

**TASMANIAN INDUSTRIAL COMMISSION**  
Industrial Relations Act 1984

T No. 6702 of 1997

**IN THE MATTER OF** an application by the Australian Municipal, Administrative, Clerical and Services Union for interpretation of the Community Services Award

re Clause 7 - Definitions subclause (b) Classification Standards Community Services Worker Level 2 - Responsibility; subclause (a) General 'Supervision'

PRESIDENT

HOBART, 26 February 1997

**TRANSCRIPT OF PROCEEDINGS**

Unedited

PRESIDENT: Appearances please.

**MR I. PATERSON:** If the commission pleases, IAN PATERSON appearing for the Australian Municipal, Administrative, Clerical and Services Union.

PRESIDENT: Thank you, Mr Paterson.

5 **MR M. WATSON:** If the commission pleases, MARK WATSON. I appear on behalf of the Tasmanian Chamber of Commerce and Industry.

PRESIDENT: Very good. Thank you, Mr Watson. Mr Paterson.

10 MR PATERSON: Thank you. I won't be exhaust - terribly drawn out in these proceedings but there's a number of matters I think we obviously need to pay attention to.

15 This matter comes to the commission by way of a section 43(1) application to clarify and to seek an interpretation as cited in the application, the interpretation of clause 7, the definitions of the classification standards for Community Services Worker Level 2, in particular, the reference under the description of responsibility to an employee working under immediate supervision of a higher classified employee and assistance is readily available when problems occur.

And secondly, the term 'immediate supervision' as defined in clause 7(a) - General Definitions - meaning the supervising employee is normally available at the workplace during the employee's working hours.

20 As a preliminary matter in this, the information provided in the application that goes to the details of the circumstances giving rise to the application, does mention one member of the union employed in an organisation and two other organisations where the union is aware of unsupervised workers working at Level 1 or 2. It's not the intention of the parties to go to an interpretation of those individual position descriptions or positions. There are matters above and beyond and in addition to this question that would need to be considered. The relevance of citing those was to cite the facts of matters that are in dispute between the union and its members and the employer.

30 I have prepared evidence that I'll lead that goes to the descriptions and the definitions - descriptions of those positions and letters that identify the fact that there are matters in dispute.

35 I have had discussions with the - with Mr Watson from the TCCI and we're essentially in agreement on that, that we're seeking an interpretation as to the effect of these particular definitions on positions such as this. So rather than seek a declaration that relates to a particular individual employee's classification we're seeking a declaration on what is in effect a threshold matter that would be dealt with in any disputes or discussions between employers about the appropriate level of classification.

In -

40 PRESIDENT: So you will be asking me to declare what?

MR PATERSON: The union will be seeking a declaration that the award - the provisions of the award -

PRESIDENT: I mean, if you're going to come to that later -

MR PATERSON: Yes - I will -

PRESIDENT: - and you specify that later, that's fine.

MR PATERSON: - that in effect, the provisions of the award mean a field officer -  
5 an employee working away from the environment of immediate supervision cannot  
be classified at less than Level 3 under the award.

PRESIDENT: Mm.

MR PATERSON: That that is in fact a non discretionary part of the definitions -

PRESIDENT: Mm.

MR PATERSON: - and that the award should be interpreted that way and should  
10 be interpreted retrospectively from the date that the classification standards took  
effect with that meaning.

PRESIDENT: Mm.

MR PATERSON: So again, just to reiterate the intent and the purpose of putting  
15 forward the evidence that goes to particular positions, is to identify that there are  
matters in dispute that have a basis in fact and that can properly be brought under  
the act to the commission for an award interpretation matter.

And a further point on that question: I believe that the interpretation - the  
declaration that we seek will assist all the parties in resolving and preventing  
disputes around levels of classification or translation of employees to the award.

20 In considering this matter, we'll first present that evidence that goes to - goes to the  
positions in the way that I have described. You'll note that in the two - the two  
positions I have deleted the references that refer to particular employees or identify  
particular employers. Should you require any clarification as to the application of  
25 these matters into the context, I do have - I believe I have the originals with me and  
that we can clarify that if it's necessary. But again, to state the purpose of making  
these deletions is to make it quite clear as by an agreement with the employers that  
we're not actually pursuing any individual employer or any specific dispute that's  
currently before the commission in this context.

PRESIDENT: Yes, all right. I'll hear from Mr Watson on that in due course or he'll  
30 leap up and object if he doesn't agree.

MR WATSON: Perhaps if I could clarify it now, Mr President. That is quite correct,  
Mr Paterson and I have discussed the matter and we believe that in relation to the  
general issue if Mr Paterson was not going to make specific reference to employers  
then that wouldn't lead me to perhaps lead a whole string of particular evidence  
35 from specific employers about positions. We're talking about the general principles  
under the award and therefore if it needs to be then taken to an individual  
employment situation well then we would do that. But we believe that as far as this  
particular interpretation was concerned it was better to, I suppose, not mention any  
employers and then once we get the decision out of this matter we'll then apply it to  
40 the specific circumstances.

PRESIDENT: Right. Thanks for that. Yes, Mr Paterson, well we'd better mark your  
document.

MR PATERSON: This will be the first -

PRESIDENT: ASU.1.

MR PATERSON: ASU.1 refers - can be identified by the word in bold print down the right hand side, 'memorandum'. The specific parts of this that go to the question here relate to the emergency home alarm coordinator. And note in the  
5 correspondence that the member concerned who provided us with her - a copy of this correspondence believed that she'd been incorrectly graded at Level 2.

The second - the second bundle of material that I wish to present -

PRESIDENT: And this first one has the letter seeking a reclassification and attached to it is the position description of -

10 MR PATERSON: That's correct. I've -

PRESIDENT: - and job specification.

MR PATERSON: - if I can just very quickly go to what the content of - the first letter is the letter seeking reclassification. The pages I have annotated 2 and 3 are the employee's assessment of the position she performs and the page I have  
15 annotated 4, was the original job description that she was engaged under when she commenced with the employer. This material has been provided to Mr Watson in advance of the proceedings here today.

PRESIDENT: All right. Good.

MR PATERSON: The second position - the second letter and job description relates  
20 to a position that is titled 'a community liaison officer'.

PRESIDENT: Yes. Thanks, We'll mark this exhibit ASU.2.

MR PATERSON: And to go to the relevant material within this - within this letter, the first page annotated by me as 1, is a memo from the organisation to the employee identifying the community liaison position as Level 2 Grade 2 and various  
25 other matters related to the implementation of that. The pages annotated 2 and 3 were a revised position description dated the 25/11/94, and the pages annotated 4 and 5 are the - again the original job description provided to this employee on engagement. And the final page annotated 6 is the selection criteria that were provided to the employee just prior to her successfully getting this particular  
30 position.

The purpose of the union in providing that material is to provide you with the contextual information, and, as I mentioned earlier, to identify the particular facts that are in dispute and to identify that there is in fact matters in dispute between at least one employer and potentially in dispute with one or more other employees -  
35 employers.

To quickly proceed on this matter, I will go through the principles of appeal as adopted by this commission and reiterate that on - in a number of occasions - the source document, I presume, really is the matter of T.30 of 1985 which essentially stated the principles and then later confirmed by subsequent other decisions of this  
40 commission.

I then wish to go to the context of the matter, in particular certain aspects of the award-making process; to then turn briefly to the context of this matter in terms of the construction and meaning of the award as a whole. In relation to those matters there are other decisions of this commission that I'll briefly mention in passing when  
45 I get - turn to those points.

The - in relation to - to the first of the accepted principles of the commission, we are - we affirm that we are seeking an interpretation against specific facts; the specific facts being that there are employees employed subject to the Community Services Award who do work in situations where they are not under immediate supervision, and at least two instances we have evidence that they've been classified at Level 2.

The principle issues in - that we are seeking are those cited - principle matters that we're seeking the interpretation of are those cited in the application; the interpretation of the level of responsibility at Level 2 as taken in conjunction with the definition of immediate supervision.

We're not seeking in this case to rely on any issue that goes to the merit of any particular case and in effect what we are doing is relying on the third principle, that is, that the words used in their general context are capable of being construed in an intelligible way. There's no justification for attempting to read into those words a meaning different from those suggested by their ordinary usage. This is the principle of the key element of the union's submission and our contention that those words when read together at Level 2 - at Community Services Worker Level 2, together with the definitions in effect require that an employee at Level 2 has that immediate supervision provided in their workplace.

If I can just take you to the construction of the classification Level 2 - Community Services Worker, Level 2 in the Community Services Award - the elements that we are discussing are those identified under the heading of 'responsibility'. The responsibility definition goes through working - the nature of the direction given to the employee which by the definitions in the award refers to the manner in which - and the manner and type of instruction given. The general supervision: the union's submission is that the general supervision requirement relates to - to the character of the supervision. The fact that it is - the fact that general supervision refers to supervision that is about checking work in progress or checking work on completion and the sort of progress checking that may occur, in this case being in respect - only in respect of complex or unusual situations.

Two points further down we find the words cited in the application 'working under - works under immediate supervision'. The union's submission on this is that these two aspects of supervision are not inconsistent with each other; they're not incompatible with each other, and they don't create any - any ambiguity that they refer to different aspects of supervision, general supervision being how the checking is done; whether it is, as I said, on completion of tasks or in - or work in progress and the immediate supervision refers in effect to the work environment specifying who does it, that is, a supervising employee, and their availability - referring back to the definitions in the general definitions the definition of immediate supervision refers to the availability of the supervising employee.

In passing, I think I should also make a note that I believe that the definitions and the process by which the - or the definitions and the award are probably one of the most exhaustive of this commission in terms of the deliberate attempt to - deliberate drafting of the award in a way that clarifies as much as possible the use of specific words such as immediate supervision.

The intent of the parties in drafting this consent position - I'll return to that question shortly - was to - to aim to prevent disputes about definitions; the fact that these matters are here is not accidental or incidental. It was very clear that the intent of the draft order to as far as possible exclude definitions such that the award could be a stand alone document in effect with the general definitions at 7(a) being a compendium or a dictionary for the award itself.

There's no submission by the union and as - that - that any matter in this application goes to the question of - of - of drafting errors. We're not relying on any drafting mistake and we believe that the drafting of the award and the words that are there were deliberate and clearly resulted in a consent order of these questions.

5 As I said - alluded to earlier, we don't believe that there - we submit that there is no genuine ambiguity in the - in the award and should - should it be necessary to apply the sixth principle, the difficulty is that there was no judgment accompanying the award and the award making process on this particular issue. We submit that in terms of the seventh principle the words do stand alone, and similarly with the  
10 fourth principle we're seeking that the award be interpreted according to the words actually used and they not be read down to imply or infer anything other than what the words there say.

Again, to go to some of the background on this matter, and the context, as the commission - as other parties in the commission would be aware, that this award  
15 was made following a protracted process, the decision of Commissioner Gozzi in March of '95 resolved the principal points the fundamental difference between the employees and the employers, between the union and the TCCI and the CSEOT and directed the parties to produce a draft order consistent with that decision.

I'll just for the record table a copy of my correspondence - or correspondence from  
20 the parties to the deputy president of the commission. It is unsigned. It's dated the 28<sup>th</sup> September. It goes to the process by which a draft order was provided to the commission and the second page of it is the cover sheet from the order of No.2 of '95 indicating that the order was in fact by consent.

PRESIDENT: We'll mark the document exhibit ASU.3.

25 MR PATERSON: To the best of my knowledge, the order was in fact handed down on the 7<sup>th</sup> November 1995 with an effective date of the 1<sup>st</sup> July 1995, in accordance with Commissioner Gozzi's decision of March. The importance of this - these submissions is that there is in fact no accompanying judgment of the commission which goes to the questions of - that we're seeking interpretation on. They were in  
30 effect - were totally presented to the commission as a draft order by consent and accepted and issued as an order of the commission by the deputy president in November of 1995.

PRESIDENT: This is dated 28 September '95.

MR PATERSON: That was the letter to the deputy president of that date.

35 PRESIDENT: Is that - yes - okay. And this is - this is where the classification -

MR PATERSON: And this is where the classifications were then -

PRESIDENT: The first time they were inserted?

MR PATERSON: The first time they were inserted in the award. The decision of  
40 Commissioner Gozzi effectively decided the wages relativities the entry points related to classifications and one or two other matters that went to significant difference between the employers but didn't issue any direction on the actual classification structure.

For the most part the parties were not all that far apart on other matters although we'd relied on different formats for - for the classification standards. We discussed  
45 between - or in - from - subsequent to - or if I can step back a step - subsequent to Commissioner Gozzi's decision being made, the union appealed the decision and the

appeal was unsuccessful, and following that appeal the parties negotiated this consent order to go into the commission, the first time that, yes, the classification standards had been inserted into the award.

PRESIDENT: And it was effective from 1 July '95.

5 MR PATERSON: The effective date was 1 July '95 and in terms of that order - well that date was in fact the judgment and the decision of Commissioner Gozzi in his  
10 decision of 24 March '95 in respect of the various 'T' numbered matters comprised the award-making process, and his judgment and his decision was that the effective date would be 1 July '95 irrespective of when the parties finalised the draft order. And to that extent I'd rely on that part of the judgment to - to - to submit that any declaration made should be declared retrospectively to that date, as I submit that that reflects the content of the draft order and the use of the words as they appear there.

15 In respect of the context of the award as a whole, I note that in one interpretation matter that I can cite a reference to - I believe T.91 of 1985, there is a - just bear with me for one minute - there is a reference that I note in this matter which was a matter of an application by the Hospital Employees Federation, Australia No. 1 Branch, an interpretation of the Hospital Industrial Board Award. I note that at page 9 of that decision, the then president of the commission noted that: One should also  
20 be satisfied that the result of an interpretation is not out of step with the general provisions of the award as a whole and in other matters, it does appear to me that it's permissible and admissible to go to the context of the award as a whole.

The only submission that I wish to make at this point on that, is that looking at the award as a whole, I note that at Level 3 Community Services Worker classification,  
25 there is provision that an employee at that level may be a sole worker in a single programme. The interpretation that we seek would not create any inconsistency with the definitions and the descriptions of the level and nature of supervision at Level 3.

The other matter that does come back to the definition at Level 2 that I'd submit is relevant, is that in Level 2 - this again is a matter that was in fact referred to  
30 obliquely by one of the organisations. I believe it's in ASU.2, where a reference is made to - in ASU.2 in the first paragraph:

*There are differences of opinion between the employers and the Australian Services Union (ASU), however -*

This employee believed:

35 *- will not be affected by the outcome.*

One of the issues that I will go to very briefly that was an issue between the parties at Level 2, was the question of whether any employees could work without immediate supervision at Level 2 and the resolution of that matter had to do with the last star point under the description of responsibility, that permits an employee  
40 to remain on premises without an immediate supervisor present in overnight, shift work or sleep over capacity and during this period the employee shall work within established guidelines, practices and procedures. Advice and assistance would be readily available and the employee would not be expected to perform duties or exercise discretion of a higher level position.

45 The submission I wish to make on that matter is that that is the only exception in the award that goes to the question of an employee at Level 2 working without immediate supervision and I'd submit that there should be no way in which that requirement or the requirement of general supervision should be read down to limit

the general requirement of working under immediate supervision. That stands as the special case that the parties agreed on as the exception and I'd submit, the only and the sole exception to the requirement of immediate supervision.

5 To go to the ASU.1 and 2 - ASU.1 - the employee concerned here is engaged in providing an emergency home alarm service. This requires the employee to visit homes of potential clients of the organisation to discuss with them - and if I can take you to either the position description as prepared by the employee and to page 4 of the original position description - expressly in the original position description:

10 *Responsible for Emergency Home Alarm interviews, installations, rotations and follow-up visits.*

They take place with the employee, conducting that work on their own, visiting people in their own homes and a similar confirmation, if you like, of that is to be found in the position description where the employee identifies there:

15 *To assess, educate, liaise, co-ordinate, install, service and supervise the Emergency Home Alarm System -*

Emergency Home Alarm Service is a service to elderly people - a device that is installed in conjunction with a telephone that allows an emergency alarm to ring and is through a system of getting emergency help to those people in quick situations.

20 I turn to the second of the positions in ASU.2. This position is in a health education and support service to people suffering a particular condition and the role of the employee in this case is to visit and liaise with these particular clients and particularly looking at the second page of ASU.2, under 'Caseload', you will see that it provides for a first, second and third visit for new clients and a first and second  
25 visit for established clients. There is extensive field work implied and explicit in those requirements of the employer in this situation.

Again, that information is essentially the same in the second job description and, finally, to go to the selection criteria that the employer - this particular employer applied to this position, you will note that under the section identified 'Skills', the  
30 employee is required to have:

*Ability to organise work priorities and work unsupervised.*

Again, to reiterate, it's not the union's submission that these particular classifications are to be interpreted. That's not what we're seeking. That is provided to you by way of context and example as to the nature of the work that is done.

35 The other work that I'm aware of that falls within this situation, although I have no documentation to it, is again the position called field officer within a health related organisation where the employee concerned works in the field visiting clients of the organisation on an extensive basis.

40 PRESIDENT: What proportion of time in these sorts of positions is out of immediate supervision?

MR PATERSON: I would believe that in most cases it would be in excess of half of their working time would be spent in that way. In respect of the position identified in ASU.2, the employees spend probably a significant majority of their time on the road and visiting clients and organising groups and liaising with clients of the  
45 organisation.

It's certainly above and beyond anything that would be reasonably deemed to be incidental and in putting to you a declaration that we would seek, I would promote to you our submission that what we have presented here today, the words in the award, the way they're actually used, support a declaration that an employee  
5 engaged to perform duties in a work environment where immediate supervision is not provided and where a significant and substantial part of their work is within that - away from immediate supervision where the award should be interpreted, they should be classified at Level 3 or higher, subject to the general definition in classification standards in the award.

10 PRESIDENT: What if they didn't meet the other criteria, of Level 3?

MR PATERSON: The submission from the union is that this is in effect a threshold matter and non-discretionary. You might also, when looking at the definitions - there are other aspects of the definitions that can be read - that are prefaced by 'may work in a particular way', or 'may perform certain functions'. Our submission  
15 in this case is that this is the employee works. There is no 'may' or 'might'. Certainly, other provisions of the award are written more affirmatively in terms of 'shall' or 'shall not' but I'd submit, this is a non-discretionary and threshold issue and the questions of other functions, other duties, other aspects of the job, would be ones to be applied to determine whether they were 3, 4, 5 or higher.

20 In the union's submission, the words actually used and the intention of the parties in drafting the consent order was to, in effect, put as we've sought in the declaration, the threshold approach to - if somebody can't be provided with - if an employee cannot be provided with that level of immediate supervision, then they should be classified at a higher level than Level 2, unless they come under that single proviso  
25 that relates to - effectively relates to workers in shelters and residential settings that remain on the premises overnight in a sleep-over or shift capacity. But if that is not the case - if we're talking about field officers, then I'd submit that the requirement for immediate supervision is something that - or the lack of immediate supervision is something that, by necessity, determines a level of classification that is at Level 3  
30 or higher.

PRESIDENT: Are you going to address me on what you believe the general definition of 'immediate supervision' is?

MR PATERSON: The general definition of 'immediate supervision', in the use of the words, the supervising the employee is normally immediately available at the work  
35 place during working hours. A number of things - it's supervising the employee, so it is not a client or a customer of the service. The relevant point there is that it is actually another employee of the service who is the one with the responsibility for supervising. The 'normally immediately available' I believe is plain English words, would mean that that person is normally there to be called on if required.

40 The work place, I would argue, should be interpreted to be the place at which the employee is conducting their work, not necessarily the offices or the centre to which they are home-based if you like, but if a field officer or a community liaison officer is in fact out in the community visiting clients, then they in effect take their work place with them. It's the place at which they do their work and perform their functions  
45 and that of course relates to the employees' working hours.

In those terms the importance of that definition and the interpretation to be placed on that definition, I think rely primarily on the fact that the supervision is conducted by another employee and that that employee is normally available to be contacted or to consult with over any issues that may arise on either part and again, the work  
50 place being where the employee in fact works and carries out the functions and

duties that they're directed to by the employer in accordance with the provisions of the award.

5 I believe that I have presented you with the case to the best of our ability and I believe that it is a relatively straightforward matter, maybe not necessarily a narrow matter, but compared to some of the interpretations that this commission has to consider, I believe that the parties, the TCCI and ourselves, are concerned that it is a question of what is the effect of these particular words and I believe that in terms of most of the principles at least, we're agreed on what the issues are. If not, how the interpretation should be framed. If the commission pleases.

10 PRESIDENT: I'm disappointed the agreement didn't go a little bit further. Yes, all right. Thanks, Mr Paterson. Mr Watson.

MR WATSON: Thanks, Mr President.

15 Our submission in relation to this matter I guess will be relatively brief and straight to the point. We intend to put submissions to you based on Mr Paterson's position that effectively, and as I understand it, he's asking for a determination or an interpretation that nobody without immediate supervision can work in the field under Level 3. So, we intend to apply the principles of interpretation to those particular circumstances.

20 Now, just for reference purposes, I have two decisions which I'd like to table. Those two decisions, Mr President, are firstly T.30 of 1985 which Mr Paterson did refer to in his submissions. And then the other decision is, in fact, the decision from T.4715 of 1993 where a full bench of the commission in fact, I suppose, established or reaffirmed the principles of interpretation in relation to these matters.

PRESIDENT: Yes.

25 MR WATSON: So I don't intent to go to those decisions in any detail, but just simply to -

PRESIDENT: Well I will mark them anyway. The first exhibit will be TCCI.1 . The second TCCI.2.

30 MR WATSON: Those decisions, in fact, go through the principles in relation to interpretation matters and there are seven points of principle and as I said in relation to T.4715 of 1993 decision, in fact, those principles had been reaffirmed by the commission.

35 The principles of interpretation regarding specific circumstances and or facts, obviously can't go to merit, equity or intent, providing that the words used are intelligible, using normal English meanings.

40 In relation to the issue of doctrine of generous construction which I think Mr Paterson was perhaps referring to in matter T.91 of 1985, where in fact an interpretation may result in any extreme advantage or disadvantage for either party, I don't believe based on the scope of this particular interpretation that that is a possible outcome. So it would be our submission that the eighth principle, I guess, or the doctrine of generous construction would not, in fact, be an issue in these proceedings.

45 In relation to the requirements of the act, obviously as you'd be aware the act requires you to declare, respectively or prospectively, how the provisions of an award are to be interpreted. And it also provides a mechanism to remedy any defect in the award to declare the true meaning without regard to merit, intent or equity. What I

intend to do, is to go through the relevant parts of the classification definition for Level 2. And I believe that following my submissions it will become clear that this issue is not necessarily clear in the award, and may even require you to turn to section 43(1)(a)(b) of the act for this matter to be resolved.

5 Now as I said, Mr Paterson is effectively asking you to declare that under the Community Services Award an employee employed as a field worker could not be employed any less than Level 3.

Now if we could just go to the Level 2 classification definition in the award, particularly in relation to responsibility. Do you have that in front of you?

10 PRESIDENT: Yes.

MR WATSON: Thank you. If we start off from the first dot point there, it says:

*works under general direction in the application of well established practices, procedures and/or guidelines, receiving instruction on broad aspect of the work, with detailed instruction limited to complex or unusual features;*

15 So if you then go to the definition of 'General direction' which is in the first part of the definitions in clause 7. Do you have that Mr President?

Thank you.

20 *'General direction' means employers receive general instructions covering broad aspects of the work. Detailed instruction is limited to complex or unusual features, and is outcome oriented. Discretion in choice of methods is expected.*

So in relation to that particular dot point, that is the first one, it is our submission that there would be nothing there to establish that a person couldn't work without immediate supervision.

If you then go to the next dot point it says:

25 *Works under general supervision, with work subject to checking on completion of tasks, monitoring of outcomes and progress checking only in respect of complex or unusual tasks/situations;*

If you then cross reference back to the definition of 'General supervision', which is back in the front of Clause 7. It says:

30 *'General Supervision' means work is subject to final checking and to progress checking, only in respect of very complex or unusual situations as required by the employer.*

PRESIDENT: I am sorry I missed -

MR WATSON: General supervision.

35 PRESIDENT: - General supervision. Right. Yes, yes.

MR WATSON: Do you have that?

PRESIDENT: Yes.

MR WATSON: Yes. So you can see there that from those words, again, it would be our submission that there would be nothing in that particular dot point of

responsibility under Level 2, which would require an employee to have immediate supervision.

The next point:

5                   *exercises initiative judgment and has freedom to act within established practices, procedures and/or guidelines;*

Again there would be nothing there to suggest that a person would need to have an immediate supervisor present.

The next dot point:

10                   *works under the immediate supervision of a higher classified employee and assistance is available when problems occur;*

15                   Now it's at this point, Mr President, that perhaps if you're reading through that in a logical sequence from the top to the bottom, you will probably get to that point and you will think, yeah well that's okay, you can probably have somebody working without immediate supervision and then all of a sudden it says that you do need immediate supervision.

If you then go to the definition of 'Immediate supervision', which Mr Paterson did in fact take you to. It says:

*- means the supervising employee is normally immediately available at the workplace during the employee's working hours;*

20                   Well those words are fairly clear. However, that would not, in our submission, necessarily dovetail or follow on from the previous dot points in that particular definition under 'Responsibility'.

The next one goes on to say:

25                   *- may oversee or provide guidance to lower classified employees and/or volunteers;*

So you could have people at Level 2, in fact, guiding other employees at lower classified levels. Again no reference there to needing an immediate supervisor present.

And then the last dot point which Mr Paterson did highlight as well:

30                   *- may be required to remain on the premises without an immediate supervisor present, including overnight in either a shift work or sleepover capacity. During this period the employee shall work within established guidelines, practices and procedures. Advice and assistance would be readily available from senior employees. In such circumstances an employee would not be expected to*  
35                   *perform duties or exercise discretion at the level of a higher classified position.*

So again in that particular dot point you could have somebody working in, as it says, either sleep over or shift work capacity, where they would be by themselves. However, if they were forced into a crisis or emergency situation, then obviously that becomes a different issue as per the last sentence in that particular definition.

40                   Now that last dot point, I think, as Mr Paterson alluded to was in fact a position that we did agree to in putting these definitions forward in relation to, I suppose, when you look at the intent of the award maker, it's going to be very difficult in these

circumstances to look at that, because we don't believe that you can. Commissioner Gozzi's decision, in fact, set out the rates of pay. He then left it to the parties to look at the definitions. The parties got together, drew up a consent document, and that was the position that we did agree to in 1995, as per Mr Paterson's letter that he has  
5 tabled. So again, it would be our submission there that in that last dot point you can have an employee who does not have immediate supervision although it does say, of course, that advice and assistance would be readily available. That would in just about every case be by telephone, beeper, mobile phone etc.

PRESIDENT: It is a special circumstance, isn't it?

10 MR WATSON: Yes.

PRESIDENT: The sleep over.

MR WATSON: Yes. Or shift work.

PRESIDENT: Or shift work.

MR WATSON: Yes. So I suppose it - just taking those words as a whole in relation  
15 to the responsibility Level 4 -Level 2, it's our submission that the words used under that particular section could not possibly, under normal English meaning, lead you to declare that field workers must be Level 3 if they work unsupervised. And we would suggest that even though the words in the award under Level 2  
20 'Responsibility' are clear in themselves, if you read each particular dot point, that when you consider them as a whole that there are contradictions in that particular definition, not so much ambiguity per se. However, the contradictions could perhaps lead to ambiguity in themselves and perhaps a defect in the award which may be more appropriately dealt with by section 43(1)(a)(b) as I alluded to before, which  
25 would in fact be an application to vary the award to, in fact, clarify the meaning where I guess parties could go to things like merit, equity and intent .

PRESIDENT: You don't think I could use paragraph (a)?

MR WATSON: In relation to you issuing an order? That would be available to you, Mr President, however, when you don't have the benefit of the words of the award maker and the intention of the award maker and a decision, I guess, to base on  
30 where everybody was coming from, and also the commissioner's determination, I suggest it may be a little bit difficult to, in fact, issue an order based on that particular section of the act when you are not really coming from any base.

PRESIDENT: All the parties have been notified that this is a possibility though. All the parties to the award have been notified that there is an interpretation.

35 MR WATSON: Yes, today.

PRESIDENT: And likely to be handed down in relation to this matter and the hearing is on today. If they are interested, do you think that they'd come?

MR WATSON: Sorry, Mr President, what I am saying is that in relation to - say for  
40 example if you had a decision before you where - when this award or these classification definitions were determined by Commissioner Gozzi in his decision of the 24<sup>th</sup> March 1995, had he addressed specifically the issue of Level 2 and immediate supervision et cetera, then I guess it would be fairly clear that the award perhaps did have a defect and you would then move to perhaps issue an order under section 43(1)(a) (a). However, in this particular case I suspect it may be fairly  
45 difficult for you to do that, based on the fact that there's no clues for you in any decision of the commission as to where you start.

PRESIDENT: Except it is fairly clear - or you're endeavouring to make it clear that there is a contradiction in the -

MR WATSON: Certainly.

PRESIDENT: - responsibility section of the class. standards for Level 2.

5 MR WATSON: Yes. Well if you were to move to do that, Mr President, then it would be our position that you would, in fact, clarify on the basis that you don't need immediate supervision at Level 2 as per the responsibility. So that would be that, in fact, as you move through the responsibility level, therefore Level 2 where it starts off 'No hint of immediate supervision' talks about general supervision and general  
10 direction, then in fact it should flow on naturally and also it allows people to work in a shift work or sleep over capacity at Level 2 without the immediate supervision as well.

In relation to principle 6 of the 'Interpretation of principles' and where genuine ambiguity does exist, as I said resort may be had to the judgment accompanying the  
15 award. But again that doesn't necessarily help us in this case, because there - I mean, you certainly refer to Commissioner Gozzi's decision, but having been through it myself again recently, I don't believe that it will necessarily help you.

In relation to the principles of interpretation and as they relate specifically to this case, in relation to principle 1:

20 *The construction or interpretation of the award provisions can only be made by considering their meaning in relation to specific facts.*

Well I guess the facts are surrounded around the contention specifically about the immediate supervision and how employees can operate day-to-day-wise. So we believe that we have covered that in submissions.

25 In relation to principle 2 we haven't sought to introduce any merit arguments.

In relation to principle 3 we believe that the words are capable of being construed in an intelligible way in themselves, that is each dot point. However, when you take them as a whole, it does lead to some contradictions and, in our submission, possible ambiguity.

30 In relation to the fourth principle, again we refer to those comments that I have just made.

In relation to principle 5, as I have mentioned a couple of times, it will be certainly very, very difficult to know what the intention of the award maker was, other than that we do know that we had a consent position of the parties which was forwarded  
35 to the commission in November 1995.

Again, in relation to principle 6, the judgment to the award, as I have said, won't necessarily help.

In relation to principle 7, based on the contradictions and therefore the possible ambiguity, we would suggest the more appropriate action would be section  
40 43(1)(a)(b). And as I've said, we don't believe the doctrine of generous construction is appropriate in this particular case.

So in conclusion, Mr President, we would suggest that based on the words in the award for Level 2 responsibility and also based on, I think, the comments that were made yourself during Mr Paterson's submission, you would also have to look

possibly past a Level 2 responsibility section and take the definition as a whole. We believe that you could not possibly declare what Mr Paterson is asking you to in fact do, and believe that the solution to this matter would lie in the other alternative as suggested and that is section 43(1)(a)(b). If it please the commission.

5 PRESIDENT: Yes, thanks, Mr Watson. Mr Paterson, are you -

MR PATERSON: Just to briefly respond.

PRESIDENT: Yes.

MR PATERSON: I don't have any argument with the principles as relied on by Mr Watson. The issue I'd just like to turn to is what options, or what courses of action  
10 you have open to you. It would be my submission that there is no defect in the award, so that any order issued by you could not be directed towards remedying a defect because, in our submission, there is no defect.

To the extent that you found yourself in a position where you were unable to issue the declaration as sought by the union, I would suggest that if the course of action  
15 that you see fit is open to you, is to issue an order under that part, that that order should be directed towards giving full effect to the words, as I have said in my submission, that I would submit that they are the way they are read and that any such order should assert the primacy of this requirement rather than delete it.

If there was any order to vary the award to give full effect, it may be that the requirement of immediate supervision should be cited as the first of the dot points  
20 in this section, so it is clearly read as primary requirement rather than an order, which would change or delete the words and go towards a significant change in the definition of the level of responsibility. So, to that - if your consideration to the submissions put to you, lead you to the making of an order to vary any provision of  
25 the award, I would submit that that order, on the basis of our submission, should be made to give effect to the declaration by making it clear that this is a threshold requirement at this level in the award.

Again, to restate on the question raised by Mr Watson as to whether there is a contradiction or an ambiguity, my submissions were and are that there is no  
30 contradiction, that the definition of general direction and general supervision has more to do with the content of the direction and the supervision, whereas the definition of immediate supervision refers to who does it and their availability at the work place. I think they are critical conceptual issues that the draft order addressed in the clearest possible way, using the clearest plain English that we could identify  
35 at the time.

So, I would reiterate, that I believe you should make and can make the declaration sought by the union and if you see that any order is necessary to clarify the effect of the award and to give full effect to it, then it should be by confirming the requirement of immediate supervision as a threshold issue at Level 2, which would  
40 have the effect of making it clear that anyone without that level of supervision would be at Level 3 or higher. If the commission pleases.

PRESIDENT: Yes. And do you agree, Mr Paterson, that there are no decisions which would assist in the consideration of this matter?

MR PATERSON: I believe that's the case, other than the issue I mentioned in  
45 terms of, if an order or declaration is made. I think Commissioner Gozzi's decision does give the date and gives you the authority to rely on that judgement.

PRESIDENT: Yes. It doesn't go to the definitions at all.

MR PATERSON: It doesn't go to the question which is the subject of this interpretation. It charged the parties with preparing a draft order, which would include those definitions and that is the way in which the award process went. I would quite agree that there is no judgement of the award maker, that goes to the specific definitions of the standards in respect of these matters that we're seeking the interpretation of today.

PRESIDENT: Yes. How long has this been disputed?

MR PATERSON: In terms of the particular employees - I believe the covering letter from the - in ASU.1 is a date of June 1996. So, it was drawn to my attention at that time. There were various attempts to have the matter resolved, but the employers' position was immovable.

Another aspect to this is that the process of translating employees to the award did take some considerable time, that there were consultants funded by the department to undertake various translation exercises and for the majority of employees covered by the award, translations would not have been effected until May-June of 1996. So, to the best of my knowledge, most employees under the award probably haven't known their classification level for a full 12 months yet.

PRESIDENT: Yes. But then it was retrospective.

MR PATERSON: It was retrospective. The decision of Commissioner Gozzi fixed that 1 July date and the award contained implementation processes and a six months phasing in of the actual wage rates, so the full award rates took effect from 1 January. The classification standards themselves were determined by Commissioner Gozzi to take effect from 1 July. The phasing in effectively allowed for half the difference between existing rates and award rates to be paid immediately and the full award rate from 1 January 1996.

PRESIDENT: Can you, from a public interest point of view, inform me as to the number of employees likely to be caught up in such a position?

MR PATERSON: The information I have available to me, in a fairly aggregated form, in relation to the translations by the consultants will identify to me only three organisations in which this is an issue. The majority of employees classified at Level 2 are performing, what I'd call, programme support, administrative support, functions to organisations, or in a number of cases work in that residential setting where they would be required to remain on the residential premises overnight in organisations such as the Salvation Army.

The three organisations that I mentioned in the application are the only organisations I know of in this situation -

PRESIDENT: How many employees?

MR PATERSON: In the case of the employee in ASU.1, I believe that she's the only one subject to this - would be affected by the interpretation. In respect of ASU.2, I believe there are only two based in the north of the state and my understanding, which is from those employees, is that it's not an issue for their counterparts in the south of the state. The third organisation, I believe, has five or six field officers who work, I believe, part time. It's not an extensive problem. It's a specific problem.

PRESIDENT: So, we're looking at about eight or so people including part time.

MR PATERSON: We're looking at probably less than 10 people, and not all of them would work full time. So, in terms of the ASU's membership and interest -

PRESIDENT: What's the annual cost involved?

MR PATERSON: I guess that the annual cost involved would be dependent on the subsequent level of classification. The difference between the actual rates, assuming that the employee has at least two years' experience and was classified at Level 3.  
5 With making those assumptions, the difference in the annual rate between Level 2, Grade 2 and Level 3, Grade 3, is of the order of \$4,330 per annum, so we're probably looking at no more than \$40,000 increase across an industry that, on latest reports, has something of the order of \$50 million worth of funding in it.

PRESIDENT: Right. That's as far as I need.

10 MR PATERSON: The other point that I would like to make is that in this context funding, at least to date, has been available for organisations to meet their costs arising from the making of the award and organisations that had a wages cost, or a labour-related cost arising from the making of the award have, to the best of my knowledge, all secured supplementary funding to meet those increased costs and  
15 where those increased costs are based on a legally binding instrument or order of the commission, there is a strong case and a strong argument that those organisations themselves won't be disadvantaged, that they have a strong claim to pursue public funding to meet that cost.

20 So, I would submit that in the most cases that also mitigates against any public interest disadvantage that might arise in respect of the impact on particular organisations, their services and their clients.

PRESIDENT: Yes. Thanks, Mr Paterson. Do you want to add anything to that public interest discussion, Mr Watson?

25 MR WATSON: I think Mr Paterson is probably right, Mr President, in relation to those particular examples of the anonymous employers that we have but I'm not - I mean, I just don't know what the overall effect would be because there are a number of organisations that use this award that are not members of ours and Mr Paterson probably hasn't got members there either. So, it's very difficult to tell. So, I'm really not in a position to be able to provide any specifics in relation to that public interest  
30 question that you had.

PRESIDENT: Yes, all right. Well thank you very much, gentlemen, for providing me with another one of those wonderful decisions to write. You know, it's my favourite task.

My decision, as you've no doubt come to appreciate, is reserved. Thank you.

35 **HEARING CONCLUDED**