

**TASMANIAN INDUSTRIAL COMMISSION**

Industrial Relations Act 1984

T Nos 5044 and 5110 of 1994

**IN THE MATTER OF** applications by  
the Health Services Union of  
Australia, Tasmania No. 1 Branch  
and the Tasmanian Chamber of  
Commerce and Industry Limited to  
vary the Welfare and Voluntary  
Agencies Award

re Clause 7 - Definitions and  
restructure of the award

DEPUTY PRESIDENT ROBINSON

HOBART, 6 September 1994  
continued from 5/8/94

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: No change in appearances. Have there been any startling developments since we were last together, since the HSUA concluded their case? Ms Harvey?

MS HARVEY: Mr Deputy President, there's only one matter which Mr Fitzgerald raised with me and I undertook first thing this morning, and that was in relation to a federal serving of a log, which I'm happy to deal with now. And then I understand that Mr Fitzgerald will be making his opening submissions this morning about one of his submissions and it may well be that I'll have some comments after that.

But if I could perhaps turn to the issue of the federal log. I understand that inadvertently about - I only know of two employers actually were served with a log as part of a federal award making procedure, and that being Coastal Residential and Devonfield. These employers were indeed subject to a dispute finding C.31827 of '92, of which we had discussions with the employers directly in relation to that matter and concluded a satisfactory arrangement. And my understanding is that these two employers have been inadvertently included in the log.

So therefore what I'd like to do at this time just to avoid any confusion is to table an exhibit which - I'm in your hands on what it's numbered now.

DEPUTY PRESIDENT ROBINSON: Yes.

MS HARVEY: It must be HSUA.11.

DEPUTY PRESIDENT ROBINSON: Of course, HSUA.11 it shall be.

MS HARVEY: And if I could just take you to the text of that. It's correspondence to me actually received this morning and it says, and I quote:

Reference is made to your earlier advice. We understand that some employers in Tasmania served on 12 August this year, as a result of the authorisation by National Executive of a log and service earlier this year, were subject to service and a dispute finding in C.31827/92. HSUA will not press its claims or request the AIRC for a finding of dispute in respect of such employers.

And it's signed on behalf of Chris Randell, our national secretary.

Now really it's just a housekeeping matter though inadvertently included. I'm only aware of two but I've certainly given an undertaking to Mr Fitzgerald that if he can provide me with anyone else who may have been served, that we would be seeking to withdraw them from the log. If the commission pleases.



DEPUTY PRESIDENT ROBINSON: I see. Does that make your members feel more comfortable, Mr Fitzgerald?

MR FITZGERALD: Yes, it does. Just in terms of - and I just take into account Ms Harvey's later undertaking to also withdraw other respondents. We're not certain about how many employers have been served. As Ms Harvey indicated it was initiated by her federal branch and I understand involves a large number of employers, not necessarily in this sector.

DEPUTY PRESIDENT ROBINSON: All those with the phone perhaps.

MR FITZGERALD: Possibly, or in the Yellow Pages, certainly that might be the case. But in fact there was one other which we're aware but given Ms Harvey's blanket undertaking to withdraw any further respondents to the federal log, we're happy with that response. It's just a matter of ascertaining who has been served. We're only aware of those who have notified. Often with claims of this kind employers have difficulty in responding to them given the ambit nature of claims. And it may be that other employers have been served and we'll undertake to ascertain who has been served and notify Ms Harvey's union.

DEPUTY PRESIDENT ROBINSON: Yes, I don't want to get involved with the detail but if, consistent with the intention of the HSUA, wouldn't it be easier for the applicant organisation to notify the Australian Industrial Relations Commission that it doesn't intend to cover any employers in Tasmania.

MR FITZGERALD: Well I'm not sure whether that's a - it's this sector we're particularly concerned with but we'd be happy with that in terms of other sectors, certainly. But it's up to Ms Harvey to respond to that.

DEPUTY PRESIDENT ROBINSON: Unless .... Tasmania's lost the plot or something.

MS HARVEY: No, that's not - just to clarify in case there's any misunderstanding, I'm not giving a blanket undertaking. I'm giving an undertaking that any employer who has already been served which occurred I think at least 18 months ago, from memory, will not be served again. So there has already previously been a dispute finding which the employers supported and there was an arrangement entered into which is history now. It's just that what's happened as part of serving for doctors and dentists surgeries, which is not subject to this award, a couple crept in. So anyone who's already been logged we're quite happy to remove if the employers can provide us with an indication of who they might be.

DEPUTY PRESIDENT ROBINSON: I see.

MR FITZGERALD: Well I think that clears it up. We're happy with that, Mr Deputy President. We're anxious - we did raise the issue and I thank Ms Harvey for responding this morning on it. Because we're keen for this matter to be proceeded with and we wouldn't want federal proceedings or the time and effort spent by the commission and the parties on this matter and then find they are overrun by federal award proceedings. I think that would be not in the public interest.

So I thank Ms Harvey for the response from herself and also from her federal branch. We will endeavour to ascertain who has in fact been served and I suppose on the next occasion we can formally indicate those on record. That might be the easiest way to do it.

DEPUTY PRESIDENT ROBINSON: Yes, very well. Whilst we're dealing with preliminary matters, I just wondered if we can clean up another matter, and that is that we had another application listed. I think it was the one dealing with this particular award in respect to scope, which we still - is formally listed but has been overtaken by I think dates which were required for inspections. So we just need to do - decide what the situation is there. I think it's - and Mrs Devine will follow up if I'm right, as usual - Tuesday the 13th this month at 10.00 a.m., we had listed TCCI's application concerning scope of the WAVA Award.

MR FITZGERALD: Yes, I understand that. Actually I had some confusion in my own diary. I thought in fact it was listed this morning, but I was corrected on that matter. It may be wise, Mr Deputy President - and I've had some brief discussion with Ms Harvey on this matter - and not wanting to commit her as to the response to it, but it could be that the matter will be a consent matter, which is a first indeed recently in this award.

DEPUTY PRESIDENT ROBINSON: You said it could be.

MR FITZGERALD: It could be, and that being the case I just wonder why, rather than - and it will allow Ms Harvey a bit more time to be able to respond to it because she's been tied up with other matters - it may be that if we could just allow the matter to swing for awhile and list it - it's probably not going to be appropriate to list it next week because, as you can see from our inspection program, we'd prefer to be on the north west coast.

DEPUTY PRESIDENT ROBINSON: Yes. You see, we have to be pretty formal and we've got the matter formally listed for hearing at 10.00 a.m. Now we have to send out notices and cancel it if it's not to be on.



MR FITZGERALD: Yes, I understand that. Well I'm in the commission's hands. If Ms Harvey has sufficient time to be able to respond to the application - there might be some slight variations to see it proceed by way of consent - then next Tuesday the 13th September might be indeed appropriate.

DEPUTY PRESIDENT ROBINSON: Ms Harvey?

MS HARVEY: Well my understanding was that we were going to be on inspections on the 13th. I did have it in my diary for the 13th and only on receipt of the clear timetable was I made aware today that it wasn't going to be possible to proceed. What I'd suggest we do is we reschedule for 10 o'clock on the 29th, which is the next day that hearings are to occur in relation to this matter, and just deal with it prior to the 10.30 starting date.

DEPUTY PRESIDENT ROBINSON: We're going to be in the commission on the 29th December.

MR FITZGERALD: I'd suggest that's a very good idea.

DEPUTY PRESIDENT ROBINSON: Alright.

MR FITZGERALD: It allows the parties time to have some discussion brief as they - I expect they'll be, maybe.

DEPUTY PRESIDENT ROBINSON: Well, we'll list it at 10.00 am, and let's hope we can deal with it on that day. Good. I think that's disposed of the preliminary matters, hasn't it?

MR FITZGERALD: Well just - just - I just - one which I just want clarification on - Ms Harvey indicated that in response to our outline of submissions - preliminary submissions this morning she may have some comment. I - my impression was that we would put our submissions and then she would have a right of reply. I didn't see that there'd be a reply to these initial submissions today - that that would be - as part of the response when Ms Harvey has a right of reply.

DEPUTY PRESIDENT ROBINSON: Well let's take one step at a time. We'll just wait and see what you've got to say.

MR FITZGERALD: Well I think Ms Harvey indicated in her submissions this morning to you that she intended to make some response to our initial submissions - I thought - that was as I heard it.

DEPUTY PRESIDENT ROBINSON: Well, I'll just respectfully remind both parties I'm going to conduct the -

MR FITZGERALD: Right.

DEPUTY PRESIDENT ROBINSON: - the proceedings and - and the order of speaking.

MR FITZGERALD: Well I understand that but that - I - I just seek some guidance on the - from the commission in respect to that then, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Well look, you know, I'm not going give a - give a response in advance of something at this stage that I don't have to yet.

MR FITZGERALD: That's fine. Okay, well I'm happy to proceed and we'll wait and see what happens.

Mr Deputy President, in terms of the order of events this morning, the commission has been forwarded an inspection program - and I have to apologise for the purpose of the record - it seems that either our fax or your fax machine wasn't working. It was - it was actually faxed through the week prior to me taking two days leave and regrettably it wasn't received here and Ms Harvey then obviously didn't have the benefit of the inspection program, so I hope that hasn't inconvenienced anyone in terms of arrangements.

DEPUTY PRESIDENT ROBINSON: Oh well, we're always anxious to organise ourselves as soon as we can.

MR FITZGERALD: Certainly.

DEPUTY PRESIDENT ROBINSON: Still, we accept your apology and hope that it's clear to everybody now.

MR FITZGERALD: Right, okay. Just - just - if I could make one change for the purpose of the record; inadvertently this afternoon's - and again I just make the point the inspection program has been designed to maximise the - the amount of time on particular sites and also particular locations and also to be able to have exposure to staff when they're on duty and also clients when they're at the particular places and I did indicate that it was 2.15 at Oakdale this afternoon - in fact could that be 3.15. But I hope that again doesn't cause any - any inconvenience to the parties. But in terms of my program today, I'd expect to be probably about - till about 11.30 in terms of the opening submissions and then we'd seek to adjourn for inspections at - at Oakdale Lodge on the eastern shore.

DEPUTY PRESIDENT ROBINSON: Well no doubt - no doubt there are good reasons why you - the inspection should be at 3.15 instead of 2.15.

MR FITZGERALD: Well, yes, I suppose - yes, as I indicated we - we have taken into account the needs of the organisations and their staff who are there at that particular time.



DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: Mr Deputy President, this - just in terms of the opening submissions, this is probably the most significant matter which has appeared in this jurisdiction or which has come to this jurisdiction since the inception of the structural efficiency principle.

DEPUTY PRESIDENT ROBINSON: Yes, I'm sorry, Mr Fitzgerald.

MR FITZGERALD: Sorry?

DEPUTY PRESIDENT ROBINSON: I just - before we leave the -

MR FITZGERALD: Yes.

DEPUTY PRESIDENT ROBINSON: - program inspections, can we treat the facts which we've now got the last one as complete?

MR FITZGERALD: Yes.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: If - could we, except for that amendment -

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: - whether that needs to be formally received as an exhibit - or I'm happy for it or just be as - for the purposes of information.

DEPUTY PRESIDENT ROBINSON: Well we'll take it that that's your list or - I don't think we made the HSUA program of inspections as an exhibit.

MS HARVEY: No, we didn't, Mr Deputy President. I was just wondering whether perhaps - I don't know whether it's appropriate now or after the initial submissions, but we could talk about duration of the inspections so we know how long we're going to be at these places?

DEPUTY PRESIDENT ROBINSON: Oh yes, yes.

MR FITZGERALD: Well, yes, I can certainly do that. It's probably our best guess - we could do that at the completion of submissions I suggest.

It may be, given that there's representatives here in the commission, it may be wise to go into conference and discuss that in conference if that's possible.

DEPUTY PRESIDENT ROBINSON: As long as we don't forget it. Sorry, Mr Fitzgerald -

MR FITZGERALD: That's fine - no, that's fine, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: - away you go.

MR FITZGERALD: As I - as I indicated in my opening remarks, the TCCI sees this as probably the most significant matter which has come before the Tasmanian Industrial Commission since the inception of the structural efficiency principle.

Now we say that for a number of reasons. Firstly, to the best of my knowledge and best of my research ability, I've - it in fact is the first fully arbitrated classification structure which includes definitions and assigned relativities, one to another, in the private jurisdiction - private sector - in this jurisdiction. The significance is also - and I'll take you to the section in terms of the act - the significance also is the impact of changes in the way service is delivered to the disabled in terms of concepts such as community integration, social valorisation and normalisation - and we've heard those terms during the course of the HSUA submission and we'll certainly be hearing during the course of our submission.

The other major significance we see, Mr Deputy President, is the cost implications for funding providers and for services and the potential impact on the delivery of service. We see the - the important need not to lose sight of client needs, values and wants in the sense that there is now greater emphasis on the individual client as far as personal development, self determination, independence and quality of life.

Mr Deputy President, what the commission is asked to do in terms of the competing claims which are very much competing claims by the HSUA application and the TCCI application, is to consider the issues in the context of section 36 of the Industrial Relations Act 1984. And if I can take you to that, and it's one which I think is the cornerstone of the award making process in this jurisdiction and makes specific rather than a general reference to the public interest. The public interest is specifically defined within the terms of section 36. And if I can quote section 36(1) of the Industrial Relations Act says and I quote:

Before the Commission makes an award under this Act or before the Commission approves an industrial agreement under section 55, the Commission shall be satisfied that that award or that agreement is consistent with the public interest.

And section 36(2) goes on to describe that in more detail, and I quote:



In deciding whether a proposed award or a proposed industrial agreement would be consistent with the public interest, the Commission shall -

(a) consider the economic position of any industry likely to be affected by the proposed award or proposed agreement;

(b) consider the economy of Tasmania and the likely effect of the proposed award or proposed agreement on the economy of Tasmania with the particular reference to the level of employment; and

(c) take into account any other matter considered by the Commission to be relevant to the public interest;

Now, even though the Act is specific in terms of the economic position of any particular industry and the likely economic effects of the claim in Tasmania as a whole it is open ended to the extent that any other matter can be included within section 36(3).

Now, in that regard, we say that the most important aspect in terms of the public interest in this particular sector, the disabilities service sector, is the needs of the client, and we shouldn't lose sight of that. It is a paramount aspect of public interest and we shouldn't lose sight of that.

There is a requirement under section 36, it is a mandatory recognition of those criteria prior to making an award, and I am sure, Mr Deputy President, you in exercising your functions previously would be well aware of this and have recognised that in the past.

But in terms of my opening submission I emphasise particularly the needs and wants of clients, and there is one aspect which is particularly important in terms of section 36.

But not one factor should constitute that recognition, in my submission. It should be an amalgam of all those factors, but without losing sight of the needs of the clients.

And also on how management of services decide how to deliver the services.

And it is a particular point where we take strong issue with Ms Harvey's submission in respect to the so-called medical model, and I will be addressing that later.

And you will recall in some of the evidence which was presented by Ms Harvey that some of the witnesses indicated

that there is a need for - a greater need for specialised employment - a specialised staff.

We say in our opening submissions only, and we will be addressing this in more detail, is that services themselves really are in the best position to determine their own staff needs, and the thrust of our submissions will be that in fact that need is not recognised by management of services. It is not recognised by funding sources in terms of the policies of normalisation and social betterisation, and in fact it is quite the contrary that there is a need to use generic services outside the particular individual's services rather than engage staff, special staff, from within.

Mr Deputy President, in terms of this preliminary submission, as I indicated it is intended really to give only an outline of the way which we intend to respond to the HSU application and submission and support, and also address some of the issues in outline form only which we intend to form part of our evidence. Evidence in terms of formal witness evidence, but also documentary evidence and submissions in support. As well as supported by workplace inspections.

So we intend to respond to the HSUA application, although of course we are not losing sight that we have an application ourselves before the commission and we intend to put submissions in support of that application.

However, I see that on occasions the two submissions will be very much intertwined, and I don't intend to necessarily address the application of the HSUA separately and then the TCCI application separately.

The issues which we are apart on will become clear, in our submission.

We do intend to produce a document during the course of our submissions which highlights the difference - the issues which are different - not necessarily a detailed response as the HSUA have prepared and put before the commission.

So in this outline, Mr Deputy President, I intend to simply indicate the means of presenting the TCCI case.

So following today, following this outline, we intend to embark on a series of workplace inspections which unlike the HSUA workplace inspections will be informal in nature.

We don't intend to present documentation relating to the workplace inspections as a formal exhibit before the commission. I'm still not certain about the status of some of the documentation which we received during the HSUA inspections. However, that obviously will be clarified at a later time.



However, it is not our intention to produce such documentation.

We will have available at each of the workplace inspections, where appropriate, various policy documents. Personnel obviously will be available for questioning and an actual physical inspection of the workplace will take place.

DEPUTY PRESIDENT ROBINSON: Will policy documents become part of exhibits?

MR FITZGERALD: They will be during the course of our submissions but not part of our inspection process necessarily.

That's why I raised the issue, and something which will need to be clarified is the status of some of the documentation which has been presented by the HSUA - whether they were just simply aids to inspections or whether they were sought to be incorporated, I am not certain. But that's for Ms Harvey to respond to at the appropriate time.

I suppose we are creatures of habit, but it was always my intention in presenting a case in response of this nature that logically we would present workplace inspections, then formal evidence which can refer to the workplace inspections, and then drawing conclusions from that evidence and workplace inspections in that order by submission.

Now we were of the view that is indeed the more logical and conclusive way of presenting our case.

I'm not in any way attempting to be critical of the HSUA case but I think where it could have had some weaknesses is that the inspections in my view occurred after formal evidence.

They seemed to be more of an afterthought than integral to the case, and I really don't think in terms of the HSUA application the formal evidence, the inspections, added much to it at all.

In saying that, as I indicated, I am not critical of Ms Harvey's case, because I think the case which we have seen by Ms Harvey in terms of presentation, both oral submissions and documentary evidence and statements has indeed been an excellent case.

However, we caution the commission being persuaded on that aspect alone, as I am sure you would not be.

We intend to conduct the inspections in a more informal way and then proceed to formal evidence.

As I said, I think this is a more logical way to proceed.

Where the HSUA case did lack, in our view, and we will be referring to much full evidence in submissions - sorry, much further submissions at a later date - was the actual drawing of conclusions from the evidence and inspections.

We had a lot of evidence - we had much evidence, sorry - and a number of workplace inspections, but little was drawn, in our submission, from those inspections.

The inspection program of course has been received by the commission and the HSUA. The intention of the inspections is not to repeat any particular matter raised or shown by the HSUA inspections, but to show that the award covers a range of activities and areas, some of which particularly the sheltered workshops where there is a very - where there is evidence of very low support needs amongst the many clients. That the environment particularly in sheltered workshops is a peaceful non confrontist environment in contrast to the evidence, particularly from Mr Singleton, who was a witness of Ms Harvey's, employed by Devonfield where he talks about daily tensions and refers to incidents of violence.

We say, and we will show by our workplace inspections and in evidence, that that is in fact not the case. And that there is a whole range of services and settings out there which makes it difficult to take a broad brush approach to as the union, in our view has. We also will show that there are a range of generic services which are available for services to utilise. In fact, services are encouraged in respect of the disabled to utilise their services just as able bodied persons would access a whole range of generic services, medical, social and otherwise, available to the able bodied.

In our submission this particular aspect of the TCCI and HSUA submissions are fundamentally at odds with each other. Despite Ms Harvey categorically denying and very strongly denying that she is not supporting the so called medical model, the thrust of her witness evidence clearly supported the need for more specialised staff within services. Whereas the TCCI submission will clearly show that services now in terms of normalising policies are encouraged to utilise generic services outside the particular service itself.

And that is the position which services will take themselves. That is their preferred position, and we'll produce evidence to show that that is the case. So I think the evidence from one of the advocates in the industry, I think, Lee Brady indicated that there is a need to engage specialist staff, there's a greater need to engage specialist staff within the services themselves, which we will refute quite strongly by the means of evidence.



What we have, Mr Deputy President, since the introduction of the Disability Services Act in 1986 is, in our view, the dominance of the - exclusively of the medical model service delivery, replacing it with an approach which took into account the - not only the requirements for services to ensure physical well being, but also to assist services in maximising their clients' personal development, self determination, independence and quality of life.

It's in this context the TCCI will present their inspections and formal witness evidence and submissions. In respect to the inspection program we intend to show a whole range of services, whereas I think with respect to the HSUA workplace inspections a very selective range was - selected services were put before the commission. We intend in terms of accommodation services, as you will see from the inspection program, inspect work places - large work places, large accommodation services such as Oakdale Lodge and small services such as Rebecca House and North West Residential. You might recall North West Residential, that's been the subject of evidence by one of the HSUA witnesses, Mr Tony Medcraft. It will be interesting to see that site in comparison to the evidence of Mr Medcraft.

And we also intend to show the variety of settings in terms of sheltered workshops which in all cases, in my submission, are characterised by minimum levels of supervision. But the variety will also include enterprises which are set up on normal commercial lines, for example, Summit Industries and Tahune Fields where the responsibility of supervising the disabled is not, in our submission, an onerous responsibility at all and is very similar to open employment, where such supervision doesn't require any special consideration or treatment by the commission.

As indicated in my earlier submissions, Mr Deputy President, the program has been designed to maximise opportunities when staff and clients are available. We've tried to take into account travelling considerations and particularly take advantage of, when we're at the locations in the north and north west coast. It's regrettable that we were not able to integrate our inspection program with the HSUA but nevertheless I think now that we are conducting very much separate work place inspections, the comparison between TCCI work place inspections and HSUA inspections will indeed be graphic.

We have already given notice, Mr Deputy President, that we intend to mount strong industrial agreement that the approach taken by Ms Harvey to, on the face of it, justify movements from the current award and some classifications from 115 per cent, which is the limit of the award at the moment, to 145 per cent which is referring to functional programmers. And I suppose it's another name, another .... by another name where

in most cases now they're called training development officers. So we see by the HSUA application significant cost or increases in wages from, in one case as I said, 115 per cent to 145 per cent. It's not open to her under the general guise of structural efficiency.

We concede that the union at the completion of the minimum rate adjustment process reserved their position but that reservation, like any reservation within this or the federal body, doesn't necessarily give the union any special status there. It's simply just giving notice that they intend to raise the matter again just as employers have previously reserved matters which are now subject to the TCCI applications conditions matters I referred to. That doesn't mean to say that that gives it any preferred status; it's simply that we intend to raise them again.

And that's - by the union doing that in terms of the classification structure and relativities, I submit, doesn't give the union any special position by the mere act of reservation. If the mere act of reservation of rights during the minimum rate adjustment process enabled an industrial party to later access substantial wage increases, then all we'd have to do - all any party would have to do is simply, as a matter of course, always reserve rights to ensure ongoing wage increases, irrespective of any attempt to justify on merit in accordance with the wage fixing principles.

In other words, when could a tribunal such as the commission, as currently constituted, say that claims have been exhausted under the structural efficiency principle. Under the HSUA proposal it seems that the limit is never to be established.

In our submission - and it will be in our - and we'll certainly make full - very full submissions in respect to this industrial argument - such an outcome would make a mockery of the foundation underpinning the minimum rate adjustment principles as one of the fundamental principles in this process. As you'd be aware, with the process of minimum rate adjustment, there - fundamental to that is the process of absorption and there should be minimal cost impact translating from the existing classification structure to the new structure.

It's undeniable, in my submission, that the principle does not exist as a vehicle for wide spread and substantial wage increases as the unions propose in this application. As I indicated not only is the union seeking to substantially move existing classifications to a higher level such as the 115 per cent to the 145 per cent which I've indicated, but it also intends to create further classifications which are not currently covered by the award.



The TCCI intends to argue most strongly that as the HSUA application seeks to move substantially existing classifications to higher levels, therefore higher percentage relativities, this can only be done by clearly proving changes in responsibilities, skills or conditions under which a worker performs. In other words, a work value case.

The same principle, in my submission, can be applied to the union seeking to extend the award to levels of management which aren't at the moment contemplated within the award - I'm talking about level 6 and 7 of the union application. This can't be done without reference to a particular principle, in other words - the principle I refer to is the work value principle, and I indicated we will be putting full submission and analysing the wage fixing principles in detail in support of this particular point.

The TCCI doesn't intend to run this as a threshold issue, however, if the commission does find in favour with that argument, then it naturally follows that the union application in its current form must be rejected.

As indicated, the TCCI will run extensive industrial argument in support and will specifically analyse the wage fixing principles as opposed the union broad brush approach which takes the line that a classification structure up to 160 per cent with significant movements from current classifications to translating to the new classifications and all the associated cost implications can be broadly categorised under the title of structural efficiency which, in the TCCI's submission, is an absurd distortion of the principles.

As indicated in our early submissions, the thrust of the union case is that there is a need for more specialists to be employed within the services. The simple response to that will be by direct witness evidence that - which will be in direct contravention - contradiction to the union position. The practices of normalisation and social valuisation now demand less involvement of special services.

We'll be arguing strongly - and this is where the industrial argument does interlink - that one of the basic tenets of the structural efficiency principle is to make awards more appropriate. It's appropriate to the industry of the employer, so if the employers are saying that they don't need those specialist services, then the award shouldn't be made to cater for it. We shouldn't be making the award around a principle which the union is pushing which, in our submission, is falsely based. It's for the - with respect to the commission - or the union to create a structure which is not appropriate for the needs of services and for their clients.

It seems that the HSUA submission has come from another era when the disabled were wrapped in cotton wool very much within

the context of a medical model. Whereas in fact we have come a long way in terms of government strategies and strategies do not buy individual services to handle the disabled and I've referred at great length already to those policies.

If the HSUA is right - that the policies of normalisation and social valuisation require higher levels of skill, then surely we would see an increase .... engagement of specialist staff. Now the evidence which the TCCI will be presenting in that regard is in fact to the contrary.

We'll show within the context of our evidence and submissions that often unqualified staff are the ones who are highly valued. You, yourself, I think, Mr Deputy President, made comments during the evidence of the HSU - .... some evidence of the HSUA that often a caring common sense approach is more appropriate in this industry than the obtaining of qualifications, and we'll be pushing this point very strongly.

DEPUTY PRESIDENT ROBINSON: I always try to be careful not to make declaratory statements mid way through cases, rather to ask questions and seek answers.

MR FITZGERALD: Yes. Well I - yes, I would certainly concede that it wasn't a declaratory statement. But the question was in that vein, if I could say that and we would support that view very strongly.

We will clearly show that simply because an employee holds a qualification in this industry that it doesn't naturally follow that a person is performing at a higher level and we're talking about that in this particular industry. To make comparisons with other industries is not always valid and that's - in terms of this claim we must look at how appropriate qualifications are for this particular industry.

The TCCI submission will also address the issue of outcome standards. What we will be saying in respect to the evidence which we will be producing there is that the imposition of such standards does not impose any additional responsibility for employees. In fact, the evidence we'll be presenting, Mr Deputy President, is that the reverse applies. That's - because standards are imposed and they are well known, that it does provide a degree of certainty in performing tasks where otherwise there would not be that degree of certainty.

In any event the standards which are part of the funding and service agreements with the Department of Community Health Services in implementing those standards are encouraged to involve as many stake holders as possible within the process which includes the consumers or clients, advocates, family, friends, employees and representatives of management committees. It's the responsibility of management to ensure that the organisation is prepared for and completes at least



an annual assessment against the standards. While employees and consumers are expected to be aware of the standards and their use, they are not responsible for the service complying with the standard.

Now we heard a lot from the - we heard much from the HSUA at the very start of the case in terms of the standards. We would be simply saying there's a - it's for management to comply with those standards and does impose any additional responsibility on the employees.

The TCCI's evidence and submission will look at the entire industry not in our submission, like the HSUA's submission, concentrate more so on CIP, community integration programs. CIP programs are not representative in our submission and will be backed up by evidence and submissions, but they're not representative of the disability services industry and we will show by inspection, work place inspections, evidence that there is a variety of settings out there ranging from the approach in group homes which often is a normal house in a normal suburb to sheltered employment which in many cases it's hard to distinguish with open employment and it is run along commercial lines competing directly against other businesses in the market place. So that's the context in which we will conduct our work place inspections and evidence.

The TCCI's submission will address the issue of working alone which again varies enormously from setting to setting, depending on client needs and wants, to situation where employees can seek assistance in the case of emergencies from others who may be available or on remote call or generic services which are available to the whole community.

What we will be saying in respect to the HSUA submission is that it would be wrong to take a common approach to try to categorise all these issues in a broad brush common way, taking into account the variety of settings which present themselves.

The TCCI submission will also address the issue of duty of care which given the normalisation principle is a delicate balance between firstly what clients want, secondly, what is in the best interest of clients, and thirdly, the least restrictive alternative.

The TCCI will show by witness evidence and submission that the duty of care becomes less onerous as it compliments the move away from the medical model.

The TCCI submission will also address the issue of behavioural management which was made great play of by the HSUA - which was made great play of in the HSUA submissions, which is not necessarily the norm in services and is not one which, in our submission, could be seen as a common factor.

The other issues which the TCCI's submission will address is the programs themselves and funding implications, including the Commonwealth/State Disability Agreements, the SDA, the Community Integration Project, CIP, and Disability Services Grants Program and the fact that government does not provide a hundred per cent funding for all these services.

The final area which we will address is the history of the Welfare and Voluntary Agency Award which supports the view that since the advent of the Disability Services Act of 1986, and as you'd be aware, work value case before Commissioner Gozzi, is that in our submission, the normalisation and social valuisation aspects have already been rewarded by means of work value.

And we also highlight the - in terms of the history of this award more recently in the negotiations - a history of basic cooperation, but the reason why the matter has come to the commission as an arbitrated matter is, in our view, is that the union - the HSUA have pursued a model which is not only extreme in terms of its funding implications, but is a model based on a past era which the industry themselves - the industry itself does not want nor does government want.

Now, Mr Deputy President, that completes the outline and preliminary submissions. We'd intend to seek an adjournment of these proceedings to commence work place inspections this afternoon, and then following that, as already indicated to the commission. If it pleases.

DEPUTY PRESIDENT ROBINSON: Yes. Mr Fitzgerald, before you sit down, I just wonder if you could give us some indication as to whether or not you - when you believe you can complete your case.

MR FITZGERALD: I had some discussions with Ms Harvey about this this morning. I think the dates which we've already programmed will be sufficient. I think it leaves me with four days from memory - my diary's in my briefcase, but I'm pretty certain it's four days and that will - should be sufficient.

DEPUTY PRESIDENT ROBINSON: Yes. Of course, it's to be understood that there's no way in the world that I would deny you full and proper opportunity to conduct not only the case in respect to your own application, but your response to the HSUA application, but of course, there are good reasons why we like to know when matters are likely to be concluded.

MR FITZGERALD: I understand that perfectly, Mr Deputy President. Yes, I'd - we all try to predict as best we can -

DEPUTY PRESIDENT ROBINSON: Yes.



MR FITZGERALD: - and I think I can say with reasonable certainty that the next dates at the end of this month and early October should be sufficient for us to complete.

DEPUTY PRESIDENT ROBINSON: Right. I'm a bit ambivalent in my feeling I must admit as to whether or not I'd like you to finish quickly and me have to attend to other matters -

MR FITZGERALD: Yes, I understand those -

DEPUTY PRESIDENT ROBINSON: - or I'd like you to go on forever.

MR FITZGERALD: I understand what you are saying.

DEPUTY PRESIDENT ROBINSON: Thank you. All right. Ms Harvey?

MS HARVEY: Yes, there was one matter, Mr Deputy President. As Mr Fitzgerald has indicated we did discuss the issue of dates this morning and Mr Fitzgerald gave me I suppose a best estimate that we would be finished within the time frame established. I just wish to foreshadow to the commission that my organisation may indeed be seeking an operative date of that date of which we were scheduled to finalise and the reason I do that and foreshadow that issue is that there is a lot of concern within the industry about the length of time that this has taken to resolve. You will recall that we started hearing actually in April and we are concerned that there has been little attempt to discuss agreed and non agreed evidence, inspections or even - we still do not have a response from the TCCI to Exhibit 4.1 which the HSUA's document that compared differences, so we still aren't really sure exactly what we're seeking arbitration on because you will recall that Mr Fitzgerald did give a commitment to you that he would respond and so that we would be able to prepare a final document, if you like, of what the actual applications of the parties were before the commission.

We still don't have that document which I believe put the commission in a difficult position, puts my organisation in a difficult position, and indeed put the TCCI in a difficult position. Now I understand perfectly well that the TCCI need - has the right to be heard. It has the right to put its evidence. It has a right to respond to the HSUA's submissions. However, I am concerned about delays; I am concerned about commitments that have not been met within the history of this matter and therefore, I certainly would be foreshadowing that if we do not meet the day that has been scheduled, I will be seeking an interim decision in relation to operative dates because I see that at the only mechanism

where we can be sure that there's a bit of incentivisation for the employers to meet their commitments. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Your comments are noted and the question of operative date will be determined on proper criteria at the appropriate time. It may well be that during the course of events, that the parties might want to do as other parties did the other day and announce that they had found more common ground than they expected to exist, and that they'd be presenting a document which they asked the commission to approve.

I know my optimistic comments often draw a smile, but I'll never give up.

MS HARVEY: I'm sorry, Mr Deputy President, there was just one other matter too that Mr Fitzgerald raised in his submissions and that was the status of the documentation the HSUA provided during the exhibits -

DEPUTY PRESIDENT ROBINSON: Oh, yes.

MS HARVEY: - and I did indicate both to Mr Fitzgerald and yourself that I would check the content of those documents with those concerned to ensure that, you know, where ever possible that if I could remove difficulties I would and I will actually be formally tendering that as an exhibit, hopefully within the next couple of days. I mean, there's nothing new in it that the parties haven't already seen. I've given that commitment before, but I'm sure you'll be aware my organisation has been extremely busy over the last 3 weeks and I apologise I didn't have it ready for this morning, but I really just haven't had time to do it, but it will be provided.

DEPUTY PRESIDENT ROBINSON: I see. Thank you. All right. Well I think we're in a situation where we adjourn to a quarter past these and meet at Oakdale which is Bounty Street.

MR FITZGERALD: I just wonder whether it might be best to go off record for moment and Mr Byrne can actually give specific directions.

DEPUTY PRESIDENT ROBINSON: Yes. All right, we'll go off the record.

OFF THE RECORD

NO FURTHER PROCEEDINGS RECORDED



HEARING ADJOURNED

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