

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3926 of 1992

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

re wage rates, classifications,
definitions and conditions of
employment

T. No. 3987 of 1992

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

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

COMMISSIONER WATLING

HOBART, 7 December 1992
continued from 9/11/92

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TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER WATLING: I'll take appearances please.

MR R. WARWICK: If the commission pleases, RICHARD WARWICK, for the Health Services Union of Australia, Tasmania No.1 Branch.

COMMISSIONER WATLING: Good, thank you.

MR P. TARGETT: Thank you, Mr Commissioner, TARGETT, P. I appear on behalf of the Tasmanian Confederation of Industries.

COMMISSIONER WATLING: Thank you. Now in relation to this matter, you will recall that the hearing actually concluded, but at the request of the HSUA Tasmanian branch, the matter had been relisted because I understand they wanted to place further submissions.

Now I think before we start on that, we have to talk about what issues we're going to discuss today - the actual subject matters that are to be reopened, because as far as I'm concerned the lot's reopened and if you want to tell me anything you can tell me anything. Once you open up the case again it's up for grabs. So what issues do you think should be on.

MR WARWICK: Thank you, Mr Commissioner, from our point of view we seek to address you on the rosters clause, and in particular the provisions which formerly appeared in the Hospitals Award at clause 78(c).

COMMISSIONER WATLING: Well what about the - we're not dealing with the Hospitals Award -

MR WARWICK: No.

COMMISSIONER WATLING: - we're dealing with the Nursing Homes Award. What are - what -

MR WARWICK: In particular the clause we seek to address you on is 39 rosters.

COMMISSIONER WATLING: Thirty nine. Right.

MR WARWICK: There are - there's also the question of the payment of wages clause, sir, which we have been discussing subsequent to the - the last conclusion of a hearing and - we're mainly to address you on that, sir, but we'd certainly seek to have some private off-the-record discussions with you about that clause prior to anything formally going on the record to see if we can in fact reach an agreement - an agreed position on that clause.

And there would simply be a third issue which is simply that there were some very brief comments I wish to make about the

classification standards which I neglected to make during the course of the previous proceedings.

If the commission pleases.

COMMISSIONER WATLING: Mr Targett, have you anything you wanted to add to the list?

MR TARGETT: The only issue I would seek to raise, Mr Commissioner, would be the contract of employment clause which was the subject of an attempt to reach agreement between the parties. At this stage I am unaware as to whether in fact agreement has been reached. If it hasn't been reached then I would seek to make some submissions on that. If it has been reached then there won't be any necessity to do so. It revolves around some matters which were raised by yourself subsequent to the hearing in an attempt to reach agreement and avoid arbitration.

COMMISSIONER WATLING: Right.

MR WARWICK: In respect of that issue, sir, I think we did correspond with you to indicate that from our side the terms of the clause were agreed if they were acceptable to the TCI.

COMMISSIONER WATLING: Yes, that's right. And the TCI has acknowledged in this similar matter.

MR TARGETT: Well in that case I don't need to raise anything.

COMMISSIONER WATLING: Right.

MR TARGETT: Other than to respond to Mr Warwick of course.

COMMISSIONER WATLING: Yes. Right. Right, well we'd better bat up then, Mr Warwick.

MR WARWICK: Thank you. If the commission pleases, we seek the opportunity to - opportunity to make further submissions to you on the question of the inclusion into the Nursing Homes Award of the provisions previously contained in clause 78(c) of the Hospitals Award. These provisions have operated in the industry for over 20 years and have served two important functions at the same time.

Firstly, they have set down certain minimum requirements in respect to the operation of rotating rosters. Secondly, these provisions have provided guidance as to the penalty rates which shall apply where irregular shifts are worked in circumstances which would otherwise have been worked in accordance with a rotating roster.

In this regard we believe that these provisions are an integral part of the industrial standards which apply in circumstances where ordinary work is performed outside the hours of 9 to 5, Monday to Friday.

If I may, Mr Commissioner, I'd seek to table a proposed clause.

COMMISSIONER WATLING: Right - we'll mark this HSUA.6.

MR WARWICK: Mr Commissioner, we seek the inclusion of this clause in the Nursing Homes Award. To this end we seek to -

COMMISSIONER WATLING: So - so you're - this is over - to override the previous one that you put forward?

MR WARWICK: Yes, sir. And indeed, we seek leave to amend our application accordingly. Our application, sir, is -

COMMISSIONER WATLING: Well, you're really amending your claim, because the application deals with rosters doesn't it?

MR WARWICK: Yes, indeed, we seek leave to amend our claim accordingly. The claim was set out - or most recently set out in exhibit HSUA.2.

COMMISSIONER WATLING: So should I disregard the letter that you forwarded to me with the reasons for requesting an opening - reopening?

MR WARWICK: In what regard, Mr Commissioner?

COMMISSIONER WATLING: In relation to the further submission - the matter that was faxed dated 25th November?

MR WARWICK: Where we requested the reopening of the -

COMMISSIONER WATLING: Yes, in the attached document.

MR WARWICK: Oh, the attached document, sir, was simply - sets out the - the existing provisions in the award - the ones in fact which we're referring to.

COMMISSIONER WATLING: Right. So your claim is HSUA.6.

MR WARWICK: Yes, well subject to it being no - amending of no claim being checked with Mr Targett of course.

COMMISSIONER WATLING: Well you're not actually amending your - you're not actually amending your application are you - so is it subject to Mr Targett agreeing to it?

MR TARGETT: I'd be delighted if it was, in which case I'd say no.

COMMISSIONER WATLING: I think you're just amending your claim, Mr Warwick.

MR WARWICK: Indeed. Mr Commissioner, we seek the inclusion of the terms of - sorry - we seek the inclusion of this clause as set out in exhibit HSUA.6 in the Nursing Homes Award. The clause has been reworked and clarified from that which has been proposed by the TCI earlier in the proceedings and indeed from that which has been previously proposed by us. In the first instance, I believe it appropriate that I take you through the clause and quickly and initially identify those areas of departure from Mr Targett's previous proposed clause.

And as I said, subsequent to that take you through the alterations in detail.

The first matter is a second proviso in subclause (a) where formally there was only one. The words have been clarified in subclause (b)(i). There is a new subclause (b)(ii) which did not previously exist. There is a new cross reference at subclause (c) - the first words in subclause (c). There are new clarifying words in the preamble to subclause (d). There is an alteration to the wording in the proviso to subclause (d)(iii), and that proviso is at the - the alteration is the last three or four words in that proviso. There are new clauses (e), (f), and (g). And turning to the third page, Mr Commissioner, subclause (h) is a matter I think which perhaps requires some treatment off the record. There was some discussion and I think indeed agreement reached in relation to subclause (h) during the proceedings and there were some words read onto transcript. And obviously I'm not privy to those words. The ones I have on the page here may be somewhat different.

COMMISSIONER WATLING: Well if it was read onto transcript you'd be privy to them wouldn't you?

MR WARWICK: Well I haven't got the transcript as yet, Mr Commissioner, from that particular -

COMMISSIONER WATLING: Well what do you mean? You mean if you were privy to them, but you didn't get it down at the time.

MR WARWICK: No, that's correct - indeed.

COMMISSIONER WATLING: Yes.

MR WARWICK: So I'm not suggesting that we - in respect to subclause (h) that we don't still agree to the wording that was agreed on, but I don't have it at hand. It may be useful to deal with subclause (h) off the record at some later stage.

Mr Commissioner, in making substantive submissions in respect to these altered provisions, I wish to take each in turn beginning with the first.

Mr Commissioner, if my memory serves me, the original proviso in subclause (a) was discussed by the parties as being appropriate for inclusion in subclause (h) in relation to part-time employees. And I'm referring there to the second proviso, and I think it's appropriate that I read through that.

The second proviso on subclause (h) says that: Provided further that where a roster is established under this clause it shall be reflected in a document setting out clearly the names of the employees required to work in accordance with such roster, the days, dates and hours during which each employee is required to attend for duty.

You will recall, Mr Commissioner, that these words were previously contained as a definition in clause 7 of the Hospitals Award. Upon reflection, Mr Commissioner, we believe that this wording is essential to the operation of the award and to the regulation of employment in the industry. In this regard we rely heavily on an interpretation by the former President of the Tasmanian Industrial Commission, that interpretation being contained decision T.124 of 1985.

And I'd seek to hand up exhibits in respect to that.

COMMISSIONER WATLING: Right, we'll mark this HSUA.7. And we'll mark the document 'Industrial Law Review' as HSUA.8.

MR WARWICK: Thank you, Mr Commissioner. If I may refer you to HSUA.7, I don't believe, Mr Commissioner, that it's necessary to take you in great detail to the material facts in relation to this particular interpretation other than to say that it was in relation to a matter of argument between the - the HEF No.2 branch, as it then was, and the TCI in relation to whether certain employees at St Vincent's Hospital in Launceston were in fact shift workers within the meaning of the award as it was prescribed at that time.

As I say, the material circumstances are not relevant because the president at the time made some comments in relation to shifted work - shift work or rostered work generally which are of particular significance. If I could refer you to page 13, Mr Commissioner, in the final paragraph on that page. I seek to read that paragraph and the following two pages into the record and I quote:

Without setting in full all of the references to rosters to be found in Clause 4, the summary which follows will, I think, demonstrate that the act of drawing up rosters and working in accordance with them is an essential part of the shift work process.

THE PURPOSE OF SHIFT ROSTERS

1. There shall be a roster for shift work which shall

(a) Provide for rotation unless all the employees concerned desire otherwise;

(b) Provide for not more than 8 shifts to be worked in any 9 consecutive days; and most importantly -

(c) Not be changed without payment of penalty rates until 4 weeks' notice has been given. Provided that an employee's place on such roster shall not be changed except on one week's notice of such change or payment of the penalty rates. So far as employees present themselves for work in accordance therewith shifts shall be worked according to the roster.

(d) Provide for a minimum of two consecutive days off duty, except when, by mutual agreement between the employer, the employee(s) concerned and the Secretary or authorised representative of the appropriate employee organisation, alternative arrangements are made. All rosters shall provide for two days off each week.

2. To establish that rostered shifts falling partly on Friday, Saturday, Sunday or a public holiday shall attract payment calculated in the manner prescribed.

3. To establish entitlement to particular penalty rates for work done during and outside a rostered shift -

4. To establish entitlement to penalty rates when a rostered employee is not relieved by another rostered employee on change of shift.

5. To establish that there be allowed a rest period following completion of a rostered shift with penalty rates being attracted when a rest period of the prescribed duration is not observed.

These then are some of the purposes of rosters.
They are complementary to a number of award provisions.

And I think it appropriate to end that quote.

COMMISSIONER WATLING: So, what are you telling me - that the president - previous president of this commission is saying that these things are mandatory to - to include in a provision?

MR WARWICK: In the context of this decision, the president was -

COMMISSIONER WATLING: But - but what are you trying to tell me in relation to this application in this case?

MR WARWICK: Essentially that the president's comments were picked up in the commentaries and endeavour to establish that his - notwithstanding the relevant material facts of this case, his - his comments in relation to the - to the necessity of a written document which is called a roster in a workplace have been picked up nationally and naturally form a precedent in the shift work - on the commentary on shift work in the 'Industrial Law'.

COMMISSIONER WATLING: So - I'm just trying to get the relevance of it to this case. Are you - are you saying to me because the previous president of this commission has written down these words that I should pick it up on the basis that a roster should contain all these sorts of things - a written roster should contain all these sorts of things?

MR WARWICK: Well indeed I believe that the provisions which are contained even in the TCI application suggest that those things have to happen - all of those terms are contained.

COMMISSIONER WATLING: Mm.

MR WARWICK: But there isn't in Mr Targett's document a specific reference to the requirement for a - a roster where established to be reflected in a document setting out clearly the names of the employees and so on and so forth. And the principal point that I'm arguing is that the second proviso to subclause in HSUA.6 should be provided in the award.

COMMISSIONER WATLING: Right.

MR WARWICK: And I would hope to further establish that that is also relevant and important in respect to the comments I wish to make in relation to subclauses (e), (f), and (g) when we come to those as well.

COMMISSIONER WATLING: Right.

MR WARWICK: Mr Commissioner, if I could refer you to HSUA.8 and you'll see on the second page there's a reference to or commentary on the decision that was made by the commissioner - by the president at the time.

COMMISSIONER WATLING: Is that just a rerun of the decision?

MR WARWICK: It is, Mr Commissioner.

COMMISSIONER WATLING: Yes. Have you checked it to see whether it's exactly the same?

MR WARWICK: It appears to be. I haven't done a thorough examination, but I think -

COMMISSIONER WATLING: I only ask the question because I've found errors in this type of documentation.

MR WARWICK: Indeed. I appreciate that that can happen. The relevant section that I wish to point out in this document, Mr Commissioner, is on the last page in the middle column at the bottom of that page where the document says 'Reasons for decision - Rosters', and the document says that:

The President was of the opinion that rosters were an essential element of a shift work system. There were none at the hospital. The definitions in the award supported the President's view. He said that although the award permitted certain agreements to be entered into regarding non-rotation where more than one shift operated on any day, there appeared to be no scope for agreement to waive production of rosters.

And I think that's really the only relevant point that I wish to bring to your attention, Mr Commissioner. I table those two documents clearly in support of the inclusion of the second proviso we seek in subclause (a).

COMMISSIONER WATLING: So - and under (a) the employer doesn't have to establish a roster.

MR WARWICK: Well under (a), Mr Commissioner, in shorthand, I would read it to say that the employer may establish a roster and clearly that would mean an employer may establish a roster in relation to day work that is within the spread of hours of 7 -

COMMISSIONER WATLING: So he doesn't have to.

MR WARWICK: Doesn't have to in respect to day work but he may do.

COMMISSIONER WATLING: What about shift work?

MR WARWICK: In respect to the second proviso -

COMMISSIONER WATLING: We don't have shift work but we're talking in - and this is where we have to be careful because in this award we're talking about rostered employees and non-rostered employees. So -

MR WARWICK: I appreciate that -

COMMISSIONER WATLING: - you're saying that for both - for rostered and non-rostered employees - that a roster may be drawn.

MR WARWICK: That's not what I take it to mean at all, Mr Commissioner.

COMMISSIONER WATLING: Well doesn't it say that?

MR WARWICK: Well I think the first proviso indicates that in relation to work outside the ordinary spread of hours for day workers a roster shall be established.

COMMISSIONER WATLING: But what about the leading bit.

MR WARWICK: Well I think - perhaps that could be clarified, Mr Commissioner, to say that in respect to work which is not rostered - work which is not performed outside 6 am to 6 pm or 6 am to 7 pm, as Mr Targett seeks in his application, the clause could say that in relation to work which is performed within those hours a roster may be established, but in respect to all work outside those hours, a roster shall be established and that probably would be the clearest construction that could be put on those words.

COMMISSIONER WATLING: Right. So you're -

MR WARWICK: And I wouldn't be opposed to those words being put forward in any decision made by you.

COMMISSIONER WATLING: Although it's not part of your claim.

MR WARWICK: Pardon?

COMMISSIONER WATLING: It's not part of your claim though.

MR WARWICK: Well on reflection I think it's probably - it is probably appropriate to amend the claim to that effect.

COMMISSIONER WATLING: Well, what words you want me to put in where?

MR WARWICK: It may be appropriate to convert the three paragraphs -

COMMISSIONER WATLING: Into 1, 2, and 3?

MR WARWICK: Yes.

COMMISSIONER WATLING: Yes.

MR WARWICK: And the first one would say that: an employer may establish a roster in respect to work inside the span of hours -

COMMISSIONER WATLING: To non-rostered employees.

MR WARWICK: That would do the - that would serve the purpose.

COMMISSIONER WATLING: If we've got - we might need a definition then for non-rostered employees.

MR WARWICK: Indeed.

COMMISSIONER WATLING: Which means that people that work between the span of hours of six and six in your case and six and seven in Mr Targett's case.

MR WARWICK: Indeed, Mr Commissioner. The second and third roman numeral, Mr Commissioner, would suffice as they stand, save that the words 'provided' and 'provided further' would simply need to be deleted - 'provided that' and 'provided further that'.

COMMISSIONER WATLING: All right.

MR TARGETT: Would I be able to get those words again, please, for number one?

COMMISSIONER WATLING: Well as I've taken them down it would read: an employer may establish a roster in respect to non-rostered employees', and non-rostered employees would be those employees employed to work the span of hours of six in the morning and six at night in terms of Mr Warwick's application and six in the morning and seven at night in terms of your application.

MR TARGETT: And is that to be put in as a definition?

COMMISSIONER WATLING: Well I don't know. I haven't got to that part.

MR WARWICK: I'm not sure, Mr Commissioner, whether 'non-rostered employees' is the most appropriate terminology because we're saying - the clause is - the roman numeral one

is saying that they may be rostered - may or may not be rostered as day work but we're calling them non-rostered employees.

COMMISSIONER WATLING: Well the simple fact is that everything else you've agreed to doesn't relate to day work or shift work.

MR WARWICK: No, that's true.

COMMISSIONER WATLING: And so, you know, anything that you put to me in the reopened hearing must be relevant to the 99 per cent which is already agreed to.

MR WARWICK: Oh, indeed, I don't dispute that for a moment, Mr Commissioner.

COMMISSIONER WATLING: So -

MR WARWICK: I'm just questioning - I'm just wondering whether non-rostered employees - the definitions term is the right one.

COMMISSIONER WATLING: Well it's your claim.

MR WARWICK: I think if we simply put it in negative terms, Mr Commissioner, and say in respect to employees not required to work in accordance with a roster and that would be consistent with a roster as defined and that would be consistent with all of the words that have gone before.

COMMISSIONER WATLING: So, run that past me again.

MR WARWICK: An employer may establish a roster in respect to employees not required to work in accordance with a roster as defined. That would obviate the need for a new definition as well.

COMMISSIONER WATLING: Righto.

MR WARWICK: And my early comments in relation to two and three I think need no further elaboration. Mr Commissioner, we believe that the decision in Exhibit HSUA.6 in the commentary contained in - I'm sorry - 7 and 8 clearly establish that rostered employees as defined must have their work cycle or work pattern reflected in a document as proposed in this clause. We believe that to do otherwise would be to contradict an important nationally recognised principle established by this commission.

If I could move on, Mr Commissioner. The clearer wording contained in subclause (b)(i) is intended to clarify the provisions of the award. The provision in fact says that:

A roster(as defined) established under this clause shall provide for rotation unless all employees to be affected in a particular nursing home desire a rotating roster.

And I finish that quote. In that regard, Mr Commissioner, it makes - this provision makes more specific reference to firstly the employees to be affected and those words were - or the words which covered that aspect of the clause were not as precise as they might be. These words we believe are more precise. Secondly, the provision talks about nursing homes or a specific nursing home and identifies and pins down that particular aspect of the provision and lastly, the words that are being proposed indicate that the alternative to a rotating roster is quite specifically a non-rotating roster and we believe in the circumstances, those words are far more precise and indeed far more useful.

Mr Commissioner, subclause (b)(ii) is a new provision which goes some way towards resolving one of the two original matters disputed by the parties relative to this clause and it says:

In circumstances where a non rotating roster has been established in accordance with (i) above, only revert to a rotating roster if a majority of the employees affected in a particular nursing home wish to revert to a rotating roster.

Mr Commissioner, the meaning and intent of this provision is self-evident and bearing in mind Mr Targett's previous submissions, I think it is reasonable to say that these words, in fact, represent a compromise on all sides, but of course Mr Targett is more than entitled to have his say about that.

There is a new cross-reference, Mr Commissioner, at the beginning of subclause (c) and those words say:

Subject to circumstances where irregular shifts are worked at specified in subclauses (e) and (f) of this clause -

- and the words that carry on then are not dissimilar than those proposed by Mr Targett except that the question of 6 pm to 6 am is still a matter of dispute between the parties.

These words - this new cross-reference serves to provide for a mechanism whereby the award reader can be informed of what the basic roster penalty rates shall be with the exception, as indicated, being those subclauses which deal with irregular rostered work circumstances.

I wish to deal with the regular rostered work patterns when we come to that section proper, but I think it useful to indicate that this cross-reference serves to eliminate any confusion which may have existed in the previous award as to whether or not irregular shifts could in fact be legally worked bearing in mind the old provisions relating to rostered and non-rostered shift work. In other words, the proposed clause will say that rostered work shall rotate unless all of the employees agree otherwise and that any variation from the rotating roster would only come about by agreement or by the provisions of the irregular rostered work subclauses. This wording and cross-reference will overcome any artificial argument which may have said that because the old award demanded that rotating rosters must be worked except by agreement, then irregular shifts could not be worked except through the employer opening him or herself up for prosecution by way of the breach of the award.

Mr Commissioner, the clarifying words at the preamble to subclause (d) do three things, and I think it appropriate to read those words. The preamble to subclause (d) says:

A roster established in accordance with subclause(a) of this clause, whether rotating or non rotating, shall meet the following requirements:

Firstly, there is a new cross-reference to subclause (a). The purpose of this cross-reference is indicate that the requirements of the roster as contained in this subclause are to be reflected in the written document which is mandatory as a result of the new provisions of subclause (a). That is in fact the new provision at (a) roman numeral (iii).

That is to say, the requirements of the roster as set out in this subclause must be able to be gleaned from the written document which must be established as a consequence of subclause (a).

In our submission, we see this as consistent with the interpretation of the President of the Tasmanian Industrial Commission in decision T.124 of 1985.

The second thing that the clarifying words at the beginning of subclause (d) do is identify that the following six provisions in this clause apply to all rosters, whether rotating or non-rotating.

These six provisions cover: maximum hours which may be worked, notice of change of roster, and other matters which are relevant to all rosters.

These six provisions are the same as the TCI exhibit, with the exception that the provisions relating to broken work cycles,

and in our claim, Mr Commissioner, those provisions appear at (vi) of this subclause.

They have been included in this subclause rather than as a separate subclause on their own.

The broken work cycles provisions are also the same as the TCI exhibit, but they appear in a different place.

And we believe it appropriate that those provisions be inserted into subclause (d).

In talking about -

COMMISSIONER WATLING: What about the provision - oh, yes, that's in Mr Targett's document. Right.

MR WARWICK: There is nothing between us in respect of those six provisions, Mr Commissioner, unless Mr Targett says something to the contrary - but certainly in our discussions today.

The only difference is that I have put what used to be called broken shifts in this provision, because they really are matters which go to the question of how a roster is drawn up and what it should look like.

The third thing that the clarifying words at the beginning of subclause (d) do is to replace the words from the old award which read:

There shall be a roster of shifts which shall -

- and replace those words with the words:

... shall meet the following requirements:

And we believe that that is a wording change only. That is certainly more clear and more precise.

Mr Commissioner, there has been a slight change to the wording at the end of the proviso to subclause (d)(iii).

The proviso reads:

PROVIDED THAT employees placed on such roster shall not be changed except on one week's notice of such change or payment at the rate of double time.

Insofar as employees present themselves for work in accordance therewith work shall be performed according to the roster as specified in Subclause (a).

COMMISSIONER WATLING: Well, this payment at the rate of double time, is that in lieu of notice?

MR WARWICK: Yes, Mr Commissioner.

COMMISSIONER WATLING: So, how much pay? So, they get 1 week's pay at double time?

MR WARWICK: They are the existing words, Mr Commissioner.

COMMISSIONER WATLING: Yes, I know, but that's why we are doing award restructuring and review. We shouldn't blindly pick things up. That's why we are doing this exercise.

MR WARWICK: Certainly. Certainly. If that requires attention -

COMMISSIONER WATLING: Well, I don't know what it means, actually.

MR WARWICK: Mm. I'm not sure that you will get a satisfactory explanation from me, Mr Commissioner, but ...

COMMISSIONER WATLING: But I would have to say to you, it is unsatisfactory leaving the words there when we can't understand what they mean.

MR WARWICK: I wonder whether - bearing in mind that we have had to spend a fair bit of time off the record on similar provisions - whether or not we could set this aside and perhaps come back to it off the record and consider the words?

COMMISSIONER WATLING: Well, are you far apart on this, these six points?

MR WARWICK: Not at all, Mr Commissioner, as I understand it, other than, as I say, I have changed the last four or five words in this proviso. Mr Targett obviously may wish to respond to that.

Mr Targett's document - and if I can read from - read the last two lines of the proviso?

COMMISSIONER WATLING: Well, what are we doing with this question first? Are we adjourning this proviso to have a look at it a little later?

MR WARWICK: I'm happy to do that. It seems appropriate.

COMMISSIONER WATLING: Right, we'll put that to one side for the moment.

MR WARWICK: The whole proviso, Mr Commissioner? I mean -

COMMISSIONER WATLING: Yes.

MR WARWICK: - the cross-reference is a different issue, though. It's consistent with -

COMMISSIONER WATLING: Well, we have got to get some order into this, right? Let's put the proviso to one side. The transcript will be in an absolute mess if we leave out phrases and then come back and argue phrases. Let's put the lot to one side.

And, quite frankly, I won't be able to follow it myself. I'll have to carefully go back through the transcript, which will take some considerable time just to work out what you are trying to say, if we jump all over the place.

Right, that takes us to roman number four.

MR WARWICK: There are no further comments I wish to make in relation to that subclause.

COMMISSIONER WATLING: Right.

MR WARWICK: Other than the ones I wish to make off the record.

COMMISSIONER WATLING: Yes. Right, well you'll get the opportunity if you want to come back to the whole clause in a minute. We'll look at the whole proviso, I mean, in a minute, and off the record.

MR WARWICK: Indeed, Mr Commissioner.

COMMISSIONER WATLING: That brings us to (e).

MR WARWICK: If I could turn to the provisions contained in subclauses (e), (f) and (g).

These are the provisions which are the central matters, from our point of view, in today's hearing and are the ones which are not contained in any form in Exhibit TCI.6.

The subclauses in our amended application are expressed differently from the old award, and I will endeavour to relate them back to the old award as I go through.

Subclause (e) begins by indicating that this clause applies to a rotating roster only.

This clause is therefore distinguished from the previous clause (d) in that it applies only where a rotating roster is worked.

At (i) there appears a requirement that night work on a rotating roster is to last no longer than 4 weeks at a time.

This provision was contained at clause 78(c)(iii)(b) in the old award.

In (ii) there is a requirement that rostered workers should spend no more than two-thirds of their working time on night work.

This was the old provision contained at 78((c)(iii)(c).

These two provisions are clearly intended to limit the amount of time each employee works on night work.

The intention of the provision is to limit the deleterious effects of extended night work.

We'll endeavour to show by cases in commentary that these negative aspects of night work are well recognised.

We would submit, Mr Commissioner, that without provisions such as these an employee could spend a disproportionate amount of time on night work when compared to other employees and, indeed, when their health is taken into consideration.

There is a proviso following the two roman numerals in subclause (e) which indicates that unless there is agreement to work a non-rotating roster, and where if you like, the employer has no option but to work an employee other than in accordance with these provisions, then an additional 30% above the relevant award rate is to be paid as a penalty rate.

(iii) of subclause (e) is similar to (i) and (ii) except in two ways:

Firstly, it provides for afternoon or night work worked at any one time to be worked for a full 5 days at a time.

The second difference in -

COMMISSIONER WATLING: Well, what's afternoon work?

MR WARWICK: Well, it is certainly intended to be that which was formerly considered to be afternoon shift.

COMMISSIONER WATLING: Well, we don't deal with that now. We are dealing with -

MR WARWICK: Well, I can certainly give some consideration to the question on which -

COMMISSIONER WATLING: You know, and night work. I don't know -

MR WARWICK: Well, there is a reference to night work - the hours are specified in (i) and (ii).

COMMISSIONER WATLING: Yes. But, so you are saying that that is now night work?

MR WARWICK: Indeed, Mr Commissioner.

COMMISSIONER WATLING: Well, how are we supposed to know it's night work?

MR WARWICK: Well, they may indeed perhaps need to be defined.

MR TARGETT: Can I interrupt for a moment, Mr Commissioner, perhaps to assist the commission?

In the document TCI.6 which was amended on a number of occasions during proceedings, we actually incorporated a definition of a rotating roster. It was on page 10 of that particular document, Mr Commissioner.

COMMISSIONER WATLING: Right.

MR TARGETT: And in that definition of rotating roster, for the purposes of clarification, I included day work, afternoon and night work and the span of hours in relation to a rotating roster.

COMMISSIONER WATLING: Right.

MR TARGETT: So that may assist the commission in the context of Mr Warwick's document.

MR WARWICK: Thank you, Mr Targett.

COMMISSIONER WATLING: Good. Right. That's got you out of the quagmire.

MR WARWICK: Indeed it has. Perhaps, bearing in mind Mr Targett's submission -

MR TARGETT: That wasn't a submission.

MR WARWICK: Pardon?

MR TARGETT: That wasn't a submission, that was an explanation.

MR WARWICK: Well ...

COMMISSIONER WATLING: Well, put it this way, have you had discussions with Mr Targett on this document?

MR WARWICK: On this document, Mr Commissioner?

COMMISSIONER WATLING: Mm.

MR WARWICK: Yes. We've certainly had discussions -

COMMISSIONER WATLING: What areas are agreed and what areas are disagreed? Because, quite frankly, I'd rather arbitrate the outstanding issues, than the agreed matters.

I've been taking it that all this is disagreed.

MR WARWICK: Well, it is my understanding, Mr Commissioner, that all of (e), (f) and (g) are certainly disagreed. And I don't see Mr Targett rising to his feet.

MR TARGETT: I'm happy to respond, if that would assist?

COMMISSIONER WATLING: Right, Mr Targett.

MR TARGETT: In relation to Mr Warwick's document -

COMMISSIONER WATLING: I don't want to go through and argue the whole issue if there's some areas that are agreed. So, maybe if we have a look at the areas in HSUA.6, the areas that are agreed and disagreed.

MR WARWICK: I did have further significant submissions, but ...

COMMISSIONER WATLING: Yes, but I am not going to go through the submissions if you are telling me they are agreed. It's wasting the commission's time. As it is, it is a reopening.

MR TARGETT: I don't intend to make any submissions as such as this stage because I haven't heard all of Mr Warwick's arguments. But, perhaps if I could just certainly illustrate a couple of points.

COMMISSIONER WATLING: Yes.

MR TARGETT: In relation subclause (a) the inclusion of the 'PROVIDED FURTHER' that Mr Warwick put in. In fact, that was incorporated in TCI.6, so there is no disagreement on the words. I just don't happen to agree where he wants to put them. But, that was included in the document.

I don't agree with the change in words in subclause (a)(i) that he has now made on record.

Subclause (b) I have no difficulty with, even though it is a change, I would make submissions on that, but I don't have any difficulty.

Subclause (c), the inclusion of what Mr Warwick has put in the first two sentences, I disagree with.

In relation to subclause (d) I have no difficulty with the context and the words used because it is basically what I did, and changed it around, but I would address the appropriateness of where it should go.

Subclause (e) I disagree with.

Subclause (f) I disagree with.

Subclause (g) I think I disagree with. I just going to have to hear some further submissions on that.

And subclause (h) - I don't know that there's any disagreement. I did put some words on record and that's what Mr Warwick mentioned previously, so I think we can clarify that one for you.

COMMISSIONER WATLING: Okay. Right, Mr Warwick, continue please.

MR WARWICK: I think it appropriate, Mr Commissioner, in respect to subclause (e)(iii) where the words 'daily hours of afternoon or night work' there needs to be in brackets a cross-reference to the definitions there and in particular a cross-reference which says, as referred to in the rotating rosters definition of this - of clause 8 of this award.

COMMISSIONER WATLING: Isn't that there now? Doesn't - it says, rotating roster as defined shall provide for something. Aren't we - doesn't a rotating roster as defined tell you what it is?

MR WARWICK: Yes, indeed. That indeed does serve that grammatical purpose, yes. Therefore, I'd not seek to amend the provision in the terms sought - previously sought.

COMMISSIONER WATLING: Right - shall provide daily hours - well doesn't the roster - doesn't rotating roster say that?

MR WARWICK: Well the rotating roster doesn't - definition doesn't say that - that the hours allocated to each employee at any one time shall continue for at least five successive nights or afternoons - afternoons or nights.

COMMISSIONER WATLING: Yes, but it says the rest though, doesn't it?

MR WARWICK: Yes, it does. So, if you like, and this is true of roman numeral (i) - roman numeral (i), (ii), and (iii), that they further refine the rotating roster definition.

COMMISSIONER WATLING: So isn't it already catered for in the definition you've agreed to?

MR WARWICK: Not the specific provision sought, Mr Commissioner, which are that night work should not go on for more than four consecutive weeks; that a person should spend no more than two-thirds of their time on night work and that the pattern of afternoon or night work allocated to each employee at any one time should continue for five successive days as a minimum. Those provisions are not contained in the rotating roster definition. We see them as operating together, if you like. The definition sets down the - the basic requirement of a rotating roster and these provision establish certain further minimum requirements that must be observed in relation to certain circumstances.

The - it's self-evident, Mr Commissioner, that - that roman numeral (iii) also contains a proviso which reads, provided that unless agreement has been reached to work a non-rotating roster in accordance with subclause (b)(i) of this clause, and where due to the operating requirements of a nursing home an employer directs an employee to work other than in accordance with the provisions of (iii) above, that employee shall be paid 50% more than his/her relevant award rate as defined for all hours worked in what otherwise would have been a five consecutive day period.

That proviso is cast in the same terms as the proviso to subclause (e)(i) and (ii) and in a nutshell those provisos say that nothing - firstly that nothing will change if agreement has been reached to work a non-rotating roster. They indicate that these provisions only apply where due to the operating requirements of a nursing home an employer directs an employee to work other than in accordance with the provisions of (iii) above and that is, other than in accordance with the provisions of a rotating roster.

And in those circumstances certain penalty rates shall apply, and those penalty rates are unchanged from what was meant and intended in the old Hospitals Award.

COMMISSIONER WATLING: Why should the employer be allowed to direct them to do something other than that which the award states in the earlier clauses that you're asking the commission to introduce?

MR WARWICK: The - if I could refer you back to subclause (c), Mr Commissioner. The construction which we seek in relation to the award would allow the working of a regular shift and in the terms set out in the two provisos in subclause (f). That is, the words contained in subclause (c) that say subject to circumstances where irregular shifts are worked as specified in subclauses (e) and (f).

COMMISSIONER WATLING: So why do you have a regular shift working?

MR WARWICK: Why?

COMMISSIONER WATLING: Yes?

MR WARWICK: Due to the operating requirements of the enterprises, Mr Commissioner. It simply may be, and indeed as we understand, it does happen

COMMISSIONER WATLING: What - well what falls into the category of an irregular shift?

MR WARWICK: Well, bearing in mind your earlier comments that we're not talking about shifts any more, it would be a roster pattern which extends on night work for more than 4 weeks - that would be irregular. Night work should be up to and including a maximum of 4 weeks at any one time for any employee.

COMMISSIONER WATLING: So you're really saying for work outside of that which is those requirements specified in (i), (ii), and (iii)?

MR WARWICK: Yes.

COMMISSIONER WATLING: Is that what you mean by irregular?

MR WARWICK: Yes.

COMMISSIONER WATLING: Well how am I supposed to glean that from those words?

MR WARWICK: Well I think the clauses taken as a whole specifies a range of requirements of a roster and particularly a written up document.

COMMISSIONER WATLING: Yes, but aren't you - yes, I know that, but aren't you saying that in relation to (e) that where they work past or more than four consecutive weeks and where their - their hours - they work more than two-thirds of the hours and - on a certain shift and a couple of other things -

MR WARWICK: Five successive day on afternoons or nights -

COMMISSIONER WATLING: That's right - you're saying - you're calling that irregular?

MR WARWICK: Yes.

COMMISSIONER WATLING: Right. So my question is, how are we supposed to know that it's irregular, or are you trying to

make a provision that says if you don't comply with these things then you shall get 50% more?

MR WARWICK: That's not our intention, Mr Commissioner. I think as I indicated at the outset we believe that the provisions as they've existed have done two things - they've set down certain minimum requirements in respect to the operation of a rotating roster. So these provisions actually do - they give guidance as to how the roster should work, that is -

COMMISSIONER WATLING: Yes, but you go on to say if - if you fail in (i), (ii) or roman (iii), you shall get a penalty payment of 50%.

MR WARWICK: Well I wouldn't say that it says fail. It says due to the operating requirements of the nursing home. It's in those circumstances where the employer must.

COMMISSIONER WATLING: So what - so what you're really saying is then that they prima facie should follow (i), (ii), and (iii), however they may be altered, and in which case if they are altered this is the amount that applies.

MR WARWICK: That's correct.

COMMISSIONER WATLING: Well I'm not too sure that that says that there though does it?

MR WARWICK: Well, to my mind, Mr Commissioner, it does, but that's what's intended.

COMMISSIONER WATLING: So if I find a flaw in it then, I - should I reject the lot?

MR WARWICK: Certainly not, Mr Commissioner, I wouldn't be asking you to do that. Anything that you believe needs to be corrected -

COMMISSIONER WATLING: But I'm not too sure that's my job if you ask me to introduce this clause, and if I find that it's not appropriate what should I do with it - alter it or - or reject it - keeping in mind that we've opened this matter up specifically for you to put your submission on this. Because what I glean that you're saying is, that prima facie that these things should apply, but that it may not be necessary for them to apply. I still get back to the earlier point that I made in the previous day of sitting, that how can you say this shall apply and then go on to condone something later and something different later?

MR WARWICK: But the clause we're proposing doesn't say that, Mr Commissioner.

COMMISSIONER WATLING: Oh, I thought it said a rotating roster shall meet the following requirements. Am I misreading the words - I know I haven't got my glasses, but - you're saying it shall meet these requirements - it's mandatory.

MR WARWICK: Yes.

COMMISSIONER WATLING: Right. And then you go on to say later on that it doesn't have to meet these requirements.

MR WARWICK: But the two provisos are requirements. They are requirements of the rotating roster.

COMMISSIONER WATLING: Well aren't the provisos - they're not a requirement of the - it's not a requirement of the rotating roster to - to operate outside those provisions is it?

MR WARWICK: Perhaps as a clarifying point, Mr Commissioner, it needs to say that subject to the payment of additional penalty rates a rotating roster as defined shall meet the following requirements and seek to amend the claim in that regard.

COMMISSIONER WATLING: Well I don't want you to mend it on the run. I need you - you need to be - and I'm not asking you to amend it, I'm just trying to ascertain what you really mean.

MR WARWICK: What I really mean, Mr Commissioner, is that the award has for many years, although it hasn't been well written and I can see that.

COMMISSIONER WATLING: Look, I'd forget the award. This award is a brand new award. The only reason that it has a provision in it at this stage is because everyone agreed as a starting point to refer stuff into it from another award. This is a brand new award and I'm treating it as such. This is the first time anything has been tested and the award hasn't had any provisions before that have been other than a starting point - and I clearly stated that even in my decision.

MR WARWICK: Well we put those submissions to you, Mr Commissioner, and indeed I intend to address you on that issue at the conclusion of these submissions.

COMMISSIONER WATLING: On what?

MR WARWICK: The question of a new award and its operation in respect of -

COMMISSIONER WATLING: Well this is another agenda item is it?

MR WARWICK: No, simply the question of the application for wage fixing principles to this particular provision and how this provision should be viewed in a lot of those principles.

COMMISSIONER WATLING: Right. Well, continue.

MR WARWICK: I would amend the claim, Mr Commissioner, and - and contain at the beginning of subclause (e) the words 'subject to the payment the penalty rates specified in this subclause'. And in respect to the earlier question which I don't think I answered, Mr Commissioner, I would seek the adoption of these provisions as a whole by way of determination by you.

COMMISSIONER WATLING: So if I reject one I reject the lot?

MR WARWICK: Those are my instructions, Mr Commissioner, to include - to seek all of these provisions - inclusions of these provisions in

COMMISSIONER WATLING: So let me understand what it means. If - if I don't accept, I don't accept the lot.

MR WARWICK: Oh, I think that that's the situation we're faced with - Mr Alley, Mr Targett's provisions

COMMISSIONER WATLING: Right, so I'm not bound by the act to do that.

MR WARWICK: Indeed not.

COMMISSIONER WATLING: No. But you're - you're wanting - don't talk about Mr Targett's - talk about your own. You're saying that I either accept the lot, unamended, or, I reject it. And if I find any - any part of it that I feel is inappropriate, then I reject the lot. I want - I'm very precise with this question and I need an answer on it.

MR WARWICK: No, I believe the answer to the question is yes, Mr Commissioner.

COMMISSIONER WATLING: Yes - so if I find one aspect with it that I disagree with, I'm on your submission required to reject the lot.

MR WARWICK: I wonder if we could avail of ourselves of a few minutes off the record to perhaps discuss the issue, Mr Commissioner?

COMMISSIONER WATLING: Well, I don't really want to get into it if - well you can discuss amongst yourself. I'm not too sure if this is challenge I want to get in discussing it.

MR WARWICK: Well I'd seek to -

COMMISSIONER WATLING: Because I'm - I don't want to be the Aunty Sally here.

MR WARWICK: Fair enough. I wonder if I might have an opportunity to discuss it with Mr Targett, Mr Commissioner?

COMMISSIONER WATLING: Yes, right. Right.

MR WARWICK: Bearing in mind your comments.

COMMISSIONER WATLING: Right. We'll adjourn.

SHORT ADJOURNMENT

COMMISSIONER WATLING: Mr Warwick, before the adjournment I put to you a question in relation to your submission that I should rule on the - the claim and it's all or nothing, and if I disagree with any aspect of it then I should reject the lot. And is that your understanding what you -

MR WARWICK: No, Mr Commissioner, I'd seek to - to not put that submission to you and not make that request of you. Rather, I would ask that the matters which are between the matters - matters which are disputed between the parties be in each case decided by you on merit. In respect to those matters which appear to be agreed in terms of the drafting of the clause, we would prefer that you treated those as consent matters, although we recognise that you're not obliged to or don't have to, simply on the basis of a request made by us. But certainly in respect to those matters that are disagreed we would seek a decision from you in relation to each of those on merits in accordance with the Industrial Relations Act.

COMMISSIONER WATLING: Right.

MR WARWICK: Mr Commissioner, I was addressing you on the question of subclause (e) and roman numeral three. In relation to that provision we say that our proposal - or roman numeral three in our proposal is similar to roman numerals one and two except in two ways.

Firstly, roman numeral three provides for afternoon or night worked at any one time to be worked for a full 5 days at a time. The second difference in this clause is that if the terms of the provision are not observed then a penalty rate of 50% is to apply.

This provision was formerly -

COMMISSIONER WATLING: Well to get back to this question of why should we put any clause in the award that provides a

penalty if the clause isn't observed. Either we make the clause flexible so you have options, or, we make the clause tight and then if it's not observed then someone is up for breach of the award.

So you're suggesting to me then we should make it flexible?

MR WARWICK: Well indeed, Mr Commissioner, in relation to the amendment to the claim we put to you in relation the preamble to subclause (e) so that that - that preamble would now read - subject to the payment of the penalty rates specified in this subclause, a rotating roster as defined shall meet the following requirements. That would, in our view, Mr Commissioner, provide the necessary flexibility of which you speak.

COMMISSIONER WATLING: Yes, well does it really, because what you're saying is that they can - they can do something different to (i), (ii), and (iii).

MR WARWICK: Indeed.

COMMISSIONER WATLING: That's an option for them. It's not mandatory from here on now?

MR WARWICK: I think the - the provisos indicate, Mr Commissioner, that it needs to be undertaken - or the additional penalties need to be paid in circumstances where due to the operating requirements of a nursing home an employer directs an employee other than in accordance of the provisions of (i), (ii), or (iii).

COMMISSIONER WATLING: So are you saying then that rotating roster as defined subject to the needs and circumstances of the nursing home shall contain the following?

Because if (i), (ii), and (iii) don't meet the needs of the nursing home, then you're saying they're allowed to do something different as long as they pay the extra money.

MR WARWICK: Yes, Mr Commissioner. We believe that's the way that the -

COMMISSIONER WATLING: So where -

MR WARWICK: - the roster -

COMMISSIONER WATLING: - so where possible they should observe (i), (ii), and (iii), however if the circumstances don't permit it then they can do the alternative things as provided in the provisos as long as they pay the rate.

MR WARWICK: That's correct. That's the - in essence the provision we're seeking.

COMMISSIONER WATLING: Mm, well.

MR WARWICK: Mr Commissioner, we would submit that leaving aside the provisos without the minimum requirements in relation to roman numerals one, two, and three, it is difficult - it would be difficult for an employer in reading the award to determine those three basic minimum requirements of a rotating roster. So certainly those provisions are essential in our submission, otherwise a rotating roster could mean anything - it could mean a day - a year of night shift with one - one afternoon shift on Christmas eve.

COMMISSIONER WATLING: Well it could mean - it could mean that. You're telling me now if it suits the - the operation of the business, it could mean that.

MR WARWICK: No, well I'm leaving aside the question of the penalty rates, Mr Commissioner. Without those provisions a rotating roster may mean that.

COMMISSIONER WATLING: Well it would mean that - without those provisions it would mean that the rotating roster shall contain (i), shall contain (ii) without the proviso, shall contain (iii) without the proviso. It becomes mandatory. But you're saying it's not mandatory.

MR WARWICK: No, that's right. That's right. Well as I said at the outset, Mr Commissioner, we believe these provisions should do two things; specify - firstly, to specify the minimum requirements in respect to a rotating roster insofar as how much night work can be performed and how long any period of afternoon or night work should continue at any one time, but also, when those - the clause should specify that when those terms can't be met by the employer and due to the inconvenience that that therefore creates for the employee, a different set of penalty rates should apply.

So we - we do not see the requirements of a rotating roster as absolutely mandatory - we don't believe that they - the award should be cast in those terms. There ought to be the flexibility which allows some departure from the requirements of that rotating roster, but at the same time allows employees to be appropriately compensated where the employer needs to depart from the requirements of the rotating roster.

If I could move on, Mr Commissioner, in relation -

COMMISSIONER WATLING: But doesn't - won't that conflict then with (b)? It says a roster is defined - established under this clause - shall - so they've got to establish it - right?

MR WARWICK: Yes.

COMMISSIONER WATLING: And it's got to be rotational.

MR WARWICK: Yes.

COMMISSIONER WATLING: That's mandatory.

MR WARWICK: Yes.

COMMISSIONER WATLING: Right. And in (e), you're saying it shall contain this minimum provision, that minimum provision and the other minimum provision.

MR WARWICK: That's correct.

COMMISSIONER WATLING: And on the other side of the coin, you're saying this mandatory roster - right - this mandatory rotating roster can be - can - or - the mandatory rotating roster does not necessarily have to contain the minimum requirements if it doesn't suit the employer's business.

MR WARWICK: Indeed in respect to - the real question is what happens in relation to the payment to the employees in those circumstances, and notwithstanding the - the mandatory nature of (b), (c) does indicate that in those circumstances alternative - alternative payments may be made. So I don't see those as inconsistent.

(b) says that the roster must be established and must rotate.

COMMISSIONER WATLING: And (e) says it's got to contain the minimum standards.

MR WARWICK: Indeed, Mr Commissioner.

COMMISSIONER WATLING: But the minimum standards don't have to be followed if it doesn't suit the employer's business.

MR WARWICK: And the employer pays the additional penalty rates.

COMMISSIONER WATLING: So how can they be minimum standards?

MR WARWICK: Well I think the operation of the additional penalty rates would serve to ensure that those minimum requirements are observed generally speaking.

COMMISSIONER WATLING: So you're not saying then that we're placing a penalty in the award are you?

MR WARWICK: No, they're penalty rates, Mr Commissioner.

COMMISSIONER WATLING: Well you're saying to me, and you've just put to me, that through that provision it will require the employer to meet the minimum. So it seems to me that you're imposing a penalty if he doesn't observe the award.

MR WARWICK: Well the preamble to subclause (e), Mr Commissioner, says, shall meet the following requirements. It doesn't say indeed minimum requirements.

COMMISSIONER WATLING: Yes, well, I agree with that, but Mr Warwick, if it shall follow the following requirements, it's either roman numeral one, roman numeral two without proviso, roman numeral three. Either you're fair dinkum about the minimum requirements or you're not. Do you want the minimum requirements?

MR WARWICK: Indeed we do, Mr Commissioner.

COMMISSIONER WATLING: Right, so -

MR WARWICK: We believe that -

COMMISSIONER WATLING: - if they - if they - an employer doesn't provide the minimum requirements then they're in breach of the award.

MR WARWICK: But why place an employer in that circumstance? Why shouldn't - we're not in the business of -

COMMISSIONER WATLING: Well you then -

MR WARWICK: - going out of our way to try and prosecute employers.

COMMISSIONER WATLING: - then again you're arguing against yourself then, because then you're saying that you don't require minimum standards. It's preferable to have those things but it's not mandatory.

MR WARWICK: That's what the clause says we believe.

COMMISSIONER WATLING: Right.

MR WARWICK: Those requirements should be met and in substitution thereof the additional penalty rates should be paid.

I really cannot see, Mr Commissioner, that those are contradictory terms. And we don't see that the penalty rates as prescribed in that - in subclause (e) are different from the original 15% penalty rate. They serve the same purpose with the 15% penalty rate which generally applies to - to a rotating roster or to a non-rotating roster and we don't see them as fines or penalties, rather as penalty rates.

Mr Commissioner, subclause (e) is somewhat different from the preceding discussions since it is not a provision which applies necessarily to rotating rosters. This provision was formerly contained at 78(c)(iii)(a) of the old award which said, an employee who, during a period of engagement on shift works night shift only. This provision was clearly not intended to apply to a person who is necessarily employed subject to a rotating roster. This wording has been replaced by the words contained in subclause (f), so I'll now quote: Where an employee is employed on specified duties for a fixed period of time other than by agreement in accordance with subclause (b)(i) of this clause, and during that period only commences work after 4 pm and ceases work before 6 am, that employee shall be paid 30% more than his/her relevant award rate is defined for all times so worked. I end that quote.

These provisions, Mr Commissioner, are intended to cover the circumstance where an employee is employed for a specified period to perform night work that the employee would otherwise not perform. And we would say that within the terms of this provision that payment would only apply where there is not agreement between the employer and the employee to work a non-rotating roster in accordance with provision (B)(i). That's clearly spelt out indeed in the terms of that clause.

Subclause (g) is simply a provision which says that an employee who agrees to work other than in accordance with the provisions of (e) and (f) of this award can have no greater claim on the employer by way of penalty rates than 15%. And that clause says: Where a rostered employee, as defined, agrees to work in accordance with a non-rotating roster as provided in subclause (b)(i) of this clause, the provisions of subclauses (e) and (f) of this clause shall not apply and such employee shall not be paid other than Saturday, Sunday, or holiday with pay penalties and overtime more than a loading of 15% on the hourly rate for all hours worked on such day.

And I think Mr Targett earlier expressed the view that he wasn't too sure whether he disagreed with that or not. I think that safe to - it is safe to say that that provision is not contained in the TCI exhibit, but since in their construction of the clause it's not necessary. That is, in Mr Targett's proposal, no employee can claim more than 15% in any circumstance.

In relation to subclause (h), Mr Commissioner, as I previously indicated, we believe that - or I believe that there is substantial agreement in relation to that clause except insofar as - well indeed, I'm not - there's not even an exception - in fact the only question is the - the words which were put on record previously which slightly amended and clarified that clause. And on the basis that we previously

agreed, those amendments - we would incorporate those into the provisions of (h).

If I may, Mr Commissioner, I'd seek to table a series of documents.

COMMISSIONER WATLING: Right. So you're going to take me through these are you?

MR WARWICK: Yes, Mr Commissioner.

COMMISSIONER WATLING: Right, well we might have to consider listing another day for the hearing I think. We might do that in a few minutes time.

Right, we'll mark the document, Australian Industrial Law Review dated 22nd December 1972 as HSUA.9. Industrial Law Review 4th May 1977 as HSUA.10, the Metal & Engineering Industry Award - HSUA.11, the Metal Industry Award loose-leaf varied to the November 1991 as HSUA.12 and the Australian Law Reporter as - on shift work as HSUA.13.

I won't get caught for copyright here will I?

MR WARWICK: I would imagine the copyright laws, Mr Commissioner, would look to the question of the person taking action to breach them - the right - rather than the person who was handed the document, but -

COMMISSIONER WATLING: That's fair enough. Right, you can do -

MR WARWICK: There is some problem with it is there?

COMMISSIONER WATLING: Well it's just that every time I see these CCA things they tell you about copyright and the copyright laws. So I just thought an interesting argument. In fact it's on the bottom of one of your exhibits I think. HSUA.11. Anyway.

MR WARWICK: Well union officials have been to gaol for more than that - on less than that indeed, Mr Commissioner, in the past.

COMMISSIONER WATLING: Yes.

MR WARWICK: HSUA.9, Mr Commissioner, is a report from the 'Australian Industrial Law Review', December 22, 1972. This is a decision which was - sorry - the second page of the document on the bottom left-hand side, there is a decision which is - which was an important decision made in 1972 and which is still in the commentary referred to as an authoritative document. There's nothing in particular in

relation to this report that I wish to bring to your attention other than it may be useful to point out the words that appear in the middle column in the second paragraph and the second sentence in that paragraph where the commission said:

However, in relation to shift allowances the Commission concluded that it was impracticable to prescribe a method of remunerating shift work which was to be of general application.

Now clearly, Mr Commissioner, the bench that considered shift work in what is known as the Shift Workers decision clearly felt that each consideration of shift work should be dealt with on the merits.

Turning to HSUA.9, Mr Commissioner, there's an extract from this - from a decision which is contained at - on the sixth page - the second page of the document which is marked page 6 and you'll see on the left-hand column there is -

COMMISSIONER WATLING: Yes, what exhibit number are we dealing with? HSUA.10?

MR WARWICK: Ten, Mr Commissioner.

COMMISSIONER WATLING: Right.

MR WARWICK: Halfway down the left-hand column you'll see the word - or the number (2) Shift Allowances and the reference is - and I perhaps read this section:

Locomotive Enginemen's Award, Railways, Traffic, Permanent Way and Signalling Staff Award, and Railways Miscellaneous Grades Award.

Following dismissal of applications to vary these awards with respect to shift work by Commissioner Walker on 16/2/76 -

- and the reference continues on -

- the Australian Railways Union (ARU) and the Australian Federated Union of Locomotive Enginemen (AFULE) had both altered long standing policies concerning shift work. Both unions made identical claims for the payment of shift allowance for the whole of the shift as distinct from the payment of a shift allowance for those hours of a shift which fell between 6 pm and 6 am. The existing method of shift payment had operated from 1945. In reaching his decision, the Commissioner reviewed the history of shift allowances in the industry and the general community. The Commissioner reviewed the reasons for the awarding of a shift allowance: because of

the nature of the job or because of the social disabilities that were incurred in working shifts at certain times. After reviewing community standards the Commissioner noted that shift allowances were usually paid for the whole of the shift and that most payments fell within a bracket of 10% to 15% of the ordinary rate with a higher percentage prescribed for nights or irregular shifts.

And I'd end that quote there. Clearly Commissioner Walker in his decision saw that higher percentages could be prescribed in awards for night or irregular shifts. And I make reference - I'd like to make reference back to that decision in earlier - further comments.

If I could turn to exhibit HSUA.13, Mr Commissioner. I think it relevant if I read to you the section beginning at the second page of the exhibit, which is page 24,262 - at the bottom of the page - Types of shift work - and I quote:

Basically, shift work is work carried on outside the hours normally worked by most members of the work-force - i.e., a working "day" or other period that does not conform to the usual 9 a.m. to 5 p.m., Monday to Friday cycle. In addition, a "shift" generally means a situation where operations in a particular employer's establishment are continued by the employment of one or more employees upon which another one or more workers had been engaged immediately before -

- and there is a reference to that comment.

Although possible shift patterns are as numerous as human ingenuity can devise, it can be said that there are three standard types of shift:

A "fixed shift" is a permanent shift worked at set hours each day five days per week. It can be worked permanently at varying hours in a day so that it could be a morning shift, an afternoon shift, a day shift, or an evening shift.

A "rotating shift" is a shift which requires a worker to work, in rotation, different periods of the day over a period of time (such as a month). For example, a worker could be required to work a morning shift at regular hours Monday to Friday for one week or a longer period, and at the end of that period he would then transfer to afternoon shift for a period, followed then by a transfer to evening shift. The rotation of these shifts would follow a pattern: that pattern could be morning to

afternoon to evening shift, or the reverse, or afternoon to morning to evening shift. Another type of rotating shift would be a shift system which not only rotated between morning, afternoon and evening shift but also rotates in such a way as to cover the seven days of the week rather than a specified number of days each week. It should be noted that the allocation of rest periods will be affected depending on the type of rotation pattern used.

An "alternating shift" is a shift worked at the same time each day but which, over a period of time, will cover a whole seven-day span. So, during one week, the five-day working week for a worker on this type of shift might be 2.30 p.m. to 11 p.m. Monday to Friday, whilst in the next week the working week might be 2.30 p.m. to 11 p.m. Tuesday to Saturday, and so on.

I think it perhaps useful if I - if I read on, Mr Commissioner. It then goes on to talk about Definitions of "shift work" in awards.

It is common to find in awards a definition of the various shifts worked in the industry. The Metal Industry Award (as it was in 1990) contained for example the following definitions:

COMMISSIONER WATLING: I'm just having difficulty with this. Aren't we in this award looking at rostered employees and non-rostered employees?

MR WARWICK: Indeed we are, Mr Commissioner, but -

COMMISSIONER WATLING: So you're throwing up the shift work argument.

MR WARWICK: Well I think that notwithstanding the fact that terminology is different in the award that we're - we're making, we believe that most of the benefits and entitlements that employees enjoy when working outside the ordinary - ordinary spread of hours should be incorporated into the award.

I should say that in - in negotiating and discussion and indeed making submissions in relation to the question of using the terminology 'rotating rosters', 'rostered employees as defined' and so on and so forth, our understanding was that what we were seeking to do was to simplify the award not to fundamentally change things the benefits and entitlements that accrued to the employees working in the industry, notwithstanding the fact that the somewhat anachronistic term of shift work is no longer used.

So certainly we - we don't see that the change in the nomenclature should lead to any change in entitlements and benefits.

Mr Commissioner, I think the important - next important point which I'd bring to your attention is contained on the fourth page of the exhibit which is 24,264 - where the commentary says at the bottom of the page in relation to Continuity of shifts worked:

Most employees look for some continuity and regularity in their working pattern. Thus awards commonly provided that a penalty rate is payable where an employee is not employed continuously for five shifts on five successive days. The penalty is usually in the order of time and a half for the first two hours and double time thereafter for each day worked.

And we would say that our claim falls squarely with the words contained in the commentary save that the penalty rate that we seek is of a more moderate - or moderate in nature.

If I could refer you, Mr Commissioner, over another three pages to page 24283 where in the section - there's a section relating to compensation for shift work, and the first part of that section deals with assessment for compensation and it reads:

It has long been accepted that shift workers were entitled to some monetary compensation over and above the wages paid to employees who carry on the same or similar functions during the normal working day. But the manner in which compensation was to be assessed and how the compensation was to apply (i.e., as a flat rate or a percentage of an ordinary wage) are always difficult questions.

In the Shift Workers' case (see 30-530), the Commission in Court Session said that, in assessing compensation for shift work, all the circumstances of each particular award would have to be examined when fixing appropriate penalty rates. Relevant factors would include:

"the shift times, whether the shifts include day, afternoon and night shifts or some combination of these, whether the shifts are fixed, rotating or alternating, the regularity or irregularity of the rotation or alteration, the duration of the shifts, the number of days consecutively on and off duty, the division of time spent on day, afternoon and

night shift, the impact of the system on rostered days off, e.g. whether the benefit of a rostered day off is partially lost if the last working shift ends in the early part of that day. If the system being worked is one chosen by the employees out of several alternatives offered, this fact in fairness should be regarded as material."

Mr Commissioner, we would say that those comments from the Shift Workers' case decision are of some significance, particularly in relation to regularity or irregularity, the number of days - sorry - the division of time spent on day, afternoon and night shift.

I wish to bring these particular provisions to your attention because they are clearly not contained in the report from the 'Australian Industrial Law Review', which is HSUA.9.

The commentary goes on to say:

The Commission was however prepared to make some general observations on the evidence that was being put before it. It summarised the situation with respect to the various types of shifts commenting (at p. 649-650) -

" ... in general we would say that a fixed day shift carries no compressible disability except where it is worked during the weekends and on public holidays where separate appropriate remuneration should be provided. As between a fixed afternoon and night shift, generally a night shift carries the greater overall disability. As between a fixed afternoon and night shift, generally a night shift carries the greater overall disability ... it is difficult to determine which shifts should be regarded as fixed. A rough and ready guide is to be found in the Metal Industry Award which treats a shift which runs for more than a month as fixed but there would be exceptions this. ... In general in a fixed shift system we would place in ascending order related to inconvenience and disabilities: (a) day shift (no inconvenience or disability); (b) in the early morning shift, say, commencing between 4 a.m. and 6 a.m.; (c) afternoon shift; (d) night shift. By 'afternoon shifts' we have here in mind shifts commencing not before 3 p.m. and by 'night shifts' those which commence not before 8 p.m. Afternoon and night shifts which commence earlier than these times in particular industries do not lend themselves to generalizations and must be considered in their own settings."

Another problem that arises in this area relates to shifts which straddle the hours which would normally be part of a day, morning, afternoon or evening shift. It is often in this type of case a question of ascertaining whether the majority of hours worked on a shift fall within a certain time span for the purpose of fixing the appropriate penalty. The Commission commented on this problem saying (at p. 650) that:

"In a rotating or alternating shift system whether the remuneration is applied only to afternoon or night shift or is spread over day shift as well is not of much consequence. As long as the whole shift cycle is considered, the discretion should be left to the parties or the arbitrator as to how the proper remuneration for the cycle is allocated. Whatever method is used, some minor account should be taken of the fact that the problems of adjustment and adaption extend to a limited extent to the day shift as well as the afternoon and night shift. ... In relation to rotating or alternating systems we would place in ascending of inconvenience and disability:-

(a) day shift (minor inconvenience and disability);

(b) early morning shift;

(c) afternoon and night shift. (The former has more social disturbance and the latter more medical problems e.g. arising from difficulties with sleep.)

Again we have in mind afternoon and night shifts of the kind discussed when dealing with fixed shifts. As between night shifts on a fixed basis and night shifts worked in a rotating or alternating system we would regard the fixed night shift as overall being more onerous because of its effect on domestic and social life even though the evidence suggests that it is less onerous in relation to possible minor health problems. Many awards specially cover fixed shifts particularly fixed night shifts, and provide greater remuneration for them than for rotating shifts. Broadly this is justified because of the lack of any periods on day shift."

And we would submit, Mr Commissioner, that the concluding words of that section are particularly supportive of our argument in relation to the clause we seek.

If I could refer you over, Mr Commissioner, one page 2492 - we contain - there's a commentary there in relation to standard penalty rates and it's appropriate that I read that to you.

It can be inferred from the preceding paragraphs stating what "standard" penalty rates are at any given point in time is a difficult if not impossible task. It would seem that an industrial tribunal's decision in respect to shift penalty rates in an industry or part of an industry must to a very great extent depend upon the circumstances and the multiplicity of factors operating in the particular case.

However, it is possible to make some broad, though certainly not definitive generalisations about prevailing "standards" adopted by the various tribunals. In relation to shift work other than continuous shift work, a rate of approximately 15% of award rates is generally accepted as equitable and reasonable (although, that 15% figure would and does fluctuate either up or down depending on the prevailing circumstances or conditions in any particular industry). In relation to the more arduous shifts, such as continuous shifts or permanent night shift, the loading appears to be between 25% and 30% of ordinary award rates.

In Australian Federated Union of Locomotive Enginemmen v. Victorian Railways Board 1977 AILR 160(2) -

- and that is the decision contained in exhibit HSUA.10 -

- Commissioner Walker reviewed the issue of standard penalty rates and said that shift payments generally fell within the bracket of 10% to 15% of the ordinary rate with a higher percentage prescribed for night or irregular shifts.

I don't believe that there's anything further in that section that I should bring to your attention, Mr Commissioner.

There is one other provision in this exhibit that I would seek to highlight to you, and it's the third-last page of the exhibit - page 24321 - and very briefly, Mr Commissioner, this section - and I'll only read two paragraphs - this section says:

The question of rostering of employees and the amount of notice employees should be given of required working patterns has been a source of constant disputation. It is therefore surprising that many of the more important industrial awards

do not contain the appropriate rostering clause although references to rosters are found in many areas of awards.

It was said by the President of the Tasmanian Commission in Re Hospital Employees Federation of Australia (Tasmanian Branch No.2) 1985 AILR 321 that rosters were an essential element of the shift work system.

And indeed that is the decision I've previously referred to in HSUA.7.

Mr Commissioner, very briefly in relation to exhibits HSUA.11 and 12, HSUA.11 is the Metal & Engineering Industry Award which is an award of this commission and indeed one, as I understand it, within the purview of your portfolio.

COMMISSIONER WATLING: By consent.

MR WARWICK: Indeed, Mr Commissioner. I'd simply make a point that notwithstanding the consent nature of the provisions of this award, there are contained at clause 26(f) which is the third page of the exhibit, provisions relating to shifts which do not continue for more than 5 days at a time and also provisions relating to employees working on night shift for specified periods of time.

The - similar circumstances exist in relation to HSUA.12, Mr Commissioner, the Federal Metal Industry Award. Those provisions are contained at 19(g) and that's on the fourth page of the document.

COMMISSIONER WATLING: Consent matter too?

MR WARWICK: Pardon?

COMMISSIONER WATLING: Consent matter too?

MR WARWICK: I'm unable to advise you in that regard, Mr Commissioner, whether or not it's a consent matter. But clearly the point in - simple point I wish to make in - in putting this exhibit and the previous exhibit is that it is open to industrial tribunals to include provisions in relation to the length upon which any particular night or afternoon shift cycle can continue, and relation to the maximum limit in relation to how much time a person can be employed on night work. Those are matter which are clearly industrial matters and can be contained in awards. Whether by consent or otherwise we would submit.

Mr Commissioner, we believe the decisions in -

COMMISSIONER WATLING: I can't let you have that throw away line without making some comment. It really depends in the way in which the clause is written as to whether it forms a penalty for non-compliance with the award or whether it provides for a system with a certain penalty or a certain rate. There is a difference.

MR WARWICK: Well we seek -

COMMISSIONER WATLING: And that's why I say that it may well become a penalty for non-observance of the award if you write it one way and if it's written another way it could mean that certain systems of work attract a - a higher premium.

MR WARWICK: We don't seek an inclusion in the award - a provision which says that there shall be a fine in the award for breach of the award. It's not what we seek by way of application, Mr Commissioner.

COMMISSIONER WATLING: So you're catering for another system of work which allows people to develop other systems of work but they just get a different premium.

MR WARWICK: Yes, Mr Commissioner.

We would - we would ask that the award be constructed in a way that said that there should be a basic standard pattern, if you like, as far as possible, but that departures from that pattern may occur due to operating - the operating requirements of the enterprise, and when those departures then different premiums apply.

Mr Commissioner, we believe that the decisions and commentary we have provided clearly indicate that the clause we are proposing is consistent with those decisions and commentary. It is clearly the case that an award can comprehend payment of additional penalty rates and circumstances where irregular rostered work patterns are performed. It is our view that the evidence supports the submission that an award should in fact contain such provisions, and in particular, an award should provide that in a rotating roster employees can have an expectation of certainty in their hours of work for at least 5 days at a time. An award should provide that employees should not have to work on night work for more than 4 weeks at a time. An award should provide that employees on a rotating roster should spend at least one-third of their time off night work.

An award should provide where an employee is engaged other than by agreement exclusively on night work then that employee is entitled to an additional penalty payment.

These provisions we submit are not burdensome or onerous on employers. We do not see that an employer will not in the

general course of things be easily able to comply with these provisions when drawing and implementing rosters.

The purpose of the clause as we seek to have included in the award as I indicated at the outset are, firstly, to set down certain minimum provisions in relation to the operation of rotating rosters, but also, that those provisions may be varied in certain circumstances due to the operation of the enterprise. And secondly - or the second purpose of the provisions is to provide for additional penalty payments in circumstances where those minimum provisions cannot be met.

We believe it is a matter of fact, Mr Commissioner, that from to time employers may need to instruct employees to work other than in accordance with the provisions of the standard rotating roster, and indeed, other than in accordance with the employees normal roster. In those circumstances employees will be additionally burdened with the onerous personal discomfort and disruption associated with out-of-hours work. They are therefore entitled in our submission to be paid an additional premium or penalty rate.

The final comment I would make, Mr Commissioner, in relation to all of these - that we've put to you this morning is that we believe that in respect of the wage fixing principles there are two relevant wage fixing principles in operation and relative to the making of this award. The first is obviously the structural efficiency principle and that principle must be observed and regard must be had for it. Also we believe that the first awards and extensions to existing awards is also significant and that principle says in its first subclause that in the making of a first award, the long-established principle shall apply, i.e., prima facie the main consideration is the existing rates and conditions.

COMMISSIONER WATLING: Right. So if I find - if I come up with a view that rotating rosters don't occur out there I shouldn't include a provision.

MR WARWICK: We would say that -

COMMISSIONER WATLING: So in using - in using that principle you're going to take me to where rotating rosters are in - in operation and the amount of money they get paid.

MR WARWICK: We would say that it is an existing condition in the industry that rosters do rotate unless agreement has been achieved.

COMMISSIONER WATLING: Well are you going to establish that?

MR WARWICK: We would argue that the long history of awarded coverage establishes that.

COMMISSIONER WATLING: We're making a new award - you just told me to look at that principle.

MR WARWICK: Indeed, and we would say that -

COMMISSIONER WATLING: Well that means if we follow your argument we should look at what exists in the industry, so we then look to see what - whether or not rotating rosters are in place and what rates apply and what applies if they don't observe certain things that you've specified in - in (e). That's the only way you can establish the existence of it. And would happen if -

MR WARWICK: Well I think that the existence of a previous award is not also - is also not inconsiderable.

COMMISSIONER WATLING: But we're making a new award and therefore if we're making it relevant to the industry we might find that there's not a system out there of rotating rosters - they might be all non-rotating rosters.

MR WARWICK: But there's a system of agreement of non-rotating rosters by agreement. I mean I'm not accepting that rotating rosters aren't worked - I think that they probably are. There are probably just as many, perhaps even if not more non-rotating rosters and we would say that clearly the award needs to comprehend both.

And perhaps in respect to the structural efficiency principle it may not be as flexible for the award if it didn't comprehend both. It may be a less flexible system if it only comprehended one.

COMMISSIONER WATLING: I just only make the point that if I was to - to try and find out what the existing provision is, I might find that there's no existing provision.

MR WARWICK: Well there are rosters out there, Mr Commissioner.

COMMISSIONER WATLING: Rotating rosters?

MR WARWICK: I would imagine the larger nursing homes would have them.

COMMISSIONER WATLING: But we don't know.

MR WARWICK: We're not too sure.

COMMISSIONER WATLING: There's no evidence before me.

MR WARWICK: Indeed.

COMMISSIONER WATLING: Right.

MR WARWICK: On that basis I think I will leave it at that.

COMMISSIONER WATLING: Right.

MR WARWICK: Thank you, Mr Commissioner.

COMMISSIONER WATLING: Good on you.

Now obviously Mr Targett will want time to respond to this and I'll need - so we'll need to set another day. What does Thursday look like? What does Thursday of this week look like?

We might just go off the record for a minute.

OFF THE RECORD

COMMISSIONER WATLING: This matter will be adjourned until Thursday 10th at 11 o'clock. Thank you.

HEARING ADJOURNED