMMISSIONER WATLING: - `employer'. Right: shall not be provided with waiting time payments prescribed in subclause (c) of this clause.

MR WARWICK: Yes.

COMMISSIONER WATLING: Right.

MR WARWICK: Subclause (g) simply goes on to say that in those circumstances which are beyond the control of the employer the employee shall be paid, if you like, as normal. That's what's intended.

COMMISSIONER WATLING: Does it say that, though?

MR WARWICK: I believe it does, Mr Commissioner.

COMMISSIONER WATLING: It says: where the payment of wages to an employee is delayed in circumstances beyond the control of the employer the employee shall be paid the relevant award rate for all time worked. Well wouldn't the employee be paid anyway? But the trouble is we are just having difficulty in getting the payment because it's through circumstances beyond the control of the employer. So, is it even relevant? In (i) you are telling us that you don't get any payment.

MR WARWICK: It's probably not necessary, bearing in mind the amendments to (i) that have been made.

COMMISSIONER WATLING: Right, we'll take (ii) out.

MR WARWICK: Roman numeral (iii) simply indicates that in those circumstances where payment of wages is delayed due to reasons beyond the control of the employer the employer shall do all things reasonable and possible to arrange an alternative method of payment, as soon as it becomes known to the employer that the employee's pay will be delayed.

We would say that that is not an unreasonable expectation of an employer in the circumstances where the computer at the bank has broken down, or whatever. Cash payments can be arranged on short notice, and that subclause asks that that happen. Subclause (e)(i) and (ii) are largely unchanged from the old Hospitals Award. They simply state what the employer must provide to the employee by way of information, and in certain circumstances. Subclause (f) simply indicates that where a holiday with pay falls on a normal pay day the pay should be paid the day before.

Mr Commissioner, we would submit that this clause fulfils a significant number of requirements that Mr Targett certainly was seeking in first raising the question of an unfair penalty on employers in circumstances where the payment of wages is beyond their control.

In respect to the question of the construction of the clause, we would say that it is a particularly simple clause, and it has merit in that regard. We don't believe that there is much point in complicating the provision by inserting in clauses talking about agreement for different methods of payment and what might happen to the employer if the employer doesn't meet those particular requirements.

We believe that an appropriate clause should have in it a very persuasive provision which says that there will be a penalty on the employer if the employer was late with the money

because it is the employer's fault. It should have a very, very strong method of discouraging employers from being late with the worker's pay. Where it is beyond the employer's control the simple fact of the matter is there is not much that can be done about it other than the employer trying to make some alternative arrangement. And the clause we propose demands, if you like, the employers do whatever they can.

But we would suggest it is really quite silly to beat employers over the head because they have agreed to try and make some alternative arrangement, and then because for whatever reason they couldn't make that alternative arrangement they should therefore be taken back and penalised again. We commend the clause to the commission on the basis of both its simplicity and also because of the very strong and compelling clause within it which requires the employers to pay on time. If the commission pleases.

COMMISSIONER WATLING: Good. Thank you. Mr Targett?

MR TARGETT: Thank you, Mr Commissioner. If I can start by handing up an exhibit.

COMMISSIONER WATLING: Right. This exhibit will be TCI.12.

MR TARGETT: Thank you, Mr Commissioner. Following the last hearing day, once again when Mr Warwick raised the issue of seeking to alter the payment of wages clause, there have been some discussions between the parties in an attempt to see if we could come to some sort of arrangement, which we weren't able to do so. In looking at the stance that should be adopted by the employers on this particular occasion it seems to us that it becomes a pointless exercise in attempting to reinvent the wheel.

The document TCI.12 which I have just handed up, Mr Commissioner, is a proposed payment of wages clause which we put to the commission would be an appropriate for insertion into the Nursing Homes Award, and this particular provision in TCI.12 reflects a decision of Deputy President Robinson in the Teachers (Public Sector) Award case, which I believe was T.1886, and that was the subject of a significant arbitration between the parties on that particular occasion, and my understanding is was not subject to appeal but accepted by the parties following arbitration.

As I said, I don't believe that it is necessary for parties to continually attempt to reinvent the wheel when we have a matter that has been determined by this jurisdiction on the very issue which is being addressed by the union on this particular occasion. We have not attempted to make changes to the intrinsic proposal contained within Deputy President Robinson's decision, and I think -

COMMISSIONER WATLING: Well, certainly the order -

MR TARGETT: Well, the order that resulted from that decision in that particular case.

COMMISSIONER WATLING: Yes. If I understand, the -

MR TARGETT: But the order directly reflected the decision of the deputy president in that particular matter.

COMMISSIONER WATLING: Well, one would think so.

MR TARGETT: Yes; even though the order was drafted subsequent to the decision it did directly reflect the decision. Obviously we have put the clause in terms to reflect the nursing home environment, but the essential difference between the proposal contained in TCI.12 and that which is put forward by Mr Warwick in HSUA.15, I believe it was -

COMMISSIONER WATLING: 14.

MR TARGETT: 14, sorry. I can't keep track of all of the exhibits. The essential difference between the proposal I am putting forward and that put forward by Mr Warwick revolves around the maximum payment which would accrue to an employee in the result that the wages were late being paid.

Mr Warwick, as I said in his submissions, believes that the payment should be made for 24 hours a day, and it is our argument that in fact there should be a maximum imposed within the award so that the employer in fact isn't paying a penalty on ordinary time for 24 hours a day. We believe that to be totally unreasonable.

We have put in the maximum payment of up to 6 hours in any one day, and we believe that to be an appropriate maximum in the circumstances. I take issue on this particular point with Mr Warwick in that he said that the penalty is there to ensure that payment is made on time. I don't agree with that point that's been put forward. In fact, I believe the payment is there as a penalty if the payment is not made. Like, a compensation to the employee, as opposed to being necessarily a deterrent.

A deterrent implies that if employers in fact don't pay wages on time and do so quite deliberately. We reject that out of hand. Mr Commissioner, we believe as this reflects a previously arbitrated matter before this commission that the reasons that led to the decision in that particular arbitration are valid reasons for the adoption of this proposal into this award, and we rely on the reasons contained within the deputy president's decision to enhance our

submissions, and we would request that this proposal in TCI.12 be adopted by this commission and inserted into the Nursing Homes Award.

I don't propose to make any further submissions on that particular point. I believe at this particular point in time it is probably the last I am going to get on my feet in this particular case - hopefully - so there are a couple of last points that I would like to make.

Firstly: we would hope that this in fact finalises these particular proceedings on this particular award, and would put to the commission at this stage that if, for any reason, the unions seek to once again reopen these proceedings we put on record that we believe that it would be totally inappropriate from here on in. They've had ample opportunity to raise all matters and re-raise all matters which they believed needed to be addressed. So we would oppose any further reopenings of these proceedings.

Secondly: this particular matter has been a very long and arduous task on everybody I believe, including the commission. There has been many days of off-record-discussions, and I would like to place on record the appreciation of the TCI in the assistance of the commission in working our way through these particular issues, in very long and laborious proceedings on occasions, and we'd just like to record our appreciation. If it please the commission.

COMMISSIONER WATLING: Thank you. Mr Warwick, have you anything to add?

MR WARWICK: Before responding to Mr Targett's submission on the payment of wages, Mr Commissioner, I'd perhaps say I wouldn't mind a copy of his exhibit in that regard.

MR TARGETT: That makes it too easy for you, Richard.

MR WARWICK: It was TCI?

COMMISSIONER WATLING: 12.

MR WARWICK: Thank you. If I may, Mr Commissioner, the clause which the TCI seeks is not one - is one that I am reasonably familiar with, and I mean no disrespect to the deputy president, but I do believe that it is a somewhat complicated clause, and I must say that I believe that a number of people working in the industry would from time to time have some difficulty following it through and, in particular, following through the cross-references from one subclause to another. I don't believe that it is a simply expressed clause. It doesn't have that feature and that quality that our clause has.

I don't believe that there is particularly much more that I need to add in respect to that question, other than to say that we don't have problems with payment of wages in the nursing home industry generally. We don't have disputes about that. I certainly hope we won't in the future. In respect to Mr Targett's comments that we ought - in essence, that we ought not to have any capacity to reopen the matter - we certainly don't intend to do so. We don't believe that there are any outstanding matters. They certainly would have been identified before this.

However, Mr Commissioner, we reserve our right to make application in respect of this award and all other awards of the commission to which we are a party at any time as the system allows and, in that regard, I would seek to make a very brief comment in respect to the classification standards that will be contained in the new award - which is one matter that I should have put on the record during the proceedings - in the course of a very complicated debate that took place, and failed to do so.

Mr Commissioner, the health industry is somewhat behind a great many other industries throughout Australia in respect to the development of national competency standards in relation to not only award structures but the broad question of training.

The reason that the industry is somewhat behind is because there has been an enormously difficult task in establishing a National Industry Training Board, and principally there the difficulty has been in determining whether there should be health and community services training board, a health industry training board, and/or a community services training board, and there was a 12 months' consultancy that took place in relation to that and a decision as made earlier this year that there should be in fact one training board for both of those industries.

That has been established, but as I say the question of developing national competency standards is way behind similar developments in other industries. In that regard, Mr Commissioner, we would obviously be wanting to measure the classification standards we've agreed upon against the nationally developed competency standards which will be put in place hopefully over the next 12-month period. And, although we believe we have got it right in respect of those competency standards, we may need to make application, Mr Commissioner, to make any amendments that are necessary.

In that regard, we certainly won't be seeking to come back to the commission to circumvent the classification standards on the basis of seeking increases in wages for our members.

Having said all that, Mr Commissioner, we would also seek to thank you for your assistance in the fairly arduous process of putting in place a restructured Nursing Homes Award. If the commission pleases.

COMMISSIONER WATLING: Good. Thank you very much. Well, there being no further business, I once again close this matter. I am left with a couple of issues to think about and write decisions on. I can't give you a guaranteed date of decision, but all I can say is it will be down in due course, and as soon as it's feasibly possible for me to get it out. Right. Thank you.

HEARING CONCLUDED