

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4960 of 1994

IN THE MATTER OF an application by
the Health Services Union of
Australia, Tasmania No. 1 Branch
to vary the Welfare and Voluntary
Agencies Award

re clause 78 - Sleeping In
Allowance

COMMISSIONER GOZZI

HOBART, 31 March 1994

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Could I have appearances, please.

MS HARVEY: If the commission pleases, MS HARVEY R, appearing for the Health Services Union of Australia, Tasmanian No. 1 Branch.

COMMISSIONER GOZZI: Thanks, Ms Harvey.

MR SERTORI: If it please the commission, SERTORI M.C, appearing on behalf of the Tasmanian Chamber of Commerce and Industry Limited.

COMMISSIONER GOZZI: Thank you, Mr Sertori. Ms Harvey?

MS HARVEY: Mr Commissioner, this matter was before the commission in a different form on November 16th and December 10th last year under application T.4700, and the commission will recall that at the time the parties had reached agreement on an interim adjustment to the sleep over provision in the Welfare and Voluntary Agency Award, and we sought to progress that as part of a package of items under the review of conditions in that award arising from the structural efficiency principle.

In the Reasons for Decision that was issued on 17th December 1993 it was said that:

I understand that a work-value case causes the applicant in this matter some concern. Be that as it is, I can see no impediment to the case being undertaken in accordance with the relevant wage fixing principles.

In that context, given that a comprehensive review may take a considerable period of time, sufficient material may be initially be able to be put before the Commission to facilitate an interim adjustment pending the total review of all the factors associated with the sleep-in.

In the submissions I wish to put to you today, Mr Commissioner, I wish to present evidence that will justify an interim adjustment of the sleep-in requirement on the basis of the work-value principles, and in putting that case I am intending to address a number of matters.

First, the history of the sleep-in provision in the current award; secondly, the principles, and in addressing the principles I intend to call a witness, a Mr Paul Byrne, to provide evidence about the nature of the change of work value in relation to the sleep-in provision; to then to address you on the quantum, and just to make some concluding comments.

So, if I can now turn to the substantive part of my submission.

In relation to the history - and if you will bear with me if I just give a quick recap of the history of this provision.

Sleep-in actually went into the current award in 1980 at an amount of \$5.00 per week. This was at a time where care was predominantly provided in a residential hostel sitting as opposed to the current provision of group homes.

The amount was put there to compensate for sleeping over and to provide an incentive, and in those times disturbance whilst an employee was on sleep-in was rare.

Since 1980 the award has only been varied once in relation to this provision, and that was by a 50% CPI adjustment. So in all that time of the 14 years we have really only seen one very minor adjustment to the provision.

In approximately 1983 the Federal Government under the auspices of Minister Grimes introduced a policy of integrating disabled people into the community, and it was within that context that we saw the shift to group homes and the development of independent living skills for people with intellectual disabilities.

In 1985, as you are more than aware, Mr Commissioner, there was a work value undertaken on the whole award. The exercise was comprehensive and in accordance with the wage fixing principles of the time, but none of the parties at that time paid attention to the sleep-in clause.

We had an extraordinary situation that arose whereby the rates of pay in the award had been adjusted but people who were on sleep-in and were disturbed were expected to exercise skills but on a sleep-in rate that predated the work-value adjustment.

So, having given you a potted history of the award, I now intend to address the issue of the principles on work value themselves.

There has been significant work-value changes, and I wish to provide evidence in the form of calling a witness who can provide evidence to the commission on this matter.

PAUL ANTHONY BYRNE, sworn:

COMMISSIONER GOZZI: Please sit down, Mr Byrne.

MS HARVEY: Mr Byrne, can you please state your full name and address for the commission?... My name is Paul Anthony Byrne, as opposed to Gregory. My address is 46 St. Helen's Street, Lindisfarne.

And, Mr Byrne, who are you currently employed by?... I'm employed by Oakdale Lodge, Yalaby, as Executive Officer.

Right. And how long have you actually been employed in that capacity?... I was employed at Oakdale Lodge as Manager from July 1988.

Thank you. Could you just please explain to the commission the history of your employment in this industry?... Right. I was first employed as senior supervisor at Oakdale Lodge from October 1978 and remained there until the end of 1981. From the beginning of 1982 through to the end of 1986 I was manager of Orana Hostel, which was a children's hospital operating in Launceston. I then had a break from the industry until my appointment at Oakdale in July of '88.

Thank you. We are addressing the issue of sleep-in. I was wondering if you could tell us what an employee would be expected to do when they were disturbed on a sleep-in?... Well the requirements of an employee now would be to meet the needs of the client, to support them in whatever area that required, whether it be in regard to personal hygiene skills or matters relating to behaviour.

Right. And does that differ to the work undertaken by employees during the day?... No, I don't believe that it does, in that during the day employees are required to implement programs, structure programs, to either enhance the skills of the client or to modify their behaviour, and those programs inevitably have to be carried on throughout the night.

Right?... To maintain consistency.

So, how would you characterise the nature of the disturbance, and what employees are required to do now as opposed to the pre-1983 days?... Pre-1983 predominantly would have been to resettle the clients as quickly as possible. As I've just mentioned it is vital now that programs are maintained; that there is consistency in the approach to the clients and in meeting their needs, and those programs have to be maintained throughout the night. So there is a greater degree of detail to be met at that time.

So they are actually exercising the skills that were required during the day?... Oh, certainly. Those skills are maintained, yes.

So, in looking at this difference between the work done now and the pre-1983 sort of work that was undertaken, you testify

that the actual work is different. How would you characterise the level of responsibility?... Well, complementing that increased skill level there is also an enhanced level of responsibility, because staff members are required to maintain the programs, they are accountable for their actions under those programs. So there is obviously an enhanced level of responsibility.

And is supervision provided now, as opposed to 1983?... Well, in that area there have actually been changes predominantly prior to '83. The accommodation would have been hostel style accommodation where there would have been inevitably more than one person sleeping over within the establishment. With the proliferation of group home situations now many staff members are sleeping alone on the premises with the clients, so they are solely responsible.

And how often are employees disturbed, in your experience?... That varies between facilities, certainly, and certainly can vary within facilities. There may be a period of disturbances, fairly frequent disturbances over a short period, and then there may be a hiatus. Other organisations, the anecdotal evidence that I have may have fairly consistent disturbances. So it does vary right across the range of facilities.

Is it correct to say it varies with the client? Say, if the client - ?... Oh, certainly, yes, dependent upon the needs of the clients, yes.

Okay. Could, in your opinion, services operate without the sleep-in provision in the award?... No, definitely not. Services have a duty of care responsibility to provide the level of support that is necessary to meet the needs of the client and that has to be maintained be it day or night.

And are there any services currently paying in excess of the current sleep-in rate in the award?... There are, to my knowledge, and this is a result of discussions that we have had within the industry. There are a range of allowances being paid throughout a variety of services. Some of those services indeed are being funded to the full extent of the allowance that they are paying. So it doesn't necessarily stop at the \$5.50 award rate at the moment.

Why do you think that's the case, that the employers are paying more than is required as a minimum in the award?... Well it is obviously a recognition of the level of responsibility and skill required to fulfil the position. In recent years, because of the variation in the level of skill required, the allowance hasn't changed and I would suggest that it hasn't recognised the variations in skill levels and the improvement in staffing requirements.

Okay. Thank you, Mr Byrne, that's the final question that I had, and I am not sure whether Mr Sertori has any questions?

COMMISSIONER GOZZI: Mr Sertori?

MR SERTORI: Thank you, Mr Commissioner.

I have one question of you, Mr Byrne, on the issue of the ability of the services to operate without a sleep-in provision. You indicated you were unable to do so if there wasn't such a provision in the award. If it was the case there wasn't such a provision, you would still need to cover that period of time with employee coverage, I assume?... We would do, yes.

How would you then remunerate those employees for that period of coverage in the absence of a sleep-in provision?... Well the only option would be either to instal a night shift which would be financially devastating or to compensate people on an overtime basis.

So the net effect is that sleepover provides a more cost effective regulation of that period of time?... Certainly, and it also I think enhances the development of skill levels within the clients. In some organisations in actually placing a night shift supervisor that may have a detrimental effect to client needs. So that the sleep-in allowance is, in fact, the best option in many cases.

Thank you. I have no further questions, sir.

COMMISSIONER GOZZI: Any re-examination?

MS HARVEY: No, Mr Commissioner.

COMMISSIONER GOZZI: Yes. Thank you. Mr Byrne, what do you think is a reasonable amount for a sleep-in allowance?... Due to the nature of the work, the improvement in skill requirements as far as staff are concerned, the level of inconvenience people suffer in being away from their family and their home environment, I would suggest the sum of \$20.00 has been discussed as being a reasonable amount. I think that is considered by most parties, certainly the staff and employers that I have had involvement with as being a reasonable amount at this stage.

You mentioned that there is a greater degree of detail involved now in the work that these people do. Can you give us a for instance? How is the work different now?... Well, for example, a client that we have recently had in our service was creating disturbance on a regular basis during the night - basically getting up to use the toilet facilities. Now, during that time she would suffer disorientation, be unable to find her way back to her room without staff support and would

then disturb the rest of the clients within the area. Now, going back a number of years it would have been a case simply of getting that person, redirecting them back to bed, and that was it. Our level of programming, trying to meet the needs of individual clients, requires that we do everything possible to enhance her skills, and that involved developing a program to orientate her around the building during the after-hours period. But we had to instil those skills and commence that program during the daytime and then reinforce it at night so that there was a consistency.

Alright. So the orientation program - that's the sort of accountability for those sort of programs that you're talking about. What other types of programs could you have mentioned? Any other specifics?... Well, again with regard to another client who comes to mind, behavioural difficulties that occur from time to time, and it may be for the purposes of today's discussion, I suppose, described as attention seeking behaviour that may occur on a regular basis during the night, again has the effect of disturbing other people. That attention seeking behaviour is dealt with in a particular format during the day -

Mm?... - and the staff that are sleeping over in that area must be familiar with the - with the types of methods that are being used during the day time program and then carry those on through the night, again so that consistency is maintained otherwise it only serves to confuse the clients.

In your experience what would be the impact of increasing the award costs as it currently is, notwithstanding that other employees may be it, but in the context of this award increasing the award costs from a figure if somebody was disturbed once a night for five nights of \$25 to \$100 a week and a 5 day cycle?... Sorry, I don't exactly follow what you mean.

Well current cost; if you're disturbed at the moment it is \$5 a disturbance?... Right.

And if you were disturbed five nights in a row that's a cost of \$25?... Right.

Under the proposal, if you're disturbed five times in the week - five different nights, it's \$100 - without all the other bits and pieces?... Right - yes.

Now how - what would be the impact of that increase in cost on the service that you provide?... The - well the impact of that increase on our service will be significant. Are you requiring dollar terms - a dollar figure?

Well, I'm just saying - I don't know how many people you've got in a sleepover situation, but if you just took one, it's \$100 - ?... Yes.

- compared to 25 is a \$75 increase in costs over the year?... There - it will have a significant impact on -

And how are you meet that impact?... - on all services. Applications for funding are currently before the state government - the funding body. Those applications date back to in our own instance early last year. We are aware that the allowance was under review and the funding body have been well aware of that situation.

And what have the funding bodies said to you?... To date we don't have a commitment unfortunately. The -

And so have you costed it at \$20 or - what - ?... Certainly - it's going to cost us \$7,300 per person sleeping over per night.

Is that your estimate?... Well that's the impact of \$20 per night - 360 -

And how many people?... We have three staff sleeping over within the facility and we are just starting a new service with three group homes and there will be a person sleeping over in each of those facilities.

Mm?... So you're looking at, what, \$21,000 - 21,900 for each arm of the organisation.

Mr Byrne, it's not my intention to give you a difficult time, but I - ?... That's alright.

- want to ask the question: one of the difficulties with sleepover that I'm trying to get my mind around is the fact that the nature of the work has - the change in the nature of the work has been recognised to an extent at least - and it might be argued not to the full extent, however in 1985 there was a work value case which recognised that a significant change in work had taken place. Now how does - how would you say increasing the sleepover allowance in any way impacts on the nature of the work? I mean the work's been compensated for, so why would you want to increase the sleepover allowance?...

MS HARVEY: Mr Commissioner, with respect, I'm just a bit concerned, because the witness is not an industrial expert and I think -

COMMISSIONER GOZZI: Well it's not - well he's a witness nevertheless and I'm just asking the question and you'll have

an opportunity in a moment, Ms Harvey?... With regard to the work during the day -

Mm?... - you know, bearing in mind I wasn't a party to the work value review that you referred to, that may well have been recognised and compensated at that stage. The allowance, to my knowledge, hasn't been varied for a number of years. Now most certainly the requirements of the funding bodies stipulate that the level of service and support that we provide to our clients meets very specific standards. Those standards don't stop when the clients go to bed, they must be maintained 24 hours a day. We have a duty of -

Yes, the point I'm making though is that the client goes to bed and the employee goes to bed?... They do.

Right. So the work effectively stops, the person gets up and then carries on looking after the patient when the patient - when the patient - or the client - gets out of bed or whatever?... Yes, but at the time that they get up to work with the client to meet their needs they're utilising skills that they would normally utilise during the day -

Yes, but if those skills - but aren't being recognised within the allowance currently. Alright, okay. Thank you. Any - ?... If - may I make one further point with regard to - you asked for the response of funding body, one of the concerns that I have - and this may or may not be appropriate - is that some organisations, as I mentioned, are paying that \$20 level or higher and are currently being funded by the state funding body to that level, so there is an issue of - of equity to be maintained between employees who are undertaking like activities.

Yes, I can understand that. Thank you, Mr Byrne. Ms Harvey?

MS HARVEY: Yes, I just wanted to ask a couple of further questions: you responded to the question about what was a reasonable amount and you used the words, 'at this stage \$20'. Is it correct to say that this has been discussed as an interim arrangement pending further consideration?... Within the light of the award discussions, yes.

Thank you. In relation to the - the issue of the examples that you gave us, work that has to be done during the sleepover, is it correct to characterise that as behaviour modification?... Certainly at times, yes.

And what is the objective of providing that service in the sleepover?... Well to improve the skills - to improve the skills level of the clients. I mean the ultimate aim is to improve a general quality of life.

Mm?... And as I mentioned to the commissioner, that doesn't just stop when people go to bed, it must be maintained - the consistency and the standards must be maintained.

So it's imperative to that objective?... Oh, certainly.

Yes. Now in relation to the funding of services, is it correct that both the union and the employers have been working together and meeting with the minister to try and get this amount funded?... We have been, yes.

And is it also correct, as you said, some services are already getting it - the additional funding?... They certainly are.

So that the cost of this increase, would it be restricted to a certain group of services?... It will be restricted to a proportion of the service providers, yes.

Thank you.

COMMISSIONER GOZZI: You've just stopped leading questions in time, Ms Harvey - that's fine thank you.

Mr Sertori, anything further you want to raise with the witness?

MR SERTORI: No, sir.

COMMISSIONER GOZZI: Alright, thank you.

Mr Byrne, thank you very much for your assistance - you can step down?... Thank you.

I'd be intrigued to know, Ms Harvey, what response you got from the minister in your meetings with him.

MS HARVEY: No, certainly I'm happy to address the issue of the funding matter. I can either do it now or if I conclude my -

COMMISSIONER GOZZI: Oh, when you get to it - fine.

MS HARVEY: Yes. Mr Commissioner, the - the evidence that's been provided by Mr Byrne, demonstrates that there has been significant work value change since 1983. That disturbance is not uncommon and that there is a significant net addition to work requirements in sleepover, and he gave examples of both the level of skill required by the employee and the level of responsibility; that services could not operate without sleepovers and that the current rate in the award has been an impediment to the delivery of services, and hence some services are already paying above it. That all this supports the parties contentions that there has been a significant net addition to work requirements as to warrant the extension of

the special allowance and that, for example, the sleepover allowance payable only when the new or changed work is performed by the employee. Those additional work requirements being - and just recapping - the responsibility and the duty of care, the accountability for their own work, implementation and continuation of structured training programs from the day into the night, and one-on-one delivery of structured training and I would also contend a greater inconvenience factor, because in the days where employees were just required to put a client back to bed, was obviously less work required to do that than to actually deliver a component of a structured training program.

That concludes the comments that I intended to make in relation to the work-value principle. I was now -

COMMISSIONER GOZZI: Alright, well look, again, because we are talking about an interim adjustment and from that submission or from that examination of Mr Byrne, and what you've indicated previously, there's obviously an intention to revisit the allowance at some further stage down the track.

Now you've mentioned 1983 as the - as the - as the datum point for it if you like; I just want to ask you, has the award been treated by the second SEP increase?

MS HARVEY: It has, Mr Commissioner. It was in approximately May 1992.

COMMISSIONER GOZZI: Right. Aren't you confined then to the datum point from the date of the second increase?

MS HARVEY: No, Mr Commissioner, we don't believe that we are for - I think there's two reasons - one is a technical reason about the principles -

COMMISSIONER GOZZI: Right.

MS HARVEY: - and in particular if the principle under (c) of work-value requires that - or to I think the issue that you're referring to - that -

COMMISSIONER GOZZI: I'm referring to the structural efficiency principle actually.

MS HARVEY: Yes. The point I think that needs to be made is that I think that the reason those principles were incorporated was to avoid the situation of double dipping in award structures.

COMMISSIONER GOZZI: Well -

MS HARVEY: Now the first point to make is that this isn't part of the award classification structure, it's indeed part

of an allowance. Secondly, I would argue that we are continuing to implement the SEP - there's a number of factors involved: one is the classification structure, and at the time that second SEP went in, we foreshadowed to the commission that we would be finalising the classification structure, so in that sense I don't think you could say the SEP has actually been finalised in any way.

COMMISSIONER GOZZI: Ms Harvey, the reason I've mentioned it to you - I'm certainly going to raise it with Mr Sertori, I've had his organisation argue very strenuously on this very point in respect of some very specific matters in other award areas where in fact the argument was, well seeing as the award has been treated by the second SEP, then that principle by the way it's worded and its meaning prevents the commission, however constituted, from going back behind that date in the context of work value.

And the reason I mention it today is because you've indicated that whatever happens here on an interim basis, that you want to revisit this allowance matter at some further time and I'm simply saying now, how do you look at that situation in the context of - of datum points and how do you look at that situation in the context if Mr Sertori at some further point down the track, says, well look, we've agreed to it last time round, as he appears to be doing now, but we're not prepared to agree to it in the context of any matter that might come up in the future. I mean, don't you look to the commission, in any event to have a consistent application of the wage fixing principles?

MS HARVEY: Well, Mr Commissioner, I'm not aware of the circumstances you're referring to in Mr Sertori's other submissions, but I think there is a very fundamental difference in this. I mean we could have as parties, and perhaps, you know, the employees, could have sought to hold every single thing up until it was completely and utterly finalised before we put the second SEP in place which would have been the requirement, if you take that sort of interpretation that I think is being put in relation to this principle, I would argue that that, because we foreshadowed at the time quite clearly that we had this broader agenda to deal with allowances, classification structure and conditions, and we foreshadowed then that we're not really having a second bite of the cherry, if you like, that we've indicated then, but the parties in the interest of good industrial relations didn't seek to finalise every single matter which was not in fact occurred in 1992.

COMMISSIONER GOZZI: Yes, I mean that - it's quite common for the structural efficiency exercise to carry beyond the second 3% -

MS HARVEY: That's correct.

COMMISSIONER GOZZI: - there's a whole range of examples of that happening.

MS HARVEY: And we indicated at the time.

COMMISSIONER GOZZI: I'm talking specifically though in the context of your work value case.

MS HARVEY: All I can say is that - that we indicated at the time that the second SEP went in, that we had this broader agenda in relation to the classification structure and in relation to allowances and conditions, and that it would have been impossible to finalise all those matters back in 1992. We're not seeking to actually vary the rate, we're seeking to vary - vary an allowance and I believe that we've met our requirements under the principles by making that clear at the time - that, you know, we weren't wishing to close the door on - on any argument that we would seek to put to you in relation to this matter.

If I could just answer the second question in relation to that - the issue that we want to revisit it, you're aware of what's happening in the discussions in the Community Services Award, it may well be that as a part of finalising the classification structure that when we implement on the ground that we may find a better way of regulating sleepover, and it would seem to me contrary to everybody's interest to be forced into a situation where we had to say, you know, this is it, because of the principles which I don't think that we are - we are meeting the principles - we are meeting the objective of the principles. So I mean, that's really why seek to - to have an interim arrangement and to put in place something that the parties agree is workable and able to deal with the very real problem.

COMMISSIONER GOZZI: Yes, and of course one of the things I want to avoid is developing an inconsistency of approach in respect of one award versus the other, as far as the application of the principles are concerned, because in the community services matter at this point in time, the amount of allowance, if you like, and a whole lot of other things is not yet agreed and it could well be at the end of the day that the very proposition I'm putting to you will be argued by the employer organisation or organisations involved in that matter.

MS HARVEY: Well I think the principles are very clear in relation to that issue of classification structures. What you're seeking to set relativities in a -

COMMISSIONER GOZZI: I'm not talking about the classification structure, I'm talking about the work-value datum point -

MS HARVEY: Mm.

COMMISSIONER GOZZI: - which is quite specific, in my view, in the context of structural efficiency. I mean I what you say about what you've indicated previously as applying in this particular award, but you're drawing the analogy, saying well okay, the is justified on the basis of what might happen in the community services area, and I'm saying to you in the community services area it may well be that the very argument I'm putting to you - the very propositions I'm putting to you could in fact be argued by Mr Sertori's organisation or in fact the Community Employer Organisation of Tasmania.

MS HARVEY: Well I'm not responsible for arguing to, you know, what the employees argue through the TCCI in relation to these matters.

COMMISSIONER GOZZI: No, but I'm putting it - I'm putting it to you on the basis that at the end of the day the consistency in the context of the application and the wage fixing principles needs to come from me - needs to come from the commission. It can't be - you can't pick up the principles one day and say this is how they will apply, and another day apply it somehow differently.

MS HARVEY: No, I think the critical issue in this, Mr Commissioner, is that we have clearly indicated to you throughout this process that there is a package of issues that need to be resolved. Now if we took a very, what I would argue, is a narrow interpretation of the principles, we'd be in an untenable position of having one point where everything had to be finalised which I don't believe would be in the interests of industrial relations because at that time in May 1992, these issues were not resolved and we were not in a position of having an agreement and having worked together and having assessed what the requirements of the industry were and having spoken to the minister and having spoken to the department. What we did do is indicate to the bench that that's what we were - the process that we were going through and I think that that puts us in a slightly different position in the sense that there was consent between both the employers and the employees that that - in organisations that that was the case.

COMMISSIONER GOZZI: I can understand that part of what you're saying. I'm also I think making it quite clear in addition to what you're saying, there is this issue of about this allowance and the possibility of the datum point argument being significant in those other discussions.

MS HARVEY: Yes.

COMMISSIONER GOZZI: And I'm simply trying to highlight to you that there are certain observations in respect to the

datum point that you need to take account of. In any event, I would say to you that if you're looking at the thing - this allowance on an interim basis as of today, are you saying then that the datum point in respect of anything further down the track is still going to be 1983?

MS HARVEY: Yes, I'm saying that we're not exhausting the work value component.

COMMISSIONER GOZZI: Alright, well I'll address it in the decision. You can certainly make your submissions to the fullest extent. I think I've gone as far as I'm prepared to go in the context of putting to you the various elements that I believe are important. How you choose to address them from here on obviously is up to you.

MS HARVEY: Well, Mr Commissioner, can I just ask for a brief 5-minute adjournment -

COMMISSIONER GOZZI: Mm.

MS HARVEY: - before we continue on this matter.

MR SERTORI: If I could address the commission as you - well I'm in your hands.

COMMISSIONER GOZZI: Well, Ms Harvey is still going, so -

MR SERTORI: Yes, I'm sorry.

MS HARVEY: I've actually requested an adjournment; obviously it's -

COMMISSIONER GOZZI: Yes, we'll - yes, we'll adjourn for a few moments.

MR SERTORI: Sorry, I should observe the procedure.

SHORT ADJOURNMENT

COMMISSIONER GOZZI: Now, Ms Harvey?

MS HARVEY: Yes, Mr Commissioner. I now intend to address the commission in terms of the quantum for this interim rate that the parties have agreed on in terms of the application before you.

COMMISSIONER GOZZI: Right.

MS HARVEY: The rate was agreed to with - having regard to the going rates currently being paid out there in services, the level of inconvenience for affecting employees and also

with regard to the funding and the constraints of the real world.

However - and I've indicated to you before, that it may transpire that as we finalise the finalise the classification structure, that there is a more effective way of dealing with sleepover within that context and I think I indicated to you before that we would certainly reserve our right to revisit the matter of the sleepover clause and the way it operates in the context of this award within the context of the principle and the act.

Now I didn't intend to go through the clause because I - you know subclause by subclause - I think everyone's had an opportunity to look through it, however if you wish me to take you to that I'm happy to do it.

COMMISSIONER GOZZI: What's the 78(b) - what's that mean again?

MS HARVEY: I beg your pardon?

COMMISSIONER GOZZI: Clause 78(b)?

MS HARVEY: 78(b)?

COMMISSIONER GOZZI: Yes.

MS HARVEY: What that means, Mr Commissioner, is that if the - an employee is required to work in excess of 1.1/2 hours in their sleepover or three disturbances, that they would be paid at overtime rates, and that in terms of that overtime to be paid it would be at least 30 minutes for each sleepover.

Sorry, 30 minutes for each disturbance which takes into account obviously the time you have to get up and go to sleep and have your patterns of rest disrupted.

COMMISSIONER GOZZI: So the first hour and a half is the \$20 and then subsequently -

MS HARVEY: Well the first - what we're saying is that within that context of that \$20 in this interim arrangement that - that there would be possible to have a - disturbances up to an hour and a half or three separate disturbances.

COMMISSIONER GOZZI: Within the hour and a half?

MS HARVEY: Well what we're saying is that each disturbance is worth 30 minutes, so you'd have - that there would be an hour and a half total, then the overtime rates would cut in, or more than three disturbances and then the overtime rate would cut in.

COMMISSIONER GOZZI: I'm sorry, I'm a bit slow on this.

MS HARVEY: Okay.

COMMISSIONER GOZZI: I just can't quite understand it.

MS HARVEY: Okay, well an employee during the period rostered sleepover is required to work in assisting or caring in excess of 1.1/2 hours, so therefore if they aren't required to do more than 1.1/2 hours work there is no payment.

COMMISSIONER GOZZI: Mm.

MS HARVEY: And it's consecutive or otherwise, so that provided that if there are more than three disturbances that they shall be paid overtime rates for the time so worked.

COMMISSIONER GOZZI: Wouldn't that be better - don't you mean if there are more than three disturbances? Does that make senses - that - that's - that's sort of throwing me a bit - provided there are no more than three disturbances -

MS HARVEY: Yes, because that's referring to the - to the hour and a half. If there's more than three disturbances then you would have - the overtime rate would cut in.

COMMISSIONER GOZZI: Well shouldn't it say then, provided that if there are more three disturbances overtime payment to be made for the time worked or something like that.

MS HARVEY: Yes.

COMMISSIONER GOZZI: Isn't that - that's why I'm asking. I'm not quite sure that - it's either no more than three disturbances - I mean you're really saying if there are more than three disturbances.

MS HARVEY: Yes - that's correct. That's my understanding.

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

OFF THE RECORD

COMMISSIONER GOZZI: Ms Harvey, would you like to amend 78(b)?

MS HARVEY: Yes, Mr Commissioner. I'd seek leave to amend 78(b) so that it reads, after the comma of 'otherwise', that it now read: or if there are more than three disturbances shall be paid overtime rate payments for the time so worked.

COMMISSIONER GOZZI: Yes, thank you, Mr Sertori?

MR SERTORI: I consent to that, sir.

COMMISSIONER GOZZI: Okay. The variation will be made accordingly. Thanks, Ms Harvey.

MS HARVEY: Yes, Mr Commissioner. So in conclusion, we've presented evidence to you today about the nature of the sleepover and the changes that have occurred. There is consent between the employers and the union about the award variation and the application before you, and we've foreshadowed to you the intention that it is possible that we may wish to review clause in the context of the act and the principles after we finalise the classification structure, as it may be that the parties can find a more effective way of regulating this particular part of the industry.

COMMISSIONER GOZZI: Mm. Well look, if you do decide to come back and allowance situation can't be accommodated within the restructuring your undertaking and you need to argue the sleepover allowance separately as an add on to what has already happened this morning, then I'd ask that you take account of the sort of discussion we had in respect of the wage fixing principles and you address it at that time.

MS HARVEY: Yes, Mr Commissioner.

COMMISSIONER GOZZI: Okay. Ms Harvey, just before you do sit down, the paragraph under 78(b) - now an employee who is entitled to overtime payments under this subclause shall receive at least 30 minutes payment for each disruption. Now without going to the overtime clause, I assume that this award - I should know - provides for time and a half and double time?

MS HARVEY: That's correct, Mr Commissioner.

COMMISSIONER GOZZI: Alright, now what's that really mean then?

MS HARVEY: Yes, it may again be a drafting - what it really means is that you would get 30 minutes at the overtime rates for each disturbances, so perhaps it should read -

COMMISSIONER GOZZI: We'll just go off the record again.

OFF THE RECORD

COMMISSIONER GOZZI: Okay, Ms Harvey, can you -

MS HARVEY: Yes, Mr Commissioner, I'll take you through the clause. I've already addressed the issue of the quantum that's set in (a). In terms - in terms of (b), the require - what this subclause intends to do is to provide for overtime rates to be paid when there's an excess of three disturbances or 1.1/2 hours worked, and it then goes on to say that once that threshold has been reached, i.e., you've gone over the hour and a half or you've had more than three disturbances, that there would be an overtime payment for each disturbance with overtime rates of at least 30 minutes.

Now the rationale for that provision within this clause is that - that an employee disturbed is a minimum - it would take a minimum 30 minutes in the sense that they would be woken up. They would then have to deal with the - the disturbance and the reason for that and take whatever action is required and then to be able to resetttle.

The issue here is that - that people should be paid when they're not just sleeping, and that there would be - we estimate that as a minimum 30 minutes are actually required in terms of each disturbance.

If I can then go on to (c):

COMMISSIONER GOZZI: Which - which in effect means it's a payment as for 45 minutes.

MS HARVEY: That's correct, Mr Commissioner. And I - the -

COMMISSIONER GOZZI: But where does that - where does that - how did you arrive at 30 minutes at overtime rates? I mean - where - where - did you pluck it out of the air?

MS HARVEY: No, we didn't pluck it out of the air, Mr Commissioner, we - a survey was undertaken by both the employers and the union to ascertain the average minimum period required for a disturbance and -

COMMISSIONER GOZZI: And what's that survey show?

MS HARVEY: It shows that it's 30 minutes.

COMMISSIONER GOZZI: Where was the survey - how extensive was the survey?

MS HARVEY: Well I can only go to what the union did and not what the employer did and we surveyed via our shop stewards in the work sites where we have membership.

COMMISSIONER GOZZI: Would that be extensive, Ms Harvey?

MS HARVEY: It would be fairly extensive, yes, Mr Commissioner.

COMMISSIONER GOZZI: Where - where this award applies?

MS HARVEY: Yes, it would be fairly extensive. That was the rationale from it and from the expertise of the people negotiating this award and their understanding and experience in the industry that that was felt to be an appropriate minimum disturbance rate. So there was a series of different rationales that coincided to give us that result.

COMMISSIONER GOZZI: What would be interim about this particular clause?

MS HARVEY: My comments in relation to the issue of the interim specifically went to - to the issue of quantum but it may be appropriate within the context of a review that if we were to come back before you, Mr Commissioner, that it may be that there would be comments made in relation to this.

COMMISSIONER GOZZI: Alright. So just to recap then, in discussions with your unions representatives in the various work places subject to this award, the general indication was that the disturbance, if there was one, would be about 30 minutes' duration.

MS HARVEY: No, I said there was a series of rationales that coincided for this - this quantum being decided are the 30 -

COMMISSIONER GOZZI: Right.

MS HARVEY: - minutes - that was the information we gleaned from our members -

COMMISSIONER GOZZI: Yes, that's what - I thought I said that.

MS HARVEY: The information that the employers gleaned from their survey, the expertise of the people and their experience in the industry negotiating this, and finally a - I suppose a view of what is reasonable in terms of disturbing for people to have to be able to wake up and then go back to sleep.

COMMISSIONER GOZZI: Right, thank you.

(c) goes to the issue of just ensuring that sleepover stands alone and that it will be nominated by the employer at the work place. (d) deals with -

COMMISSIONER GOZZI: Sorry, what's going to be nominated by the employer?

MS HARVEY: The period of the sleepover, Mr Commissioner, will be nominated -

COMMISSIONER GOZZI: How can the period of the sleepover be nominated by the employer?

MS HARVEY: Because there is a span in which people are expected to be at the work place, from and till.

COMMISSIONER GOZZI: Look, I would have thought that the sleepover period would be nominated, if you like, by the client - would be determined by the client.

MS HARVEY: We're assuming that the employer takes on the duty of care responsibility through the funding organisation about the sort of - and there is in fact standard outcomes that are required, but it may well vary from site to site about how those standards that employers are required to meet by the funding body are applied. So the client, in that sense -

COMMISSIONER GOZZI: That doesn't make any sense to me at all, Ms Harvey, I'm sorry. I mean, how can the employer nominate the period of sleepover?

MS HARVEY: Perhaps, Mr Commissioner, if I could continue going through the clause because it does - there is an issue that deals with rosters and how it's rostered, but it is in the sense that there is a span of hours and the starting and finishing time of which an employee is expected to be there for their sleepover is made clear.

COMMISSIONER GOZZI: Whereabouts is that?

MS HARVEY: We don't the situation to arise - well, I'll continue to go through the clause and perhaps then we can come back to these issues of concern.

COMMISSIONER GOZZI: Well, look - no, I'd like to settle this one now, if you don't mind. I just don't understand it and seeing as we're dealing with it, how does it work?

MS HARVEY: Well I was hoping to deal with them in a consequential manner but since you insist, if you go to (f), it says:

Sleepovers will be established in accordance with a roster setting out clearly the names of the rostered employees and the days, dates and hours during which each employee is required to attend her duty. The roster shall provide for a system of scheduled days off in accordance with Clause 74 - Scheduled Days Off and shall not be implemented or changed until after the expiration of 4 weeks notice or in the case of an individual employee after the expiration of one weeks notice or the payment of one weeks pay in lieu of notice.

Provided that such notice of payment in lieu of notice shall not apply in an emergency situation where agreement is reached between the employer and the employee concerned.

Provided that employees shall not be required to work consecutive shifts and sleepovers unless agreed by the employer and employees affected. Employees will not unreasonably withhold agreement.

What we're seeking to do, Mr Commissioner, put in a system of regulation of sleepovers to make it consistent with the shift work clause that has already been endorsed by this commission, so we didn't want the - as a result of the survey that the union undertook there was a clear view of employees that there needed to be some rostering of sleepovers because in the current award there isn't and an employer could technically just nominate and front up an employee at work and say: you will sleepover tonight - and not specify the hours of that sleepover, where it starts and where it finishes.

So, (f) taken together with (c) provides that level of certainty for both the employer and the employee with the rostering of sleepovers.

COMMISSIONER GOZZI: All right. Then should (c) read: subject to subclause (f): Each night sleepover shall stand alone.

MS HARVEY: I have no problem with amendment.

COMMISSIONER GOZZI: Or should (c) in fact come after (f) or should it be under - provided further that each night -

MS HARVEY: Can I suggest, Mr Commissioner, that perhaps we go off the record and - because I would have to confer with Mr Sertori in relation to the drafting.

COMMISSIONER GOZZI: We'll go off the record.

OFF THE RECORD

MS HARVEY: Mr Commissioner, following our discussion off the record, I'd seek to - seek leave to amend the application in the following manner. If we delete the current clause (c) and place it at the end of the current (f), prefacing it with the words: Provided that - so that the final paragraph of the current (f) would read: Provided that -

COMMISSIONER GOZZI: Provided further that.

MS HARVEY: Provided further that each sleepover shall stand alone and the period of sleepover shall be nominated by the employer at each work place -

- and there will be a numbering consequential amendment so that the current (d) becomes (c); the current (e) becomes (d) and current (f) becomes (e).

COMMISSIONER GOZZI: All right. Thank you. Any problems with that, Mr Sertori?

MR SERTORI: No, sir.

COMMISSIONER GOZZI: Thank you.

MS HARVEY: So if just address the issue of (d), Mr Commissioner. Again, as a result of -

COMMISSIONER GOZZI: (c).

MS HARVEY: Sorry - (c), as a result of the discussions with the employers and the union it was felt that it was appropriate to put down some guidelines about the type of environment in which an employee would be required to sleepover, and it's listed down there in Roman Numerals (i) to (iv) and it goes to the issue of single bedrooms; the provision of linen and blankets and the use of cutlery, crockery, reasonable storage facilities for securing personal belongings and access to shower and toilet facilities that can be made secure for private use.

Both the parties are of the view that this is important to put in here to establish standards and there has been a problem in the industry where new houses have been set up that haven't provided adequate facilities in that respect, so if we make it very clear then it assists in planning for the future.

(d) goes to the issue of where the employee requests the employer to provide meals. That's the - a deduction can be made equivalent to the meal allowance and that's a fairly standard provision, Mr Commissioner, in relation to the cost on the employer of providing meals to an employee.

(e) I've already addressed in relation to the requirement to make sleepovers consistent with the roster provisions, and that would be the final comments required in relation to the clause itself, Mr Commissioner, unless there's any further questions that you have on that matter.

COMMISSIONER GOZZI: I'm sure I can dredge up one or two more, Ms Harvey, but I think -

MS HARVEY: Perhaps you could resist the temptation.

COMMISSIONER GOZZI: Perhaps I can. Thank you.

MS HARVEY: So, I've already - as I've said, Mr Commissioner, we seek to amend the award to affect the application with an operative date of date of hearing. If the commission pleases.

COMMISSIONER GOZZI: Yes. Thank you. Date of hearing?

MS HARVEY: Oh, sorry, date of decision.

COMMISSIONER GOZZI: Yes. Thank you. Mr Sertori?

MR SERTORI: If the commission pleases, this matter is, as you can appreciate, a matter to which we are prepared to consent after extensive negotiations. The clause reflects some exhaustive negotiations between the respective organisations and investigation.

I'm not going to revisit the arguments put forward in advance, to - put forward to support this application other than to broadly endorse the evidence as brought forward by Mr Byrne and its summary by Ms Harvey. However, I would say that it is our position that the matter as put before you is a fair settlement - a fair outcome for - against that evidence, both in terms of the - particularly in terms of the amount being sought, and the content and structure of the clause. We recognise that Ms Harvey's desire to conduct further discussion on this matter in the course of classification review and we will participate in that discussion, but that doesn't presuppose that we're committed to any particular outcome other than today.

Further, we hear Ms Harvey's submission that goes to an issue of dating work value change to a date prior to that specified in subclause (c) of the work value principle as set out in the most recent decision of the 24th of December 1993. As you foreshadowed the position of our organisation in other matters, as it is here, is that there is a date specific in that particular provision that relates to the timing of the structural efficiency principle and we believe that the evidenced advanced today relates to that date, and we would understand that that may well be an issue that the parties subsequently have to argue in detail as this matter progresses.

In respect to the clause itself, Ms Harvey has fairly adequately - more than adequately covered the detail of that clause, other than I would draw the commission's attention specifically to subclause (a) there is a passage in fact in the preamble that provides a facilitative arrangement in that clause that agreement might be reached otherwise between the employer and the union in respect to the provision of subclause (a). That goes to this issue of the affordability and the impact of the amount of \$20.00 as was provided in

evidence that there is a variety of arrangements out there where establishments are paying an amount of \$20.00 or more or near to it and others are in fact not paying an allowance at all or the allowance of \$5.50.

We have, as also provided in evidence and through Ms Harvey's submission, been in communication with the State Minister and his advisers since late last year on the issue of sleepover anticipating what might come out of this tribunal. That discussion is ongoing, however a commitment is not as yet forthcoming. It is significant that the minister has not refused the request to fund this amount and is conscious of the fact that he is already funding similar amount - establishments under this award in other areas, and we are awaiting, at this time, their decision as to whether this area will be funded for those that require a funding to afford the particular amount.

The understanding between the parties should there subsequently be a difficulty in terms of economic incapacity, in the first instance, we would access subclause (a) to negotiate an appropriate outcome based on individual circumstances of the establishment in the absence of which we would come before you on a case by case basis to - under the appropriate principle of incapacity - and of course section 36 of the act.

We welcome the involvement of the union in the process of trying to achieve funding of this particular matter and their input has not been without some influence in effect. We also welcome the constructive way in which they've looked at the affordability of this particular matter and reflects fairly unique set of negotiations have been the cornerstone of this award over many years.

Having said that, sir, we support and seek your endorsement of this application, effective from date of decision. We endorse the amendments as have been made in the application. We believe that the regulations provided will help to overcome a rather significant problem that's confronted the industry in respect of sleepover and that has been the concern under the current clause as to what rate of pay might apply to an employee who is disturbed during a period of sleepover and whether or not the amount of \$5.50 in fact covers that disturbance or is in fact simply an amount for when the person is asleep on the premises. That issue has not been tested, however, there are opinions that have emerged from various enforcing authorities that would suggest that perhaps some payment ought to be rendered.

The provision that we put to you ensures appropriate regulation of that particular matter and an appropriate control over the cost of regulating that particular matter,

and provides an - and indeed puts that issue to bed effectively.

Other than that, sir, I don't think there's much use in adding further submission and would seek your endorsement of this matter and your early decision will assist the parties in its deliberations with the State Government in seeking funding should you so decide in favour of the applicant. If the commission pleases.

COMMISSIONER GOZZI: Mr Sertori, the - thank you for those submissions. How extensive is your survey in respect of the 30-minute period?

MR SERTORI: We did - I thought we covered overwhelming majority of establishments - the growth in this area is quite phenomenal and so it wasn't as extensive as I first thought, but there were some 25 establishments that were surveyed, certainly represent a cross sample of the various service types and that information in fact showed us that generally where disturbances occur, that usually they are - if they occur - to one, maybe two disturbances per night, and that usually - and that it is unusual that those disturbances extend beyond 1.1/2 hours and that was confirmed through the shop steward survey of the union.

The survey also unearthed circumstances where the provision was being used to employ people on the pretence that they were on sleepover when in fact by a more astute examination of the award, they could be deemed to be working and hence our desire to ensure appropriate protection and appropriate regulation in this area as a desire of the employers in this particular industry to not only provide - to exercise their duty of care of their clients, but also to their employees.

COMMISSIONER GOZZI: Fine. Thank you.

MR SERTORI: Thank you, sir.

COMMISSIONER GOZZI: Ms Harvey?

MS HARVEY: Thank you, sir. I just wanted to make a couple of points after Mr Sertori's submission. Whilst I'm happy with the main content of that, I just - I suppose I felt obliged to make the point in relation to Mr Sertori's view that this put an end to the issue of sleepover and the issue - convenience and hours of work. I don't think it does. Really it's not the final word and I suppose I've already foreshadowed to this commission that it may well be that we need to revisit this as a result of the classification structure, so I just thought it incumbent on me to make that point very clear. If the commission pleases.

COMMISSIONER GOZZI: Yes. Thank you, Ms Harvey. All right. Thank you for the submissions this morning. I reserve my decision and hand it down in due course. Thank you.

HEARING CONCLUDED