

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T. No. 2587 of 1991 and
T. No. 2473 of 1990

IN THE MATTER OF applications by
the Tasmanian Prison Officers
Association and the Tasmanian
Public Service Association (now
the State Public Services
Federation Tasmania) to vary the
Prison Officers Award

re structural efficiency principle

COMMISSIONER IMLACH

HOBART, 25 February 1994
continued from 17/2/94

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER IMLACH: Are there any changes in appearances?

MR P. NIELSEN: No, Mr Commissioner, from the TPOA.

COMMISSIONER IMLACH: No. I'm sorry for the delay, gentlemen. I was engaged in important matters. Now, you're first off, Mr Willingham?

MR WILLINGHAM: Good morning, commissioner, thank you. I'll just deal with an outstanding matter from the last day of hearing, commissioner. You may recall on that day we had the privilege, if not the honour, of a representative from the SPSFT - a rare honour it is indeed, as is evidenced by the fact that they're not here today, but you will recall on that day, Mr Commissioner, the SPSFT presented an exhibit which I think you noted as SPSFT.1, which is a letter addressed to the secretary of the Law Department seeking some discussions in relation to the State Services Wages Arrangements proposal for chief prison officers and above, and it was claimed in the submission of the SPSFT that they had had to go elsewhere with their custom because they'd received no response from the relevant authority.

I'm advised by my colleague, Mr Marris, that in fact the letter was written in response to that letter from the SPSFT, inviting the union to meet and discuss the issue, and Mr Marris further advises me that he is still waiting for a response to that. And a little later in the morning, I'll provide you with a copy of the response to which I've just referred, Mr Commissioner. Not a lot turns on it. It's just for the purposes of the record.

COMMISSIONER IMLACH: Yes. Is there a time lapse you can - ?

MR WILLINGHAM: I understand that the letter from the Corrective Services Division was sent at around about the end of January. I'm not sure of the date. That's why we're waiting on the document itself -

COMMISSIONER IMLACH: I see.

MR WILLINGHAM: - commissioner, and I'll give you a copy of that, but I further understand - just following that through - that the SPSFT met with the Office of Public Sector Management last week, I think it was, and I've not been advised by anyone from any corner what the outcome of those discussions was, if in fact there was an outcome. So, Mr Commissioner, I'm sorry, but as with the rest of us, you will have to wait in pregnant anticipation.

COMMISSIONER IMLACH: Thanks for that anyway, Mr Willingham.

MR WILLINGHAM: It was a pleasure, Mr Commissioner. Now, Mr Commissioner, on the last day of hearing we reviewed in some

detail the specific evidence which had fallen from the association's witnesses and I think from memory we concluded that task at about five to 5.00 and I hope you've recovered from the ordeal.

It's now my intention to commence today's proceedings by going to the summaries of evidence and the summarising conclusions reached by the association's advocates on the last but one day of hearing. That was the 20 something of January, I think, 26th of January - 27th of January.

We'll be going to a number of the exhibits, Mr Commissioner, which have been tendered by the association and just so that you have an opportunity to get them nearby, I think we commence with TPOA.68 and we work right through to TPOA.97. TPOA.68 was tendered to you on the 24th of June 1993.

COMMISSIONER IMLACH: Internal memorandum.

MR WILLINGHAM: That's correct, Mr Commissioner, and the transcript references for the purposes of this part of my submission, we'll be commencing with Mr Shirley on the 24th of June and the transcript reference is at page 394 to 413.

We'll also be working with the Prison Officers Award and the version we're using, Mr Commissioner, is No.2 of 1991.

COMMISSIONER IMLACH: Well just a minute, please, Mr Willingham. We're right for page 394. All we have to do now is nail the award.

MR WILLINGHAM: I have a spare copy, commissioner, if you can't put your hands on one.

COMMISSIONER IMLACH: I'd be grateful, Mr Willingham. As a matter of fact I've got one myself here now - 2 of 1991.

MR WILLINGHAM: Thank you.

COMMISSIONER IMLACH: I won't need to avail of your kindness.

MR WILLINGHAM: And lastly, commissioner, the National Wage Principles as adopted by the Tasmanian Industrial Commission in the August 1991 State Wage Case which I think Mr Shirley and Mr Nielsen have already referred you to. Not a great deal turns on that aspect, Mr Commissioner, if you can't locate it immediately.

COMMISSIONER IMLACH: I only have the latest ones. Anyway we'll see how we go.

MR WILLINGHAM: I think the latest principles are essentially the same, certainly in any material aspect, commissioner.

And just one thing before I do commence in earnest, Mr Commissioner, I understand it's agreed with the commission and the parties that we only run for this morning's session and we'll be adjourning at lunch. Is that correct?

COMMISSIONER IMLACH: Well it suits me. I'd forgotten if we had arranged it. I'm available all day, but it suits me if we want to finish at lunch time.

MR WILLINGHAM: Well I understand my colleague had -

MR NIELSEN: Yes.

COMMISSIONER IMLACH: Oh, that's right, yes.

MR WILLINGHAM: - put the request through and I'm quite happy to acquiesce to that and -

COMMISSIONER IMLACH: So am I.

MR WILLINGHAM: Very well. Thank you. Excuse me, Mr Commissioner. Mr Commissioner, just referring back to my earlier comments in relation to SPSFT.1, I do now have a copy of the response to that. I might just read it into the transcript. It's dated, in fact, the 3rd of February and it's addressed to the SPSFT, Mr Kerryl Grey in particular, and it says, and I quote:

I refer to your letter of 14 December 1993 raising the question of whether your members classified as Chief Prison Officer and above who are party to the Special Case currently before the Tasmanian Industrial Commission, may withdraw from the Special Case in order to gain access to the wage increase available under the State Service Wages Agreement.

In order to consider the issues involved with your request I propose that you meet with the General Manager of Corrective Services (Mr Ben Marris) and myself following Mr Marris' return from leave on 14 February 1994. Perhaps you could call me after 14 February to arrange a mutually convenient time.

Now, Mr Commissioner, if I could hand that to your associate and arrange copies for my colleagues. Thank you.

COMMISSIONER IMLACH: We'll - yes - will we number that?

MR WILLINGHAM: I - it's there for information only. I'm going to try to achieve an unblemished record with no exhibits

throughout this case, Mr Commissioner. I don't want to start this early. I'm only too conscious of the amount of paper work the commission has to sort through in these sorts of matters and I don't want to add to your burden.

Now, Mr Commissioner, as a prelude to our submissions going to the merit of the association's claim, I would like to clarify our position in respect of those matters which fell from the association during their summing up of the evidence and then during their concluding substantive submissions.

As I have indicated to the commission, the first part of that deals with the submission of Mr Shirley on the 24th of June 1993. I referred you to the pages that we're going to be discussing and they are pages 394 to 413 of transcript.

Now insofar as Mr Shirley's summary of the evidence led deals with matters of fact, that is, that he correctly records what was said by his witnesses, we do not argue with his summary.

We continue to rely upon our submission made on the last day of hearing in response to the actual witness evidence itself. To the extent that Mr Shirley did no more than record in summarised form the evidence which he led from his witnesses, there is no need for us to repeat that response.

There are however some aspects arising from Mr Shirley's summary which require further response from us. Now if we could take you first to page 398 of transcript, Mr Commissioner, and that's where Mr Shirley is revealing the evidence of Officer Graeme Brassington-Bell.

Mr Commissioner, we've already made our submission in respect of this officer's evidence and we continue to rely on that submission. However, in his summary Mr Shirley attempts to construe the evidence given by Officer Brassington-Bell in a way which we submit cannot be supported by the record. In the fourth last paragraph on that page, Mr Commissioner, Mr Shirley says the hospital is a full contact post.

Our response is, well, Mr Commissioner, so what. Is Mr Shirley implying there that there are no other full contact posts around the prison. In the third last paragraph Mr Shirley says that officers have developed some psychiatric skills and are occasionally invited to give their observations to the hospital psychiatrist. Mr Shirley goes on to say that the officers are also asked for their assessment of inmates and what they have observed.

Now, Mr Commissioner, it is just plain inaccurate and misleading to say that officers have developed or acquired or are required to possess psychiatric skills. Mr Shirley and his witness both say that officers are given no specific training in respect of dealing with 'mentally disturbed

inmates'. And you'll find Mr Shirley's concession on that at page 399.

Mr Commissioner, if Mr Shirley meant to say that prison officers going about their basic duties of observation and monitoring of inmates gradually gain experience in human behaviour as it relates to the prison environment, well all well and good.

If he then meant for us to construe that people qualified in the study of the mind and disorders of the mind sometimes invite comments from people employed to observe and monitor inmates in the hospital, all well and good. But if, and to the extent that Mr Shirley intended to convey anything else, we utterly repudiate it.

Mr Shirley then goes on to say that inmates have greater unrestricted access to their cells and other areas of the hospital than was previously the case. Not new access, Mr Commissioner, just more of it. He implies that prisoners confined in the hospital area are wandering around like Brown's cows, Mr Commissioner, to their heart's content.

Now that is a very distorted image, and the facts of the matter, Mr Commissioner, would be abundantly recalled by you as a result of your inspection in the prison hospital. Mr Shirley then goes on to tender a letter from the manager of the custodial corrections to the general manager - that's exhibit TPOA.68, Mr Commissioner.

Now Mr Shirley emphasises that part of the memorandum which says, quote: It would appear that the number of inmates coming into the prison system with a psychiatric or psychological disorder has been increasing.

Mr Commissioner, we say this: it is a fact that inmates of this nature, that is, those with psychiatric and psychological disorders, have been present in the prison system long before the period under review. Now although I have no choice but to accept the apparent increase noted by Mr Halloran, and that was at the time of writing the memorandum, Mr Commissioner, we have no evidence as to whether that apparent increase was a passing phase, as may well be the case in the prison environment.

No evidence has been provided by the association as to whether the figures compare favourably or unfavourably from the commencing datum point and neither were we able to test Mr Shirley or his witness in respect of this exhibit.

I note there, Mr Commissioner, that that is one of the difficulties that we face when the exhibits relating directly to evidence given by witnesses who have been signed off is produced in subsequent submissions. And we have two

alternatives to that: we can either make submissions as we're doing on this occasion or we can seek to recall the witness.

Now on this occasions we've chosen not to complicate matters and impede the swift progress of the case, but it does present a problem and I'm sure that you can appreciate that.

Now at page - 400 and 401 of transcript, commissioner, Mr Shirley revisits exhibits 48A and 48B. Now you may recall, Mr Commissioner, that was the note provided by Dr Lopez to Officer Brassington-Bell and to which Officer Brassington-Bell spoke during his evidence. And 48A is the original handwritten version and 48B was the version which Mr Shirley kindly transposed into typewritten form for ease of reading.

Now as we noted at the time, Mr Commissioner, a document of this nature even when it's written by someone of the stature of Dr Lopez, is not of great assistance to us when the witness is unable or unwilling to elaborate upon its comments, or, that the author is not called to speak to it.

Just dealing with some of the comments that were made in Dr Lopez's note, we respond this way: of course prison officers stationed in the hospital work closely with the medical and nursing staff. It just seems to me to be an exercise of stating the absolute patently obvious. And of course prison officers act in the front line in critical situations of stress and aggressive outbursts. That's common to all areas of the prison system. It is, as we have already said, Mr Commissioner, an inherent and ever present feature of life for any prison officer within the prison.

Now, Mr Commissioner, I think it's worth noting at this particular part of the submission, that what we're talking about is in fact a prison hospital. You could be forgiven, Mr Commissioner, for gaining the impression through the TPOA's evidence and submissions that the prison hospital is nothing more than an adjunct to the Royal Derwent Hospital or some form of institution for the insane. Well, it is not. It is a prison hospital.

You may be forgiven for thinking that the prison hospital is solely devoted to people with severe psychiatric and psychological disorders in which every waking moment it charged with critical stress and physically threatening circumstances. In fact, the prison hospital, Mr Commissioner, provides four services and they are the medical assessment of all people entering custody; outpatient care for inmates in the prison system; in-patient care for inmates requiring medical treatment, and in-patient psychiatric care for prisoners and those who are detained under the Mental Health Act, having been found not guilty by reason of insanity. Now those are the four kinds of services provided by the prison hospital, Mr Commissioner.

Now in addition to prison officers whose duties were and are fundamentally custodial, the hospital is staffed by a wide range of clinical and professional staff. The non custodial includes three doctors of psychiatry, a general practitioner, a welfare officer, eight nurses, five enrolled nurses, and seven casual nurses. I give you these figures, commissioner, to give you an understanding of what the real business of the hospital is about and the differing roles which are played by the staff who populate it - to give you a better balanced perspective of the operation and services of the prison hospital.

And just because I want to give a better perspective to what I believe is the impression you may have been given by the association, which is that it is mostly aligned to psychiatric and psychological disorders which is clearly not the case, in the annual report which I will be providing you a copy of, Mr Commissioner, of 1992-93 for the Department of Justice, which I previously referred to as the Law Department, so I'll get my knuckles rapped for that, but in that annual report they make a note that in the year 1992-93 psychiatric consultations decreased from 2,755 - 2,755 to 1,368; it's a decrease of more than half from the previous year. Psychological consultations, commissioner, were down from 4,033 to 2,537.

Now, I'd be the first to say and I will be saying later that statistics can be very misleading, but the two sets I've just quoted to you, commissioner, those markedly declining figures, are simply not consistent with the sort of picture that was being portrayed by Mr Shirley, his witnesses, and his exhibits.

Let me turn to the point where Mr Shirley was reviewing the evidence of Prison Officer Cox and Mr Shirley tendered TPOA.69. Now that's a letter from the General Manager, Corrective Services to the Secretary of the Tasmanian Prison Officers Association, and the memorandum raises - brings attention to provision of the Criminal Code and particularly Chapter 14. Now the sections that were referred to in that memorandum weren't actually attached to the exhibit, commissioner, but nothing much turns on it. Mr Marris was simply pointing out that those particular provisions of the Criminal Code apply equally to all citizens - all citizens - and that there was no special focus which we from that which goes to prison officers or any other occupational group for that matter.

Now just to make that absolutely clear, the provisions of the Criminal Code, Chapter 14, apply to everyone in this room, irrespective of whether they are prison officers or whether they are not.

Now at pages 386 to 387, Mr Commissioner, Mr Shirley spoke to the wage fixing principles, and in particular, the work value principle. Now, Mr Commissioner, we're going to deal with the work value principle later in our submission and we're going to deal with it quite extensively, so I won't respond to that part of Mr Shirley's submission now, and much the same comment applies in relation to the datum point submissions that Mr Shirley put which you find at pages 388 to 394 and we'll be dealing with that in greater detail a little later on.

Now just concluding with Mr Shirley, at page 413, in finalising his submission, Mr Shirley argues as to why significant wage increases should be awarded to all prison officers - page 413, Mr Commissioner. Now, Mr Nielsen echoed that part of the submission in his own submission of the 27th of January, so rather than repeat it, we'll deal with that particular aspect when we come to Mr Nielsen's concluding submissions which in fact I'm going to do now, if it pleases the commission, and in order so do to, Mr Commissioner, if we could ask you to note that Mr Nielsen's submissions actually start at page 416 on the 27th of January, but the pieces that we will be adverting to are contained within pages 418 to 421.

Now, Mr Nielsen, succinctly concentrates on what the association regards as the significant areas of change and increased responsibility that have accrued to prison officers and that part of Mr Nielsen's submission is contained in only three pages, but he packs quite a lot into them, so we'll comb through it in detail.

Where a particular topic has been raised within Mr Nielsen's summary and it has been dealt with, Mr Commissioner, in our response to the witness evidence, we won't take up the time of the commission and the parties by repeating it in this part of our submission. We will continue to rely upon what we said on the last day of hearing.

And because I want the commission to be fully seized on what we will be covering as we go through our submission, I should also mention that there are some aspects raised by Mr Nielsen which we will deal with more fully later in our submission, but we will touch upon that as we go through Mr Nielsen's remarks.

So at page 418 and 419, Mr Commissioner, Mr Nielsen talked about the changing role of a prison officer and he starts off by using another reference to the term 'turnkey' and I'd have to say, Mr Commissioner, in passing that that expression seems to be used very much more by people within the prison system than without it. It seems as though it's almost used in a pejorative or denigrating fashion. Now I can't understand why because the term 'turnkey' actually expresses a function and

to the extent that officers still turn keys, it's not entirely inappropriate.

And I agree with Mr Nielsen that in days gone past the essential role of the prison officer was more or less as connoted by the term 'turnkey' or 'screw'. I looked up the origins of that too, Mr Commissioner, and I'll take everyone to that a little later on, but we'll plough through this for the time being.

But in this case, Mr Commissioner, we're not discussing the long gone past. We are discussing the quite recent past - the last 10 years in fact. It is demonstrably clear, Mr Commissioner, and we will speak to it later on, that whenever it was that the prison officer's role moved away from one of merely acting a turnkey, it certainly predates the period under review and under your consideration and by a very substantial margin.

I acknowledge, Mr Commissioner, that it could be very difficult to pinpoint an exact, an exact date when that metamorphosis occurred, and in fact, I'd be reasonably certain in my own mind that no such precise date could be pinpointed.

Nevertheless, what we do assert and we assert it most strongly, Mr Commissioner, is that the process of change referred to by Mr Nielsen was well and truly under way in 1984 and for that matter well prior to 1984. And we'll later explain to the commission the reasons that we advance in support of that assertion.

Now at page 419, Mr Commissioner, Mr Nielsen refers to the supervision of sporting and recreational programs permitted to inmates. Now I'm concerned about this one because we have, we believe, demonstrated that these programs were well in place in 1984 and this is reinforced by the evidence of the TPOA and I hope it's reinforced by the submissions that we made on the last day of hearing.

My concern is that this particular topic seems to have had such a constant thread throughout the evidence and the submissions of the TPOA and so being most concerned, I'm further concerned that the commission, as constituted, might - despite my argument to the contrary - have some regard for it, and we have dealt with it fairly comprehensively and I wouldn't have thought in the ordinary course of events I would need to dwell upon it, but it is quite clear that any claim that inmate activities of this kind are new to the period under review, just simply cannot stand up to scrutiny and it follows that a claim that these activities have imposed a greater workload or increased responsibilities on prison officers similarly cannot be sustained.

Now, I'm going to try and put this one to bed, Mr Commissioner. If I can just quote something from a book that I have here. It's the Tasmanian Year Book. I'll do the quote first, commissioner, it's very brief. It says, quote: Groups meet regularly for wood carving, art, pottery, toy making, chess and dramatics; feature and documentary films are screened monthly and concert parties visit the prison regularly. A comprehensive sports program is conducted including athletics, gymnastics, and competitions in cricket, volleyball, basketball.

Now, Mr Commissioner, that finishes the quote. It's taken from page 515 of the Tasmanian Year Book 1975 and it reviews the year 1974, so I thought I'd go back that far. That's 10 years before the alleged datum point in this case and perhaps that will put it to bed.

At page 419, commissioner, Mr Nielsen goes to interaction and welfare. I had some difficulty separating these because these aspects were invariably linked in the taking of evidence and although they're not necessarily quite the same thing, in many instances they are in fact virtually indistinguishable, one from the other, as far as the evidence is concerned. So it seems to us to be a reasonable course to follow and probably quite sensible that for the purpose of this exercise we'll regard welfare as an implicit by-product of interaction and deal with it accordingly.

Now, Mr Nielsen says that prison officers have, quote: taken on the role of a welfare office. Now we totally reject that assertion. It is not borne out by the facts and it is not borne out by the evidence. Indeed, Mr Commissioner, the evidence and the facts indicate that a whole raft of professional people and agencies are available to deal with and do deal with what we might categorise as welfare related issues - or not what I might categorise as welfare related issues; what the association has categorised as welfare related issues.

You may recall, Mr Commissioner, that a wide variety of professionals, agencies, voluntary and community based groups, is active in the welfare and rehabilitation of prison inmates. Not the least of these people, Mr Commissioner, involved in this work are the department's own welfare officers.

Now, without taking up too much of your time, Mr Commissioner, I'd like to again just read a brief extract from the Department of Justice's Annual Report 1992-93, and the extract I'm about to read is taken from page 110, and it's headed 'Programs and Welfare', and again a very brief reference. I quote:

Welfare Officers provide an essential link between inmates and their families. A large proportion of

the work involves assisting inmates with those things that they are unable to do for themselves because of their imprisonment. These include telephoning family members, solicitors, employers, community groups and Probation Officers to resolve problems. Crisis counselling as a result of grief and stress is an almost daily occurrence.

The officers arrange referrals to specialist groups who assist in programs for anger management,-

- something there for me, Mr Commissioner, -

- drug and alcohol problems -

- there's another one -

- and other programs available to inmates either whilst in custody or on release. Welfare Officers also assist with arranging for Social Security payments to be available immediately upon release.

- and that will trigger your recollection, won't it, Mr Commissioner? The prison officer evidence going to a form, which I'll refer to later, which was to enable CES benefits to be paid. Here we have the welfare officers doing it. Everyone's doing it. I'll just finish this quote off, Mr Commissioner:

The Welfare Officer's work load is particularly heavy. The average number of interviews conducted daily is 21 per officer. This is in addition to time spent attending Classification meetings and moving between institutions.

Staying with the subject, Mr Commissioner, the examples of so-called welfare given during the evidence do not reveal anything other than the prison officer acting as the first port of call for a wide variety of inmate requests. Evidence was given that many, if not most of these requests, are referred to the appropriate quarter. That might be the chief or higher, welfare officers, agencies, and other specialists in the particular field.

Other examples were of a kind that anyone would assume took place on a fairly regular basis and have taken place on a fairly regular basis since time immemorial - request for visits for instance, were one instance drawn to your attention. Request to attend funerals was another. Request to make an additional telephone call or a telephone call was yet another.

As I said on the last day of hearing, Mr Commissioner, it begs the questions: if an inmate doesn't approach a prison officer

for these sorts of requests, who would the inmate approach? And if it is within the power of the prison officer to deal with those requests, well they may deal with them, and why not?

But I will say this, Mr Commissioner, no-one - no-one - is ever going to convince me - and I hope won't convince the commission - that inmate requests of that nature are a feature new to the period under review or that the method of dealing with them has changed in any material aspect whatsoever.

We then go to interaction.

And Mr Nielsen says that there is more interaction between officers and inmates and that this interaction is now expected to occur as part of the normal daily duties of a prison officer.

The subject of interaction, Mr Commissioner, figured extensively during the taking of evidence and we covered it in part in our response - our direct response to the witness evidence, but because of the obvious significance attached to this particular matter by the association, we're going to deal with the whole question of interaction at length later in our submission.

Again, this is just one of those examples where I wouldn't want the commission to think we have overlooked that particular matter as we go through Mr Nielsen's summary.

Now at page 420 Mr Nielsen makes a submission which I categorised as an officer is an officer is an officer. What Mr Nielsen actually said was that the officers and the prison at Launceston should be seen as a microcosm of Risdon, and he said and I quote: Their working environment - he was referring to the Launceston Prison - is a reflection of the Risdon prison environment and prison officers perform all the duties which are undertaken by various classifications in Hobart. End quote.

Well what we say, Mr Commissioner, is on the one hand evidence from witnesses at Launceston Prison tended to suggest that their duties, responsibilities, interaction and so forth, were in fact different from the other institutions, and I refer you in particular to Officer Virieux, but on the other hand Mr Nielsen effectively is saying that Launceston Prison is smaller but that their duties are the same.

Now it's the association's contention, commission, not mine, that Launceston can be seen as a microcosm of Risdon. What I understood Mr Nielsen to be saying in that particular part of his submission and for that matter some of his witnesses, is that officers at Launceston carry out all of the functions

performed at the Risdon complex, and my view is that even that is an over simplification and perhaps it's an exaggeration.

Nevertheless, commissioner, in - it is sufficient in my view to say that all prison officers may be required to, and do, perform a range of duties within their competence, ability and experience.

At page 421, Mr Nielsen says: Prison officers are and have been required to perform their work in all areas of Her Majesty's prisons throughout the state.

Could I, just for the record, Mr Commissioner, say that I'm advised that whilst that statement is true, my instructions are that no officer has summarily been directed to serve in a location other than that substantially assigned to him or her and we are unaware of any compulsory directions to serve from one geographical location to another. I stand to be corrected on that - that is my advice.

And of course where this kind of transfer does take place on a voluntary basis, the appropriate compensatory and dislocation allowances have been paid.

Mr Nielsen continues by saying - I quote: Any changes which have occurred affect all prison officers, and because they can be asked or directed to work at any location in the state all prison officers should be reimbursed accordingly with significant wage increases. End quote.

And what I've assumed by that is that Mr Nielsen meant that whatever increases might be granted should apply uniformly to all similarly classified employees.

Now if my assumption is right, that comment of Mr Nielsen's is of some potential significance, and for two reasons: The first is that when Mr Nielsen says that any changes which have occurred affect all prison officers, that assertion is simply not in accord with the evidence from some of his witnesses. One has only to review the evidence which was led from, for example, Launceston Prison, the prison hospital, Hayes, the women's prison, medium security, to confirm what we say. Quite a number of those witnesses and others claim changes to work and routines which were either limited to the individual or the immediate work location or post or the particular prison or division. None of the witnesses, Mr Commissioner, claim that all of the changes detailed in their evidence had equal application to all officers. And that really is scarcely surprising because if such a claim had been made it would not have stood up to scrutiny.

The further point, Mr Commissioner, is that by no means did all of the witnesses attest to the same changes. Where two or more witnesses spoke to the same alleged change we often heard

differing views as to the extent and the significance of the change. In many instances matters being advanced as some substance by one witness wouldn't even be mentioned by another.

Now the second of the two reasons, Mr Commissioner, that we say Mr Nielsen's comments on that particular subject are of some significance is that he falls foul of the work value principle because if you find, as I have just submitted, that the evidence is varied and is not uniform as to the extent of the effect and nature of the change that the officers have adduced, then what Mr Nielsen is asking for is aggregation on averaging which is clearly proscribed by the wage fixing principle.

As I've already indicated to you, commissioner, we will be discussing the work value principle in some considerable detail later in our submission.

Now that concludes our response to Mr Shirley's and Mr Nielsen's concluding submissions and as I've just said, some of those aspects that we touched upon will reappear as we go through the rest of our submission. But I'd now like to take the commission to the submissions of, in order, Mr Hughes and Mr Masters and Mr Hughes' submission commences at page 423 of transcript and is accompanied by exhibits TPOA.70 through to TPOA.83.

Mr Hughes starts off by going through the structural efficiency agendas and negotiations which have taken place between the management and the employee representatives, and I think it's correct to say that all of the exhibits, TPOA.70 to TPOA.83 are part and parcel of that particular topic.

Now those exhibits, Mr Commissioner, they provide an insight into the process - the structural efficiency process - which was followed by the parties. And Mr Hughes, I think was endeavouring to demonstrate that the TPOA's bona fides were unblemished in relation to their side of the bargaining process and also that their commitment to pursuing and achieving the goals comprehended by the structural efficiency principle were similarly untainted. I think it's also reasonable to conclude, Mr Commissioner, that Mr Hughes was concerned that despite a lot of talking and a lot of writing, a lot of negotiation, nothing much was actually happening despite the association's apparent eagerness and enthusiasm.

Now as I will say a little later, Mr Commissioner, I don't see a great deal of point going back and trying to see who was blameless and who was blameworthy, because even if we were able to establish it, nothing would be proved and nothing would be achieved by it.

What the facts do appear to disclose, Mr Commissioner, is that after a very long process of discussion and negotiation at worst - at worst - the parties failed to reach any form of substantial agreement, and at best, the parties haven't finalised the process.

There is one further conclusion that I will draw from exhibits TPOA.70 through to TPOA.83, and that's this, Mr Commissioner: if this case - if this case is all about change then Mr Hughes' exhibits hinder his case rather than help it.

Now at pages 434 through to page 447, Mr Hughes deals with a number of award variation matters. Now I intend to deal with our response to the proposed classification structure at a later stage as a separate component, Mr Commissioner, so I won't dwell on it here now in any detail, but I do want to touch on some of the matters raised by Mr Hughes in this part of his submission. I particularly start off by taking you to TPOA exhibit 84, which is a very basic outline of the classification structure sought by the association.

But, Mr Commissioner, before troubling you with that, you may well recall that the details of that particular exhibit are in fact incorporated into exhibit 91, so exhibit 84 doesn't require more than a passing reference. And much the same is true of exhibits 86 and 87; their content is similarly incorporated into exhibit 91. Exhibit 91, commissioner, you will recall is the big one, the one we've all been waiting for, for so long my friend - my friend and colleague, Mr Nielsen, introduced with such dramatic and theatrical flourish -

COMMISSIONER IMLACH: Panache.

MR WILLINGHAM: - on the 27th - and, indeed, panache, as always, commissioner.

Now exhibit 85, commissioner, which was also tendered on - during that part of the proceedings, is - I'm sorry - does go to a letter from the manager, custodial corrections, to one of the prison drivers at Risdon, and it - the subject matter deals with prison officer transport and prison officer stores, so that exhibit needs to be read in conjunction with Mr Hughes' submission.

At page 437 of transcript, Mr Hughes says that the association does not wish to proceed with these matters at this time. The union's preference is to come back to the issues at some later stage, presumably when perhaps this case is concluded. Now that of course is the association's prerogative, but on that basis there is - there is nothing further for us to respond to.

Now at page 445 of transcript, Mr Hughes proposes a variation to clause 19(c). Now that provision, Mr Commissioner, relates to the period of notice which is required to be given if an employee's position on the roster is changed.

Now the association proposes that the current mandatory provision requiring 7 days' notice should be retained but that a 48 hour mutual consent provision be included.

Now it's in the general concept of the association's proposal we welcome the initiative. Our preference would be for no specified time line to be included. In other words, we would rather the clause provided simply that the existing 7 day notice period could be waived by mutual consent.

At pages 445 to 446, Mr Hughes proposes a time off in lieu of overtime provision to be inserted into clause 19(e) of the award. The association seeks toil to be compensated at an overtime rate. To use Mr Hughes' example, if an employee worked 4 hours overtime at double time it should - the time off in lieu payment would be 8 hours. We do not agree with the proposed variation in the terms expressed by the association.

The minister has no particular wish to see a proliferation of toil provisions anyway, nevertheless our position is that where time off in lieu of overtime is taken it should be on a time for time basis - that is - in other words, if an employee works 4 hours overtime they receive 4 hours time in lieu of payment.

Mr Hughes did not offer any reasons in support of the association's proposal, so it's not quite clear to me why it was advanced in the first place. The association's concept doesn't appear to offer any advantages to the employer and in my judgment it's in fact arguable that it may in some circumstances be more costly than the existing arrangements. Nevertheless, we would be prepared to consider a toil provision but only - only - if it was on a time for time basis as we just outlined.

And I might indicate to you, commissioner, that that - that particular provision - that is, the time for time basis feature in some areas of the public sector as a result of collectively the second tier and first edition structural efficiency agreements. I'm fairly well aware that you've got some knowledge of that.

At pages 446 to 447, Mr Hughes talks of the overtime and penalty rates applicable where an officer works what for the sake of convenience I might call it double or back-to-back shift.

The association's position is understood, Mr Commissioner, and it is not unwelcome. However, in my view, it does raise an interesting concept and one which has been canvassed more than once in the past.

In essence, Mr Commissioner, work performed after the completion of normal hours is treated as overtime, whereas it might appear that work performed immediately before the shift of normal hours is treated as a sort of double overtime. Where the additional shift is worked after the normal rostered shift, only the second shift attracts the overtime payment. Where the additional shift is worked before the regularly rostered shift, Mr Hughes says that attracts the penalty rate as does the normally rostered shift attract the penalty rate, and Mr Hughes goes on to say that this is because of the 8-hour break requirement.

Now I've got to confess, commissioner, I'm uncertain as to why the 8-hour break requirement triggers the double penalty before the normal shift but not after it. My view is that irrespective of whether the additional work is before or after the normally rostered shift it is overtime and it should be treated as overtime. It should not affect the ordinary rate of pay applicable to the regularly rostered shift.

Now I just take you to an example, Mr Commissioner. I don't want to unnecessarily complicate this, but if you took for example an officer who - who is rostered to work from 10.00 until 2.00 - 10.00 till 6.00, I beg your pardon - 10.00 am to 6.00 pm, if that officer is then asked to work a double shift, the officer would work the 10.00 till 6.00 shift and his or her normal shift and then would work from 6.00 pm to 2.00 am in the morning as the additional shift - the double. The officer would then take an 8-hour break and would be available to resume the normal shift - the normally rostered shift which was 10.00 till 6.00. So there wouldn't appear to be a problem and I think that's what Mr Hughes was coming at, although I'm very open to correction on my interpretation of what he was putting.

And then the payment would be 8 hours at the ordinary rate and the 8-hour penalty rate in that particular example. Now if you take the example of the officer, for instance, doing it the other way around. Let's supposing the officer works before the normal shift, so this officer whose normally rostered shift is 10.00 till 6.00 works 2.00 till - the immediately preceding shift, 6.00 till 2.00 - that's overtime. The officer works 6.00 till 2.00 and is paid the penalty component for that and then in my submission works the 10.00 till 6.00 shift and that should be paid ordinary rates, and that officer then has an 8-hour break - in fact has a lot more than an 8-hour break - before resuming the regularly rostered shift, so I don't know where the 8-hour break provision comes into this calculation and in going into my research I just got

this wonderful feeling that maybe I missed something and - I've missed something - but even I haven't in relation to the 8-hour break - even I haven't, commissioner, in relation to the 8-hour break, I'm going to make a submission to you in relation of how overtime ought be treated, and we say that overtime is not being treated correctly anyway.

Now as I've said to you, commissioner, the minister is of the firm view that overtime can be worked before or after the regularly rostered shift. There is nothing startling in that proposition whatsoever. It happens everywhere as you would know, commissioner, and there is no prohibition of it in any relevant award or statute, and I'm being passed a note but I'm not going to look at it, I don't want to be distracted from this very important component of my submission but I'll look at it later - don't take it away.

I've said three times now, commissioner, I may well be overlooking a crucial element in this but if my argument stands up thus far, the following observations may as well go into the melting pot. I don't think the general conditions of service clause, 11 B 3.9(e), which was referred to by Mr Hughes, is relevant to the circumstances. I think it may well be an incorrect application of it.

But even if it is correctly applied two things are quite clear; first of all the overall wording contained in clause 11 B demonstrates why there is an absolute screaming need for awards to be written in plain readily understood English.

MR NIELSEN: Hear, hear.

MR WILLINGHAM: That's one thing we agree on -

MR: With Mr Nielsen.

COMMISSIONER IMLACH: Well why wasn't it presented to the commission then?

MR WILLINGHAM: Unfortunately it has been but to officer - to members of the commission who were at the time unsympathetic to that review, commissioner, that's all I'd better say since I have to still appear before them.

Now secondly, my contention, Mr Commissioner, is that particular clause is written quite clearly on the assumption that overtime will be worked after normal working hours. It does not - it does not contemplate - and you can see that clearly from reading it - it doesn't contemplate the situation where overtime might be worked before the regularly rostered duty hours.

Now I didn't put all of this into the ring to confuse anyone let alone the commission and what I'm proposing, Mr

Commissioner, is that if it pleases you and it pleases the association, I'd like the opportunity to discuss this whole area in a little more detail with the association and with my colleagues from corrective services, firstly to find out whether I'm on the right the track all the way through or whether I sort of derailed on some parts and if I'm right what we could do about and in any event to discuss the issue that Mr Hughes first raised which was the apparent inequity of the situation as far as the prison officers were concerned. And we accept in principle what he was saying, and I'd very much like to do something about it. I think without any great difficulty we could probably frame an appropriate clause for insertion into the Prison Officers Award, but I really do think it takes a little bit more time than we've had and we could easily have those discussions, commissioner, between now and the next day of hearing, or certainly before now and when the Prison Officers Association exercises its right of reply. It may well be that we could have some agreed matter before you.

And if it's not possible to agree it, then each party is - has its rights retained and preserved to submit their respective positions to you for arbitration.

COMMISSIONER IMLACH: Yes - before you go any further if you're moving off that subject -

MR WILLINGHAM: I thought I'd probably done it enough.

COMMISSIONER IMLACH: - Mr Willingham, are you - what's your reaction to a short break?

MR WILLINGHAM: I was thinking of being both a masochist and a sadist, commissioner; I was going to punish myself by going right through and everyone else alongside of me, but if it pleases the commission - if it pleases the commission - I'd be very happy to take a small break and let you -

COMMISSIONER IMLACH: I'm sorry I opened my mouth.

MR WILLINGHAM: I was just anxious to try to conclude as much as possible, given day, commissioner. I'm really quite happy to go forward, but if it pleases you and my colleagues I'm happy to take a brief adjournment.

COMMISSIONER IMLACH: Well I think a short break wouldn't hurt anyone.

Shall we return at five to 12.00?

MR WILLINGHAM: If it pleases, commissioner.

SHORT ADJOURNMENT

MR WILLINGHAM: Thank you, commissioner. Just a couple of things if I could quickly refer to. I indicated to the commission a little earlier that employed in the prison hospital were three doctors of psychiatry. I'm advised, in fact, it's one doctor of psychiatry and two doctors of psychology.

And my colleagues berated me over the break, that they couldn't follow my previous submission entirely because I got some pm's and am's mixed up which may or may not be correct, but in any event I think it's well understood what 2-10 and 6-2 shifts are, so if there are a couple of pm's in the wrong place, I think it goes without saying most people who read the transcript will understand what was meant, if not was said.

COMMISSIONER IMLACH: Perhaps if all parties read the overtime clause in the shift section or the shift work clause in the award it - as I'm not allowed to interpret it - perhaps the parties might like to have a go at it.

MR WILLINGHAM: I believe, Mr Commissioner, that we've reached agreement in the short break that we will meet on this in the very future and see if we can't provide you, as I suggest, it could be done with a clause which frames the intention correctly for your consideration as an agreed matter.

COMMISSIONER IMLACH: Good.

MR WILLINGHAM: And might I say if it wasn't entirely clear that we would seek to have that discrete to the Prison Officers Award and not have its reference back to the diabolically, convoluted General Conditions of Service Award provision.

Now, if we could then turn to page 447 where Mr Hughes summarises the association's views in relation to the classification and career structure. Now Mr Hughes says that the association's proposed classification structure will allow for improved efficiency and productivity and that the to date under utilised knowledge of prison officers will be put to much greater use through them being able to perform a broader range of tasks.

Now that may turn out to be correct, Mr Commissioner, but Mr Hughes doesn't explain why and how that will come about as a result of the proposed classification structure.

On the fact of it, commissioner, and in the absence of any elaboration, the proposed structure does not demonstrate, to me at least, how it will produce what Mr Hughes claims for it and it doesn't explain for that matter why the existing

structure couldn't produce a similar outcome, that is, to provide greater productivity and efficiency and to enable prison officers to use the knowledge that they've acquired and thus perform a broader range of tasks.

Mr Hughes says that the proposed classification structure will, for the first time, provide prison officers with a classification structure and career path that, quote: actually has relevance, end quote. And my instinct, Mr Commissioner, is to ask, through you, relevant to what?

Now, finally Mr Hughes says that the association's proposals will, amongst other things, reduce the costs for the agency. It is possible - although it's not certain - that a few of the association's proposals may result in a lowering of some costs, but overall, Mr Commissioner, the association's catalogue of claims, as they stand, will unquestionably add to, not reduce, the costs of running the prison service and by a very substantial amount.

But before leaving Mr Hughes' part of the proceedings, I remind the commission that we will be returning to the association's proposed classification structure towards the end of our submission and, Mr Commissioner, I now want to take you to the association's loaded rate proposal, and by gee, it's well named, 'loaded'. You find that, Mr Commissioner, at Exhibit TPOA.88 and Mr Masters speaks to it at page 449 through to 453.

Now I should - I don't often breach informal conversations and discussions, Mr Commissioner, but I can tell you that during the break amongst other things, I got a fair sort of a caning from the association about - I'm really having an off day. In fact, it is a comment that fell from one of my colleagues as well, not just the association, and by the time I finish with this one I've got no doubt I'm getting a second serve of it at the luncheon break.

But, for what it's worth, here is our response to the loaded rate proposal. Now after going through the Exhibit TPOA.88, Mr Masters summarised what the association regarded as the advantages which would result from the introduction of the loaded rate as proposed by the association and he said that the proposal would - in fact, Mr Commissioner, I'll read these through, but they are, of course, contained on the transcript page, but he said that they would decrease the time and effort required to prepare the pay; it would decrease computer commitment time; it will allow for more accurate budget procedures and forecasts by eliminating penalty rates and leave loading from budget requirements; it would result in a potential saving on overtime payments; it will align prison officers to other emergency services, and I stop there to say that I don't equate the prison service with an emergency service.

It would eliminate the necessity for recording and adjusting penalty rates; it would allow prison officers to budget on a constant income; it would make for greater efficiency and productivity and lastly, it would considerably reduce payroll preparation costs.

Now as Mr Masters concedes, Mr Commissioner, this proposal is at presently confined to only one of the several rosters - many rosters currently in operation, and he said that it - changes to other rosters would be required if this proposal was picked up, otherwise flexibility of redeployment might actually be impaired.

Now it is correct, Mr Commissioner, to say that extensive discussions have taken place on this particular issue. I outlined our position briefly on the 27th of January and you can find my comments at page 464 of transcript. Our view is unchanged.

The very best and most up-to-date advice that we received suggests that the association's loaded rate proposal either will not or is most unlikely to produce the kind of benefits espoused for it by Mr Masters. And not the least difficulty that we face in analysing the proposal is that there are so many changes to rosters for a variety of reasons, that it is impossible to find anyone who remains on the theoretically perfect roster pattern for a full cycle of 84 weeks.

There remains, as far as we're concerned, considerable doubt as to whether the association's proposals and calculations in respect of leave loadings and long service leave are correct. Further, there is no doubt in our mind that the association vastly over estimates the likely administratively savings which might accrue if the proposal were to be implemented. The experts who do these things and know these things, Mr Commissioner, assess the time saving and therefore the cost saving as minimal.

Having said all of that, it is the association's proposal and it is for them to work out its virtues and its advantages insofar as its members are concerned.

Now as best as I could tell from Mr Masters' submission, the association reckons that the chief advantage, if not the only advantage, of this proposal is that it will ensure employees receive a more constant income from pay period to pay period. Now as with any of the other proposition, Mr Commissioner, from the employer's perspective, we have to assess what is put up before us and decide what we believe is the employer's interest and what is not. Our problem with this proposal, at the moment, is that there too many notional and theoretical lines to it and these theoretical and notional lines can't be

proved in an exacting way. The only way they could be proved is in - as a practical context, that is, they are implemented and we find out if the things that are claimed for the proposal do in fact materialise. In normal circumstances people would consider perhaps a trial and that's been suggested during the discussions, but it's one of those proposals that could be an expensive mistake. Not a mistake - an expensive trial to find out that the claimed benefits don't in fact materialise. On the other hand, of course, the trial could prove that they do.

Another thing is that at least on the face of it, we think this proposal would cost us and at worse we think it would cost us a lot and we also think that it has the potential to cause more problems than the problems identified which it's allegedly going to resolve.

Now, the - talking of resolving problems, commissioner, I don't know whether you've had time to study Mr Masters' proposal in detail, but I've got to say it's not an easy task for the uninitiated to get a handle on this concept. Maybe simple for you, sir, because you've got a vast knowledge of shift work and rosters and related matters, but it took me longer - far longer than any other aspect with this case to attempt to come to grips with it and I am by on means completely across it now. Now if I was -

COMMISSIONER IMLACH: Well I've never had to contend with it in practice, Mr Willingham.

MR WILLINGHAM: Well, hopefully we'll do it together, commissioner, but I have to say if I was unkind and uncharitable, I would say I always have this problem where Basil gives me some work to do, but I'm not, so I won't. But the concept, if you like, of a flat rate is not unattractive to the minister or to the department - it is not unattractive to the minister or to the department. Now whether it's the association's proposal or some other variant, more work needs to be done; more certainty needs to be determined.

But we do not, Mr Commissioner, we do not dismiss the concept. We would not rule out the possibility that the association's proposal or something similar could be introduced at some stage. And - and I just make this mention, Mr Commissioner; if - if one of the primary criteria or - or the sole criterion of the association is to provide a mechanism by which officers get a constant payment from fortnight to fortnight, there may well be other avenues that we could explore which would achieve that objective and they would be fairly innovative and fairly wide ranging, but there are other avenues which could achieve that and I'd like to discuss them with the association. I think we could usefully canvass some of those ideas and it may be that some of the proposals that we would

put forward might get a receptive hearing from the association - I don't know.

So for the reasons given, Mr Commissioner, we are unable to agree to the association's proposal in its present form and at the present time, but we would, as with other matters like the opportunity to discuss this between now and the next day of hearing or certainly between now and when the association exercises its right of reply to see whether we couldn't get a little closer to framing agreed provisions.

Now, Mr Commissioner, if I could now take you please to TPOA.89, and page 455 of transcript. I should - should mention, Mr Commissioner, I'm just dealing with the remainder of the exhibits now for the purpose of convenience. At page 455 of transcript, Mr Nielsen tendered this exhibit which is an internal memorandum from the manager, custodial corrections to a wide variety of other officers in the division and it outlines the comparative cost of corrective services throughout the country.

Now the table attached to the exhibit reveals that Tasmania's prison costs per capita are shown in quite a favourable light. As with all statistics, Mr Commissioner, they may or may not reveal as much as they conceal but in this instance and as a matter of record we don't - we don't to do any more than note the exhibit and take Mr Nielsen's suggestion up which is that the exhibit should be allowed to speak for itself.

We then take you, Mr Commissioner, to exhibit TPOA.90 and you'll find discussion by the association in relation to that exhibit at pages 456 to 458 of transcript. TPOA.90 contains a number of charts, graphs and tables whose purpose is to illustrate the rates of pay applicable to prison officers employed elsewhere around the country.

We will speak later, Mr Commissioner, to the notion of comparative wage justice and the general relevance or otherwise of any data which is put forward in support of that notion.

But for the time being I refer the commission to our comments at page 470, which I gave on 27th January. Now pages - I'm sorry, Mr Commissioner, exhibits 92 through to 96.

Now these exhibits were tendered on the last day of hearing, commissioner, the 17th February and transcript is not yet available for that day, as I understand it at the time of leaving my office this morning. So accordingly, Mr Commissioner, I can't recall with any certainty what it was that Mr Nielsen said, if anything, or what weight he attached, if any, to the exhibits, but my recollection is that Mr Nielsen tendered them only as a support to his earlier exhibits, and particularly TPOA.90 which went specifically to

a comparison of national rates of pay. And I think I'm getting a bit of a nod there which says, yes, that's the case, commissioner. Thank you for that.

Now I've given the documents only a cursory examination, Mr Commissioner, because as I've said, I couldn't recall entirely in what context Mr Nielsen had tendered them. But - but let me say this, my cursory glance shows that there is a lot more to comparisons between Tasmania and other states than just the basic wage rates, and even those basic wage rates have to be considered in light of their own structures, their own conditions and their own environment.

Now if there's anything I've overlooked from Mr Nielsen's submission on 7th February in relation - as it - or as it relates to these exhibits then I can pick it up on the next day of hearing, commissioner.

Now I think also, Mr Commissioner, at TPOA.97, is the last of the exhibits from the association currently before you, and it is a - a draft order.

I don't think anything of substance turns on it. It is presumably to reflect in draft format all of the variations which the association is seeking the commission to award and our response to the exhibit, Mr Commissioner, is obviously to be distilled from our overall submission and unless the commission wishes me to go through the exhibit bit by bit, I might not turn to the subject of datum point.

COMMISSIONER IMLACH: Proceed.

MR WILLINGHAM: Mr Commissioner, this subject of datum point was discussed by the association's advocates during the first day of hearing at pages 3 to 6 of transcript and then again on the 25th of June 1993 at pages 386 to 394. Now, in general terms, Mr Commissioner, we don't disagree with Mr Shirley's proposition relating to the wage fixing principles which he addressed you on at page 387 and in particular, Mr Commissioner, we rely on the words of the work value principle and I quote:

The time from which work value changes should be measured is the last work value adjustment in the award under consideration but in no case earlier than the 1st of January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this principle.

End quote. Mr Commissioner, we'll return to the wage fixing principles more extensively later in our submission, but for

the instant purposes, the last time the award was work valued was 1984. That case was matter T.16 of 1985 which itself was an extension of application P.272 of 1983 via the mechanism of the old Public Service Act.

Now the initial decision in matter T.16 was handed down by then Commissioner King on the 11th of February 1985 and is before you, Mr Commissioner, as Exhibit TPOA.1. Now let me say at this point, Mr Commissioner, I don't think a heck of a lot turns on the issue of datum point in this case, but because the principles are relative important, I think I'm constrained to make a further submission in relation to it.

Although the association has claimed 1981 for certain classifications, it is clear from the evidence that without exception, the witnesses in this case have spoken to changes which are alleged to have occurred since 1984. And Mr Shirley says so. He says so at pages 393 to 394 of transcript, Mr Commissioner, and he says, and I quote:

So in the main, we have presented documentation, evidence and witness statements to you, in general terms, since 1984.

End quote. He goes on to say, Mr Commissioner, quote:

However you have to reference points, and that's the submission of the TPOA, that you have two reference points, if you so determine.

End quote. Now the reference points to which Mr Shirley referred was September of 1981 and December of 1984. Now we disagree strongly with Mr Shirley that the association has access to a 1981 datum point. And even assuming, Mr Commissioner, that you agreed in theory with Mr Shirley's submission, there is no way anyone, let alone this bench, with respect, could tie the evidence and submissions which have been provided to the period 1981 to 1984 because there haven't been any.

Mr Shirley says that 'in the main' his case has been based on changes said to have occurred since 1984. Mr Shirley understates the matter. All of his evidence, all of his statements, all of his submissions, have been directed to the post 1984 period. Nothing - nothing at all fell from the association for the period 1981 to 1984, therefore, Mr Commissioner, in our respectful submission, the commission has nothing to consider in respect of the earlier of Mr Shirley's two proposed reference points, even, Mr Commissioner, if you agree with his theoretical but flawed proposition.

There are two other reasons why we disagree with Mr Shirley's contentions in relation to datum point and for the record, our position is this; Commissioner King's initial and primary

decision in matter T.16 is dated the 11th of February 1985. That decision is in respect of evidence which was taken up to and including the 20th of December 1984. In our submission, Mr Commissioner, the prima facie datum point is therefore the last date upon which information relating to work value was brought to the attention of then Commissioner King, that is, the 20th of December 1984.

Alternatively, in common with customary practice, we submit that the commission, as constituted, could also accept the date of decision, that is, the 11th of February 1985 and quickly see, Mr Commissioner, that nothing much turns on either of those two dates because the gap between the two of them is less than 2 months.

For the sake of convenience, Mr Commissioner, we submit that the beginning of 1985 is a sensible date to nominate as the datum point and of course, that is the point from which the association's has been mounted. However, Mr Commissioner Imlach, I would be remiss if I did not draw to your attention pages 4 and 5 of Commissioner King's initial decision in matter T.16 which is before you as exhibit TPOA.1. Because, for the sake of accuracy, it should be noted that Commissioner King recorded the datum points of the T.16 work value case as being 25th September 1981 to the 2nd December 1983. However, Mr Commissioner, it should be noted that the evidence in that case was not taken until December 1984, a year after the expiry of the notional datum point established by Commissioner King.

Now transcript of that case, that is, T.16, reveals that there was no attempt by the association, or anyone else for that matter, to confine the evidence to the limits set by the datum point, and in fact I think Commissioner King has actually set the datum point after the evidence has been given. I can say that now because he's not here in the commission any more.

So the evidence was given on an up-to-the-moment basis. So in all of the circumstances, commissioner, we believe the appropriate datum point is January 1985 in respect of all classifications purported to be covered by the application of the association, and indeed, I should say covered by the associations.

And it - in submitting that date, Mr Commissioner, it is tolerably clear that the TPOA's case will not be prejudiced - will not be disadvantaged in any way since they have conducted their case on precisely the same basis.

Now I think we need say no more in relation to the datum point because although the association has then said that you, sir, are entitled to look backward and beyond the 1984 datum point that they themselves sought, it is clear, I think that there is no evidence which the commission could consider, therefore

the issue of whether Commissioner King was right or wrong or whether the association's interpretation of his views is right or wrong is academic as to whether you can go back to 1981 for certain classifications. And if it became an issue in the matter of the right of response of the association where they further wanted to develop that particular point, I'd seek the right to come back to it, but otherwise I wouldn't necessarily detain the commission further on that aspect.

Now one of the problems that that datum point issue caused for the association was that in submitting their dual reference points they claimed that because Commissioner King didn't evaluate the work of certain classifications in certain geographical locations, it was open for both the association and for the commission as constituted to examine those classifications beyond the ordinary datum point of 1984.

Now one of the reasons that they - that Commissioner King didn't - didn't - assess those classifications was because the association chose not to call evidence. They chose not to call evidence from Hayes and they chose not to call evidence from the women's division in support of the claim in matter T.16.

So certainly Commissioner King was unable to make a determination in respect of those matters because he had nothing before him upon which to make a determination. So having got the result, Mr Commissioner, with the initial decision of 11th February 1985, it was open to the TPOA to appeal the decision, but they chose not to.

It was open to the TPOA to submit a fresh application to pick up the lost squadrons of classifications but they chose not to. So - and at no time, Mr Commissioner, subsequent to that matter being determined did the association suggest that their intention had been that the claim would be limited in its extent as was found by Commissioner King.

Now that was our position then and that's our position now. But then when you get to the application itself, the - in other words, Mr Commissioner, the extent of this claim, what we submit, with respect, is before you, there's this sense of deja vu from the 1984 case in relation to how the Tasmanian Prison Officers Association have mounted it.

It's just another one of the wrinkly facets of this matter. Because the TPOA in picking up on some of the features of then Commissioner King's 1985 decision homed in - they homed in on the restricted nature of that decision when arguing their datum point case. The association says with some justification, that Commissioner King did not evaluate the work of any classification for which witness evidence or other supporting material was brought forward - hence the association's argument regarding the dual datum points. And

yet, Mr Commissioner, the association has followed precisely the same path in this case. They have condemned us all; themselves, the employer, and this commission to relive the experiences that faced Commissioner King when determining T.16 in 1985.

If the same logic is applied as the association applied in arguing its datum point case, the commission as constituted could not make a determination in respect of any rank other than prison officer at Hayes and at Launceston Prisons, deputy superintendent in the women's prison and officers up to the rank of chief prison officer in the Risdon complex.

The association's submissions have predictably sought to indicate the range of duties and functions of prison officers in general, and as such, that those duties were representative of all employees within each relevant classification.

We have already said, Mr Commissioner, we do not believe the association's witness evidence necessarily supports their claim. And if I can ask the commission please to turn to exhibit TPOA.91, which is the association's complete version of its claimed classification structure, classification standards and wage rates.

COMMISSIONER IMLACH: Yes.

MR WILLINGHAM: Now we'll be dealing with this, as I've said a couple of times in greater detail later on, Mr Commissioner, but if I could particularly ask you to look at pages 4, 5 and 6 of exhibit 91 - I'm not sure that they're numbered, but they are the fourth, fifth and sixth pages.

COMMISSIONER IMLACH: Yes.

MR WILLINGHAM: Those pages, Mr Commissioner, they contain classifications for which not one single shred of information, evidence or substantiating submission has been put. The closest we get is evidence taken from the acting deputy superintendent of the women's prison.

Now, Mr Commissioner, if you then go back to pages 1 and 2 of the exhibit, the association claims two levels of prison officer and prison officer first class. Now again, Mr Commissioner, these totally new concepts and the association puts them forward, structure, standards, salaries and all, without a skerrick of support by way of evidence, without a skerrick of support by way of other documentary material and with only the merest smidgen of reference to it by way of elaborative submission.

In our submission, Mr Commissioner, the association asks the impossible of the commission, or, Mr Commissioner, if not the impossible certainly the impermissible. As Commissioner King

found, an assessment cannot be made and consequently no determination can be made in the total absence of any evidence or other relevant supporting material.

We therefore, Mr Commissioner, respectfully submit that - and strongly submit that the commission is simply not placed in a position whereby it is able to consider, let alone accede to, the claims in respect of the classifications to which I've just referred.

Mr Commissioner, if I may, do you have any questions in relation to that aspect or may I turn to the next subject?

COMMISSIONER IMLACH: No - proceed, Mr Willingham.

MR WILLINGHAM: Thank you. If it pleases the commission, my next subject is operative date. I won't take long with this one. Mr Nielsen, at page 460 of transcript, put the association's submissions in relation to operative date and - and had a decent sort of a pun each way on the entire question. And at page 460 he starts off by initially asking for the date of his application, and then he suggests maybe the first day of hearing of the special case. Now I think you'd probably anticipate, Mr Commissioner, that we are completely opposed to the association's submission in relation to operative date, either of which, Mr Commissioner, either of which would potentially involve quite a significant degree of retrospectivity and therefore if you'll moved to grant all or any parts of the association's claim, it also follows that it would involve a considerable degree of retrospective expense.

In our submission, any variation to any award, Mr Commissioner, and certainly one arising from a special case, should operate from the date the award is varied, and that is as stipulated by section 37(4) of the Industrial Relations Act.

Now the fact is, Mr Commissioner, that the TPOA's application - the TPOA's application - which is 2587 - is dated 6th July 1990 - 6th July, 1990. The application was dealt with by the Anomalies Conference on 13th July 1990. And for your own convenience, Mr Commissioner, that was matter TA.69 of 1990, and the transcript if you have access to it - and I understand it's restricted - is to be found at pages 708 to 710, and transcript in conference, AC.2.

Now the application having been granted its arguable special case status did not actually come on for hearing before this commission as constituted until 14th October 1992 - nearly 2.1/2 years later. Now hearing - an initial hearing took place on the - briefly - on 4th November 1992, then inspections took place at Risdon Prison on the 13th, but it was not until 20th November 1992 that the taking of witness evidence actually commenced.

And further hearings for the purpose of taking evidence took place on 27th November '92, 4th December, 11th December, 5th March 1993 and 7th May, 1993. And the association as you're well aware, commissioner, summarised its witness evidence and concluded its primary submissions on 24th June 1993 - nearly 3 years following the arguable special case reference from the Anomalies Conference.

And indeed, Mr Commissioner, it wasn't until 27th January of this year that the TPOA concluded its substantive submission.

Now we don't offer any criticism in respect of the period of time which has elapsed since this matter first saw the light of day on 6th July 1990. It is the association's prerogative to run its case how it sees fit and at the pace that it sees fit, but we do say, Mr Commissioner, that the employer has little responsibility for and has made a negligible contribution to the now quite extensive time which has elapsed since this case first saw the light of day, and - and to be fair I don't think the association has claimed anything to the contrary. But it is certain that the running and the timing of this case has been overwhelmingly in the hands of the applicant.

So, Mr Commissioner, we do not agree with any proposition that retrospectivity is appropriate to the circumstances of this case and we submit therefore there are no special circumstances which would make it fair and right for the commission to award retrospectivity under the discretionary powers available to it under section 37(5)(b) of the act.

Now, Mr Commissioner, as for application 2473, which is the application from the then Tasmanian Public Service Association, there have been no submissions whatsoever going to the merits of the application, so in our view the question of retrospectivity in relation to it cannot be a valid consideration or for that matter any other sort of consideration.

Now, Mr Commissioner, I now - or my next subject is the work-value principle and it's going to be quite a long one. I certainly wouldn't anticipate finishing it by 1.00. You may believe that it's an appropriate time, or if you wish me to proceed I'm quite happy to.

COMMISSIONER IMLACH: Well, if you're not going to complete, Mr Willingham, I think it would be better for all of us, yourself in particular, if it was in one piece.

MR WILLINGHAM: Good.,

COMMISSIONER IMLACH: But it does mean that you'll be first off the rank on the next day of hearing.

MR WILLINGHAM: I would expect, commissioner, and I think it was planned that I would occupy all of the next day of hearing, subject to any bits and pieces.

COMMISSIONER IMLACH: Right.

MR WILLINGHAM: Thank you, commissioner.

COMMISSIONER IMLACH: Anything else, Mr Nielsen?

MR NIELSEN: Yes, Mr Commissioner, we're a little bit concerned that we've set dates which we support for the - for April with the - and we did make some little inquiries prior to the hearing this morning as to the availability of transcript, but I think our dates are 21st and 22nd April, and we would desire if possible, Mr Commissioner, of trying to get them at least 2 weeks before those dates.

COMMISSIONER IMLACH: Yes, well I'll do what I can, Mr Nielsen. You'll note that there's no -

MR NIELSEN: Well I'm aware from speaking from the young ladies this morning in the commission that they have a very heavy workload on the - on transcript - very heavy.

COMMISSIONER IMLACH: Yes, well will you note that my associate is endeavouring to assist in that matter.

MR NIELSEN: Very efficient.

COMMISSIONER IMLACH: I assure you that's to extent some unprecedented.

MR NIELSEN: Yes.

COMMISSIONER IMLACH: That's how much we wish to cooperate on that matter.

MR NIELSEN: Yes. A very efficient -

COMMISSIONER IMLACH: So we'll do the best we can.

MR NIELSEN: Thank you very much, sir.

COMMISSIONER IMLACH: Anything else?

MR NIELSEN: No. The next day of hearing as I understand it is 17th March and my colleague here is desirous that the last hearing that we have as to whether we could get transcript from that, but I've already raised the question with you. Thank you, Mr Commissioner.

COMMISSIONER IMLACH: This matter is adjourned.

HEARING ADJOURNED

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