

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 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 Industry Limited to vary the
Welfare and Voluntary Agencies Award

re Clause 7 - Definitions and restructure
of the award

DEPUTY PRESIDENT ROBINSON

HOBART, 28 October 1994
continued from 19/10/94

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: Thank you.

MS HARVEY: Yes, Mr Deputy President, I'm ready to commence my concluding submissions, but I understand Mr Fitzgerald has a threshold matter.

DEPUTY PRESIDENT ROBINSON: Very well. Mr Fitzgerald?

5 MR FITZGERALD: Well I'm reluctant to raise it, Mr Deputy President, but I think it's one of some importance and I'm not sure whether there would be an objection in terms of relevance; I suspect there will be, but if I could be heard in terms of the submission, if that's appropriate, and Ms Harvey could make her comments.

DEPUTY PRESIDENT ROBINSON: You'll have a fair hearing, Mr Fitzgerald.

10 MR FITZGERALD: I've got no doubt that that will be afforded, Mr Deputy President.

But I have had some discussions with Ms Harvey relating to this matter this morning. It relates to a matter which has previously been notified to the commission, and I concede that it is the subject of separate proceedings and that's the matter which I am sure you are aware of relating to Summit Industries and an application which I lodged
15 in fact on the 21st of October, and it's been received as matter T.5238 of 1994 and there have been - and I agree that that matter will be adjudicated or will be determined when it comes before you in that form and I assume it will come before you and I think it's indeed preferable that it does come before you because of your knowledge of the industry and your involvement in this case.

20 DEPUTY PRESIDENT ROBINSON: I'm sorry, what - could you give me a little bit more detail?

MR FITZGERALD: Yes, certainly. It relates to, in our view, a threat of industrial action made by an officer of Ms Harvey's union

DEPUTY PRESIDENT ROBINSON: It's a section 29, is it?

25 MR FITZGERALD: It's a section 29 matter, but in terms of these proceedings, we'd like to make some submissions and request that the HSUA give an undertaking that such a threat is removed and that there be a reasonable process of negotiation in respect of this organisation.

Now the reason why I believe it is relevant, Mr Deputy President, is that given the
30 threat of industrial action which has been made although denied by the union, it is improper in our view that whilst this matter is being adjudicated such claims which, in our view, is a 5 per cent across-the-board at Summit claim, is made against an employer which is respondent to or - sorry, which is - needs to comply with the award which has currently been the subject of arbitration before you.

35 Now, it's my experience, Mr Deputy President, that matters of this kind, the commission don't look at these circumstances favourably. It's not our wish that we hold the matter up today and we would like to conclude the matter conclusively today and I'd like to be able to give you some detail about the particular matter relating to Summit, but we're not wishing to hold the whole matter up today but we are wishing
40 to ensure that the commission can make a decision relating to this whole matter of arbitration before you without the threat of industrial action and for that reason I don't intend to - I wouldn't want to labour the point, but I need to give just a brief summary of what has occurred at Summit so that you are aware of it. In my view the matter is in the union's hands -

45 DEPUTY PRESIDENT ROBINSON: I've got two people on their feet at once.

MR FITZGERALD: Yes. Well I'm not sure -

MS HARVEY: Yes. I'd just -

MR FITZGERALD: - I will still continue. I'm not sure whether there is some objection to the comment or -

5 MS HARVEY: Yes. Yes, there is an objection.

DEPUTY PRESIDENT ROBINSON: Is it a threshold type questions?

MS HARVEY: Yes, it is threshold -

DEPUTY PRESIDENT ROBINSON: Because obviously I will you an opportunity to talk to it.

10 MS HARVEY: Yes, sure, sure. The threshold issue is that Mr Fitzgerald has asked for a commitment that there is no threat of industrial action and I in fact have correspondence signed by my secretary giving that commitment so I just thought it might nip it in the bud so that we don't have to spend hours on a case that's not subject to this application.

15 MR FITZGERALD: I was going to present that exhibit as well. In my view, it doesn't in any way present a reasonable response or realistic response to our application. There is in fact an indication by the union that there was never ever any threat of industrial action and that's not consistent with our instructions and in our view demands placed by this letter are both unreasonable, particularly in terms of time
20 frames and I would like to be able to make some submissions in respect to that.

DEPUTY PRESIDENT ROBINSON: Right. What was the nature of the threats and how did they come forward?

MR FITZGERALD: Well the threats actually occurred last Friday by an officer of the union, Mr David O'Byrne and accompanied by two shop stewards, Eric Alderson and
25 Claude Filluel, sorry, three, Urzula Heindenrich and the threats were made to Mr Snadden personally indicating that unless his organisation agreed by - I think the date was at that time the 26th of October which was I think Wednesday of this week, to that claim, then there would be industrial action occurring at that plant - that plant at Summit.

30 Now, the union has presented - attempts to present a response to a further meeting which Mr Snadden had which we believe is unreasonable and indeed in fact alludes that - implicit in that is a continuing threat of industrial action and we would wish to speak to that, Mr Deputy President.

35 So what we are seeking is an unequivocal undertaking that - from the union here today that - to allow this - the overall matter - the matter before you and subject to arbitration can be heard without the threat of industrial action which is indeed proper, particularly in the industrial relations environment we're in at the moment, and that that threat be removed and that there be a proper frame work and time frame set up
40 to allow the negotiations to occur between Summit and the union in a reasonable environment.

Now, the response by the union doesn't in any way indicate that because they see the negotiations - the 5 per cent negotiations concluded this Monday. Now the response - and I will take you to it later - was given to Mr Snadden - it arrived at - in fact it
45 arrived, I think, at 12.15 yesterday and Mr Snadden didn't pick it up till mid afternoon, and demands a response by the close of business today requiring a meeting

on this coming Monday - Monday the 31st where the union views that negotiations will be concluded.

5 In the event of that not being accepted, then the union, by their letter, indicate that they wish to discuss development with members. Now in our view, implicit in that is a continuing threat of industrial action. Now given those circumstances, we don't believe it - it's in the public interest that these proceedings allow to continue while those circumstances exist against a member subject to the WAVA Award.

10 Now as I indicated, we want to wish - we don't wish to hold these proceedings up. I'm sure we're all very joyful to hear that we're here on the last day it seems, and I don't want - I hope that it is in fact the last time, but in my submission it's in the union's hand to give an unequivocal undertaking that there is - that the threats of industrial action at Summit have been withdrawn and secondly, that there is indeed a reasonable time frame in which negotiations can proceed at Summit through the processes of a consultative committee, but not - as suggested by the union -
15 concluding the negotiations on this coming Monday.

So I have skirted around those submissions to some degree and I'm happy to go to into further detail, but again I'm conscious that I don't want to spend too much time but -

DEPUTY PRESIDENT ROBINSON: No, no.

MR FITZGERALD: - I just bring it to the attention of the commission.

20 DEPUTY PRESIDENT ROBINSON: Yes, my basic question, Mr Fitzgerald, to you is whether or not the alleged threat of industrial action came from the union officially - HSUA - or it came from a group of people without the union involvement.

25 MR FITZGERALD: Yes, well I had very specific instructions on this, Mr Deputy President, it has been denied by the union representative, Mr David O'Byrne, who is an organiser of the union, that in fact threats were made, but Mr Snadden who was present at that meeting on October the 21st is prepared to give sworn evidence that the threats were made by Mr O'Byrne, an organiser of the union, in the presence of Mr Alderson, Mr Filleul and Ms Heidenrich.

30 Now if necessary Mr Snadden is prepared to give sworn evidence in that regard and also if required, subpoena those three other individuals. Now we - that's - that maybe sounds like it's going a bit too far, but in our view quite clearly the threats were made by the union in full knowledge that this claim before you is currently being arbitrated. Now in those - in those circumstances, I believe the actions of the union are most
35 inappropriate. The whole matter can be cleared up quite simply here and now by Ms Harvey who is the assistant secretary of the union, given - giving - an unequivocal undertaking that those threats which were made are withdrawn, and secondly that if negotiations are to proceed at Summit, that they proceed in a reasonable environment by a consultative mechanism with - involving representatives of management and employees with a realistic time frame.

40 Now as I indicated, the time frame which the union present is that we are required to respond - or the Summit Industries are required to respond by the close of business today to a proposal that a meeting occurs on Monday next - Monday the 31st - where the union sees negotiations being completed. Now that in all circumstances in my
45 submission is unreasonable and the further paragraph which I quote from the letter, it indicates from Mr Hall, who is the secretary:

Your written confirmation of acceptance of this proposal is required, in this office by close of business on Friday 28 October 1994, as we will be discussing developments with members early next.

5 Now that, in terms of enterprise negotiations, if that's what Ms Harvey is indicating they are, is totally unreasonable and inappropriate given the circumstances we're in before the commission.

So I'd - I would submit, Mr Deputy President, that the matter, in terms of section 23 of the Industrial Relations Act - I'll just have to go to it -

DEPUTY PRESIDENT ROBINSON: I might be able to assist you, Mr Fitzgerald.

10 MR FITZGERALD: No, it's not 23 - it's -

DEPUTY PRESIDENT ROBINSON: Probably 86 or something.

MR FITZGERALD: It was a matter relating - no, I've got it here - I'm sorry - it's in respect of section 21 which - 21(c) which says: the commission at any stage of these proceedings, dismiss a matter or a part of a matter, or refrain from further hearing, or
15 determining the matter or if the commission is satisfied - (i) that the matter or part is trivial - that's not necessary - (ii) that the further proceedings are not desirable - or are not necessary or desirable in the public interest. Now we'd be relying on that provision. Again, I'd simply say that it's not our preferred position; our preferred position is to hear as an alternative the union undertake or give those undertakings which I've
20 previously put before the commission.

DEPUTY PRESIDENT ROBINSON: Yes. Before I ask for a response from Ms Harvey, I think it probably appropriate I respond at this time and indicate that certainly the commission as a whole, I think, and certainly myself as a member, would look most unfavourably upon any threats of industrial action by any organisation whilst -
25 particularly whilst - a matter was before a commission for a decision, to - if the commission were to ignore alleged threats and proceed by allowing such alleged threats to remain, it could be open to the interpretation that the commission was hearing and deciding matters with a gun at their head - to use a colloquial phrase, which is of course not on, and I would be looking to the union to respond responsibly in relation to that before - before - certainly before deciding the present matter at this
30 time.

I however would draw some distinction between a request for negotiations at any time between employers and employees and/or their union, and indeed the right of any party to lodge any applications which they feel appropriate at any time, so that the processors can deal in an orderly fashion, and at an appropriate time schedule, with
35 anything which arises. That distinction is between a request to talk and negotiate and the threat of industrial action. So I would ask you to have regard for that.

MR FITZGERALD: Well I just wonder before - if I could just produce this as an exhibit for a start -

40 MS HARVEY: Well I suspect we're -

MR FITZGERALD: - Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: Ros has got a copy - yes.

MS HARVEY: Well I was actually about to - to have saved Mr Fitzgerald the trouble because I was about to table exactly the same exhibit, so I don't know how you - which way you want to number it, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: I will call it TCCI.18.

5 MS HARVEY: Eighteen. Okay. My understanding is what you have before you is
correspondence to Mr Ian Snadden, from the state secretary of the union, and -
alleging - and I stress that it's an allegation because certainly my organisation does
not accept that any threat was ever made and we won't be needing to subpoena the
10 three people Mr Fitzgerald refers to because we're quite happy to call them on our own
volition to attest to the fact that there was no threat.

DEPUTY PRESIDENT ROBINSON: Well - well -

MS HARVEY: But any way, let's not get into that because the issue is the
commitment.

15 DEPUTY PRESIDENT ROBINSON: No, I wouldn't ignore that, but I mean I'm more
interested in what the current situation is.

MS HARVEY: Okay. Well the current situation is that if you go to two thirds down
the page it says:

1. No threat of industrial action exists.

- which meets the commitment that Mr Fitzgerald was seeking.

20 *2. No time frames were established, although it is our view that negotiations
have been protracted.*

3. HACSU is also committed to the consultative process.

- again one of the issues that Mr Fitzgerald nominated as being significant.

25 *Accordingly we suggest that a meeting between management of Summit and
HACSU representatives should be held on either the afternoon of Monday, or
any time up until 2.00pm on Tuesday 1 November 1994.*

The meeting should bring to a conclusion the negotiations on this matter.

30 Now when we say that - two matters - and when we say it's going to draw to a
conclusion negotiations on those matters, certainly there has been an issue at Summit
about productivity - achieved productivity bonuses according with meetings, certain
targets in relation to the production of their product, and whilst I've only had very brief
instruction on this and I don't wish to go into it in great detail, the history is that there
has been two previous agreements which haven't been fulfilled from management and
that that has led to - led to the situation where people are most unhappy. Now we are
35 committed, as the comments from my secretary says, in no clearer form than being
over his signature, that there is no threat of industrial action, that no time frames
have been established by our organisation, and finally, that we're committed to a
consultative process. All we ask is that in a situation where there's tenseness that one
should meet with the employer to set forward a program.

40 Now the conclusions of those negotiations may be that there is a program agreed on
how the negotiations will occur, and to suggest that reporting back to our members is

5 some sort of threat is, in my opinion, totally inappropriate. An organisation as ours is bound by our rules to report back to our members because they are the ones who have to decide it. It's an issue of democracy and certainly I'm not going to give any commitments that we won't report back to our members. But I trust that the three comments made there in writing by the secretary of my organisation, suffice to allay any concern about this matter and we're certainly very keen to have the matter concluded today and I don't see that this issue is any impediment to that.

10 DEPUTY PRESIDENT ROBINSON: Well you take on board though, Ms Harvey, what I've said in relation to there being even the likelihood of any threat of industrial action in relation to industrial matters whilst the award is before the commission. But I - I say this, that I will - don't want to hold up today's hearing and I'll allow it to go ahead, but I would like to be kept advised of progress in relation to the other matter.

15 MR FITZGERALD: Could I - yes, I understand it, but before Ms Harvey, could I just respond to some of those comments because I think they need responding to, because I -

DEPUTY PRESIDENT ROBINSON: Well I've - perhaps if you just give Ms Harvey another second.

MR FITZGERALD: Oh, I thought she'd finished - sorry.

20 MS HARVEY: No, the only final thing I wanted to say is, that - that this matter has been listed as a separate matter and that - and that certainly we respect the right of Mr Fitzgerald to lodge an application as he sees fit, and that at the time that it appears before the commission then I will - there will be people before you who have the full details in relation to the whole history of the matter which I'm afraid unfortunately I'm not in a position to give at this point in time.

25 DEPUTY PRESIDENT ROBINSON: Well as I - as I understand it, that file hasn't been referred to me by the president - if I'm right.

MR FITZGERALD: Oh, that's somewhat unusual, I would have thought. I would have thought it would be better if it were filed - referred to you, but that's within the commission's discretion.

30 DEPUTY PRESIDENT ROBINSON: Well - that's right.

35 MR FITZGERALD: That I think it's - our view is that - that it may be - I'm still not certain about Ms Harvey's response because I think the letter is not unequivocal - it may be that that matter is sorted out when it comes back before the commission. But if I could just make some brief comment in terms of the submissions made in respect of the letter, we are not satisfied with the response contained in this letter and that is the firm instructions of Mr Snadden. Can I say that the - or I accept Ms Harvey's point that the final paragraph indicates that there is a process of consultation which is required by her union's rules and I can see that but the reason why we believe there is some implicit ongoing threat is that that's taken in the light that in our submission quite clearly a threat was made, although denied by Ms Harvey, and indeed it's a brave move for Ms Harvey to indicate that her - her shop stewards would be prepared to give evidence - that would be indeed interesting evidence. But certainly we can give categoric evidence that a threat was made and that's why we have some reservation about that final paragraph.

45 In terms of the no time frames, the second point of the union - sorry - if I can just clear the point up in respect of no threat of industrial action - we are not still satisfied, although we accept that we don't want this matter - the overall matter held up - we are still not satisfied that there has been an unequivocal withdrawing of that threat.

DEPUTY PRESIDENT ROBINSON: Well we've heard Ms Harvey today -

MR FITZGERALD: Yes, well -

DEPUTY PRESIDENT ROBINSON: - to this commission and it's on record.

5 MR FITZGERALD: - except that Ms Harvey says that there was never any threat made and we do accept that.

DEPUTY PRESIDENT ROBINSON: Well I'm -

10 MR FITZGERALD: Now in terms of the time-frames - the second point - and this is the critical point which Ms Harvey skipped over very quickly; the second point by Mr Hall was, no time frames were established, although it's our view that negotiations have been protracted.

15 The next - in the next paragraph, he - he suggests a meeting between representatives of the union on either this Monday or Tuesday and the next line - the next sentence is in fact the critical sentence where he said, 'The matter should bring to conclusion the negotiations on this matter'. Now in the one breath he says that there's no time frames and at the second breath he said, this is - this is how as we see it - the union sees it - that these negotiations will be completed. Now if that -

DEPUTY PRESIDENT ROBINSON: Well it might - it might - it might be -

MR FITZGERALD: - if that's not a time frame -

DEPUTY PRESIDENT ROBINSON: - it might be a desired wish -

20 MR FITZGERALD: Well, yes, but it's somewhat against the whole of the letter, Mr Deputy President, it is still threatening in our submission.

DEPUTY PRESIDENT ROBINSON: Well I hope I've made my position quite clear.

MR FITZGERALD: Well I didn't - I didn't want to take it any further than that except to -

25 DEPUTY PRESIDENT ROBINSON: No.

MR FITZGERALD: - respond to those comments and we will certainly - unless there is some better response by the union in respect to this whole issue, we will be certainly taking these matters up in the section 29 notification which we've put before the commission.

30 DEPUTY PRESIDENT ROBINSON: Well I've said, because I've got this particular - these two particular applications regardless of who has got the section 29 dispute, I would like to be kept advised of that other matter -

MR FITZGERALD: Well -

35 DEPUTY PRESIDENT ROBINSON: - because I've got these files and I'll have regard to the situation and - according to what the reports are.

MR FITZGERALD: Well we'd undertake to keep you advised and thank you for your patience this morning in hearing this preliminary matter.

DEPUTY PRESIDENT ROBINSON: Thank you.

MS HARVEY: We seem to have lost your associate, Mr Deputy President, because one of the first matters I wanted to raise is that your associate did raise with both myself and Mr Fitzgerald, an issue of the way the applications were actually phrased, which we need to resolve this morning.

5 DEPUTY PRESIDENT ROBINSON: We might just delay a little bit before we get into the detail of that, but I can just confirm for everybody that I had a - had a look at the applications and started my chore to understand exactly with the implications of both applications as they were proposed to affect the existing award and a number of queries were raised in my mind which I asked Mrs Devine to take up with each of you
10 so that we could hopefully clarify what the intention was.

MS HARVEY: Okay. Well I -

DEPUTY PRESIDENT ROBINSON: And I must admit, I - I blushed at - that I should have asked that on the first day.

MS HARVEY: Yes, well it's easy to do -

15 DEPUTY PRESIDENT ROBINSON: Well I think I understand what the intention is.

MS HARVEY: - with this award, I admit, because the history of it is that we had a whole separate lot of different separate sections, and over a period of time - separate divisions - we've been trying to bring them together -

DEPUTY PRESIDENT ROBINSON: Mm.

20 MS HARVEY: - and in that process we've brought together Division A and Division B which included what were three old divisions into new Division B. So anyway, to cut the matter short, I have discussed it with Mr Fitzgerald, and we're both in agreement in relation to this matter, and that is that the application is to - both my application and Mr Fitzgerald indeed as well - although they contain different content -
25 the application is to vary the wages clause in Division B and then in the actual award it then - when you go to the wage clause in Division B it says: Division B, Division A - which is very confusing.

DEPUTY PRESIDENT ROBINSON: That's right.

30 MS HARVEY: And that - that - that section would stay as is under the current applications -

DEPUTY PRESIDENT ROBINSON: Mm.

MS HARVEY: - then it has Division B, then it says: see Division B.

DEPUTY PRESIDENT ROBINSON: Yes.

35 MS HARVEY: Which is - then - then section D - so it's Part C, Part D - if you put aside their headings and Part E - those parts of Division B which we seek to vary by these applications in terms of removing the current definitions and wage rates and replacing them with the alternate propositions.

40 But - so quite clearly, the intention is to put in place a classification structure to cover residential homes, sheltered workshops providing sheltered employment and day training and activity therapy centres for physically, intellectually or sensory handicapped persons. That's the overall intention and the way that it's set out in the award is currently - you know, it is very inadequate and we would see it really as a drafting exercise to fix it up.

DEPUTY PRESIDENT ROBINSON: Yes. It is confusing.

MS HARVEY: It's terribly confusing; I agree.

DEPUTY PRESIDENT ROBINSON: So at page 27 of the consolidated award, No. 4 of 1993.

5 MS HARVEY: I'm actually looking at my award copy. Page 27, yes. That stays as is.

DEPUTY PRESIDENT ROBINSON: Okay.

MS HARVEY: Page 28, 29, 30 and 31 are sections of the award that will be varied by the respective applications.

DEPUTY PRESIDENT ROBINSON: Right.

10 MS HARVEY: Now having said that, of course there is a drafting issue in the sense that the definitions are in clause 7 under the new proposal and the wage rates should be in clause 8. But the intention is to affect those employees and obviously we'd have to consult in terms of any orders, if orders were to be made. So I trust that that clarifies the intention.

15 DEPUTY PRESIDENT ROBINSON: That helps me because I had visions of waking up in the middle of the night and thought I've not responded to the applications.

MS HARVEY: Perhaps it may be useful for the record that Mr Fitzgerald confirms that what I've put is correct.

20 MR FITZGERALD: Yes, I intended to do that. Yes, I just want to check those final pages because I handed my award across to Ms Harvey. It seems that the situation which she has put to the commission is indeed correct. Obviously it would be dependent on the respective classifications. But there is a need to change the definitions in terms - sorry, the applications seek to change the definitions. The clerical definitions would remain as is.

25 DEPUTY PRESIDENT ROBINSON: Yes, of course.

MR FITZGERALD: The definitions on page 21, for the purpose of Division A, would remain as is. And then for the purpose of Division B the applications, the respective applications seeks to delete those definitions and replace them with those contained in the respective applications.

30 DEPUTY PRESIDENT ROBINSON: Thank you.

35 MR FITZGERALD: And in terms of the wage rates, I think Ms Harvey is right. Just to clarify it, the clerical provisions of course would remain - wouldn't be affected by the applications. Division - sorry, B, Division A, which is on page 27, which is the residential homes, would remain and would not be affected by the applications. And then the following divisions, Division B, which relates to residential homes, sheltered workshops on page 28, and then D, which relates to sheltered workshops - I'm not sure why the duplication. And E on page 31 would be affected by the respective applications. So I hope that's consistent with what Ms Harvey said; I think it is.

DEPUTY PRESIDENT ROBINSON: I think it is.

40 MR FITZGERALD: Yes.

MS HARVEY: Can I just indicate it is one of the reserved matters that leave was sought and granted by you, Mr Deputy President, for the removal of Division A. I think I indicated previously that at some future date - it's not subject to the current application. I think I indicated to you earlier that we have not been actually able to find someone subject to that award. We thought Roland Boys Home were but it turns out they're public sector. And there is one other disputed matter as to one other site whether it's covered by the award. But the intention of the parties is certainly in the longer term to remove that - or the short term, one would hope, to remove it altogether and to have then what we would have is one consolidated award with an admin. And clerical and a support workers stream.

DEPUTY PRESIDENT ROBINSON: Well the respective proposals are to delete those sections other than Division A on page 27, and the respective applications are to apply the scales and definitions et cetera contained in the applications, the respective applications.

MR FITZGERALD: Could I just say - I don't want to prolong this. Just in respect to Division A Ms Harvey may be right in terms of that ultimate deletion. We need just to seek some instructions on that as to whether anyone is covered.

DEPUTY PRESIDENT ROBINSON: Well that's futuristic anyway.

MR FITZGERALD: It is, but we can't say categorically that it will in fact be deleted until we seek those instructions.

DEPUTY PRESIDENT ROBINSON: Okay. We can probably proceed.

MS HARVEY: Yes, it gives me great pleasure, and everyone else's too, I imagine, to be on my feet for the final day of hearing in this matter and to be making my concluding submissions.

DEPUTY PRESIDENT ROBINSON: I'll hold you to that.

MS HARVEY: If I could at this stage hand up an exhibit. And this would be, I understand, HSUA.12.

DEPUTY PRESIDENT ROBINSON: That's right. I take it that you're not really introducing fresh material, as such.

MS HARVEY: No, Mr Deputy President, if I could say that what this is - what I've sought to do in my concluding comments is to try to bring together the submissions that have already been made and make some comparison, and obviously to conclude. I understand that I can't bring new matters to this commission and that the focus of this is really a summary and concluding matter.

Now there may be just one minor thing that could potentially be called new, and I'll draw attention to it when I actually come to it to give Mr Fitzgerald the opportunity to respond, if that's appropriate. But there's only one.

DEPUTY PRESIDENT ROBINSON: Well you might do that before he jumps to his feet.

MS HARVEY: Okay. The one is that in relation to the wage fixing principles, Mr Fitzgerald stated that it was - his position seemed to be that it was against the wage fixing principles to have a work value process in the case of what had occurred with WAVA, to then be subsequently followed by an SEP process and that in fact was double dipping. Now in this document the only thing that in any way could be called new, it does not refer back to existing transcript, is I do refer to a case in relation to

the Therapists Award, which was subject to a work value in 1987 and then subsequently formed part of a structural efficiency exercise under T.2399.

5 Now case T.2399 has already been referred to and handed up as sections - extracts from the full bench decision. So it really is marginal whether it's new or not, but that is the only thing that is in any way could be considered to be new material. I'd argue that it isn't new material but I thought I should bring it to your attention.

DEPUTY PRESIDENT ROBINSON: Okay.

MR FITZGERALD: I'm not certain how to respond to that. I'd probably need to see it before I can respond. It's a bit hard to respond without seeing it.

10 DEPUTY PRESIDENT ROBINSON: Yes, well you can reserve your situation.

MS HARVEY: Other than that everything is just purely summary and concluding comments. Obviously I have the right to respond to some of the submissions that Mr Fitzgerald put, but it's only in terms of argument, not new material.

15 Now this document, Mr Deputy President, is in fact an attempt to bring together all the threads of the submissions that have been put to you, and to reach some concluding comments from my organisation's point of view. I have attempted to put in transcript wherever possible, transcript references. However because of our attempt to conclude this matter early for reasons - for other reasons which we've discussed before, it meant that I didn't have quite as much time as I would have liked, so some of
20 the references to the latter transcript aren't actually there. However if it is a problem I could probably at some future date - but I don't think it will anyway because everyone has got the transcript. It was really an issue of ease.

25 So this document, Mr Deputy President, I will be tabling a second exhibit later in my submissions which is actually a review of the HSUA and TCCI evidence, particularly going to witness statements and referring to - again to transcript numbers and witness statements.

30 MR FITZGERALD: Well I'm not sure whether that can be done at this state, Mr Deputy President, if it's a review of the HSUA evidence. That should have been done at the point of making submissions and primary submissions, I would have thought. That opportunity has gone.

DEPUTY PRESIDENT ROBINSON: Well -

MR FITZGERALD: I concede in response to the TCCI submissions, that's fine. But to review HSUA submissions, that point has been passed, in my submission.

35 DEPUTY PRESIDENT ROBINSON: Yes, but there's a right of reply to her own application - your comments on her application.

MR FITZGERALD: As I read - as I interpreted the comments - Ms Harvey may want to clarify them, but there was going to be a further document which in fact sought to review HSUA evidence, as well as TCCI evidence. Now that's how I read it and if that is the case then that should have been made in the primary submission.

40 DEPUTY PRESIDENT ROBINSON: Well I would hope that any documentation put forward is an aid to the record, as an adjunct to the submissions which would be properly made rather than the introduction of something which is quite new.

MR FITZGERALD: Right. I thought I made myself clear. There's obviously a right to respond to the TCCI case. I concede that and that's the purpose of the right of reply.

And Ms Harvey is entitled to review TCCI evidence as well. She hasn't done that yet. But the point that she made is that I think she was also reviewing her own evidence. Now that should have been made in the first instance, not now.

DEPUTY PRESIDENT ROBINSON: Well not reviewing it, I wouldn't -

5 MR FITZGERALD: Well that's the statement she made.

MS HARVEY: Perhaps we could wait until we get to it because I suspect that Mr Fitzgerald won't have problem. All I was doing was indicating the actual - what I intended to do today. The actual exhibit that I will be tabling - perhaps review is a bad use of terminology.

10 MR FITZGERALD: Right.

MS HARVEY: I've tried to identify critical issues and say this is what the HSUA evidence is, this is what the TCCI evidence, and demonstrate where it's inconsistent and where it's consistent.

DEPUTY PRESIDENT ROBINSON: Okay.

15 MR FITZGERALD: If that's all it is that seems to clarify it.

DEPUTY PRESIDENT ROBINSON: Good.

MS HARVEY: Yes. Right, I would - no, let's not revisit this matter.

20 Okay, so if I could take you to - and I'll try to do this as quickly as I possibly can because I know that everyone is very familiar with all this since it's been before us for 6 months. But in the index there it outlines the different aspects of the case as put by the HSUA. On each page there is, just in terms of layout, I've set out what the actual argument put by the HSUA. On the right-hand side of the page I've indicated whether it's contested or not contested, and I haven't commented on everyone but certainly critical ones.

25 Under the double line on each page, or under each heading, is the TCCI's - what it is that they put in their case and also comments in responding to that from my organisation's point of view. So that's the actual layout of it.

30 So in terms of - if I could take you to page 1 of HSUA.12, in terms of what the HSUA is seeking, it is seeking a decision from the TIC, an arbitrated decision to insert a classification structure in WAVA in terms of the application and that HSUA reserves its right to seek to review the structure once the National Disabilities Competency Standards Project of the IT is completed. And then there's reference to page 16 there.

35 Now by comparison the TCCI is seeking an arbitrated decision to vary the award in the terms of the its application for the classification structure. If I could just point out, Mr Deputy President, the structure of this document is the same as the structure of my submissions, so it should make it a bit easier.

40 2) is an outline of the industry. We provide an outline of service types and funding arrangements and then I've listed down there the different service types and relevant transcript numbers. None of that information was actually contested. The estimate of employment levels we provided at page 30 of transcript. Again that was not contested.

We set out the legislative arrangements and in the first point there, there is:

5 *Legal obligation on services to meet the requirements of the relevant Act. This includes compliance with the Objectives and Standards. These are virtually identical in the Commonwealth and State legislation. However, the outcome standards issued by the two Departments are designed specifically to the sectors they administer.*

And that was at transcript page 33. Again that was not a matter that was contested.

10 *Schedule 3 sets out the Standards with which services must comply. These emphasize the need for proactive services designed to increase the independence of clients through active support and imparting of independent living skills. Standard 4 requires services to be tailored to meet the individual needs of clients.*

Again that was not contested.

15 *Services are legally bound to meet the standards. The funding agreements with services require that they employ adequately qualified and experienced staff and that they are employed under the conditions of the award or agreement.*

Again not a contested matter. Initially that is contested is that:

20 *The outcome standards, the view put by the HSUA that the outcome standards comprehend extensive skill and responsibility levels in staff. The standards give a clear indication of the levels of skill and responsibility required in the industry. These are reflected in the HSUA's classification standards.*

25 So that's from transcript page 37 and we set out the standards. They were discussed in pages 38 to 68. Now the TCCI maintained in their submissions that the responsibility for standards rested solely with management, and as a result there was no special burden for staff. Now the HSUA totally rejects this view and refers the Industrial Commission to the standards which have already previously been provided, which specifically recognise the need for skilled staff. And that was in standard 4.

30 Whilst any management has overall responsibility for meeting contractual arrangements, we don't deny that, this does not diminish the fact that the standards require skilled staff. And I think that the TCCI sought to fudge that distinction. And whilst we don't deny that management has the contractual relationship, clearly it's analogous to any sort of contract that any business would enter into that it has the legal responsibility, however, it also, as by virtue of that, has a responsibility to employ skilled staff who can in fact deliver on the contractual arrangements that they've entered into and the standards themselves and the way they dictate individual planning and the way that they dictate certain outcomes in terms of privacy, in terms of medication, in terms of the whole series of matters we've seen. They certainly comprehend a level of skill of the staff who are interacting with the clients.

40 If I could take you on to the history of negotiations on award restructuring. Now before I start on this it certainly is correct that the TCCI contested the right of the HSUA to put this information to the commission. But our view is that they did not in fact contest the content of the submissions that we put.

Now if I could just run through them:

The HSUA presented evidence about the sequence of events by way of background to the case. The critical points in relation to this application were:

- There had been a long period of negotiations and agreement was not possible, hence the requirement for arbitration;

5 *- At the time of the agreement by the parties to implement MRAs in the award there was an agreement that there would be further work on the definitions through a joint skills analysis. This was stated by HSUA on transcript in matter T.2706 and confirmed by Mr Sertori. It was further reinforced by the reasons for decision from the Deputy President.*

10 And that was in transcript page 171.

Metals relativities were agreed as the basis for the restructuring of WAVA. HSUA accepts that we cannot force the TCCI to uphold that agreement. However, it lessens that weight of any argument that the metals relativities are not relevant to this award when there was agreement for lengthy period of time
15 *between the parties. HSUA argues that the application is justified in the terms of the act and the wage fixing principles.*

A joint skills analysis was undertaken under the auspices of the State Negotiating Committee. The outcomes of the skills analysis are reflected in the HSUA's application.

20 And finally:

Conditions matters had been finalised on 22 November, 1993 in relation to the SEP.

25 Now we hear the commission's determining in relation to conditions matters and that will obviously be subject to further debate and further submission and further application, and we wish to put no further submissions in relation to that other than to reserve our right to oppose it when the time comes. We may have applications and conditions matters ourselves.

30 Now in terms of the TCCI's case, they did contest the right of the HSUA to provide any history of negotiations arguing that once arbitration had begun that all bets were off. The HSUA presented extensive submissions about the concept of without prejudice that went to legal advice and also went to advice from - I think it was Justice Olsen in relation to the handbook for advocates, which was discussed extensively at that time.

35 The HSUA argued that it was important that the commission understood the history of award negotiations, the agreement in relation to MRAs was conditional upon agreement to continue work on the WAVA classification structure using the metal industry relativities. This was recorded in transcript and the reason for decision. The issue was not the admissibility of the evidence but the weight that the commission should put upon it. If the agreement was properly recorded before the commission and it were to be ignored it would be against the public interest as no party could have
40 faith in the commission. So these were the points that we argued.

The commission determined that the exhibit supplied in relation to the history of the negotiations was indeed admissible evidence.

In terms of the outline of the claim, we went through the claim in detail and I've got the reference numbers there from transcript.

5 Now, in addition to that, Mr Deputy President, we produced a document - a differences document outlining the differences between the HSUA and the TCCI claims and those - and what I've done in this section is identify the issues from 4.1 that I - was part of the exhibit and also those issues identified by the TCCI in their submissions.

10 Now - so I'll go through each of these. In relation to progression, this is a contested matter. The argument is about the utilised versus - skills versus skill required. The HSUA argue that the HSUA's classification was no different to what currently exists in all awards and the employer would be able to determine the classification by providing descriptions. Now, it is worth noting, Mr Deputy President, that the standards do require that position descriptions be issued to each employee and the TCCI has not contested that the standards are in fact legally binding through the legislation. I think there has been great misunderstanding about this point and the intention of the HSUA in relation to its application and that's the points I want to come to now in terms of the TCCI's response.

15 The TCCI did reject the HSUA's approach to progression arguing that it would allow for self promotion regardless of the requirements of the employer. The TCCI clearly misunderstood the HSUA's application despite clear explanation on transcript. The employer maintains control through the accurate position descriptions. It's worth noting that position descriptions are required by the outcome standards.

20 The HSUA - the reason we are rejecting the wording used by the employers in their application is that it would allow an employer to require an employee to perform at a higher level, but refuse to classify at the appropriate rate because a position wasn't vacant. Now, in our understanding, our application says that you will be classified according to the skills that you utilise, however the employer determines the skills that are utilised by the position description. No debate about that, and in fact, if you go the HSUA's application it is very clear because it lists indicative tasks. It's not like some awards that are very vague. It is very specific in terms of what people could be expected to do.

25 Now, we have no debate - and in fact we presented sworn evidence to you from a witness that he had skills at a higher level, but he wasn't using them and in terms of the application he would be classified at a lower level and that was Mr Craig Roley. So there is no - we don't believe that there is a - is an argument in relation to - we don't believe that the TCCI's position is sustainable. We believe it goes a step too far and that by requiring that a position be available it does in fact allow them to require employees to perform skills at a higher level than they are classified at without promoting them because a position is not available, and we would submit that that is totally unjust, totally against the structural efficiency principles, and indeed, totally against any other award classification structure that we've seen before the commission.

30 Now, at this point I want to refer to the exhibit that Mr Fitzgerald provided, which was TCCI.11, he sought to justify

MR FITZGERALD: Was that the timber industry one.

45 MS HARVEY: Sorry?

MR FITZGERALD: The timber industry one.

MS HARVEY: No, it's not, it's actually the other two - oh, sorry, it's TCCI.12. I apologise.

DEPUTY PRESIDENT ROBINSON: Just while we're getting that exhibit out, what would your reaction be if the - an employer at one of the establishments covered by this award engaged a supervisor who took all the responsibility and just engaged staff with the clear instructions in writing that all that was required of those particular staff
5 - no matter how many there were - was that they are to attend to feeding and toileting and very, very basic duties and no more?

MS HARVEY: In terms of where they should be classified? They would be classified according to the classification level and that's all.

DEPUTY PRESIDENT ROBINSON: Right.

10 MS HARVEY: They cannot take upon themselves additional responsibilities that they are not employed to do, and certainly we had never argued that, and in fact I think the - the exact - that's why I say I think this is really subject to a lot of misunderstanding and, you know, I concede perhaps I introduced some of that misunderstanding by talking about the difference between skills utilised and required and the compromise
15 which Mr Fitzgerald picked up on. I was really just talking about a historical analysis of what - or what had brought us to this debate and that the resolution of that debate had quite clearly been that you had to utilise the skills.

Now in utilising those skills, we accept that the employer determines that through the position description. We do not accept that an employer can classify someone at a
20 lower level and then require them to exercise skills at a higher level without paying them at that level.

DEPUTY PRESIDENT ROBINSON: Right.

MS HARVEY: And our submission is what the employer indeed intends.

DEPUTY PRESIDENT ROBINSON: But if the employer doesn't require people to
25 exercise higher skills than allocated, you've got no problem.

MS HARVEY: Provided that - the only rider I would put upon that is that it is clearly communicated to the employee -

DEPUTY PRESIDENT ROBINSON: Yes.

30 MS HARVEY: - and that's why position descriptions are so important and that's why the wording that we have put forward does put an onus on the employer to provide clear position descriptions.

Now we think it would be very undesirable practice to say required by the employer and then that would just leave an open door approach to an employer to say, 'Well I never required that, but had no way of proving it'. Now, by the approach that we are
35 setting out and perhaps it's an appropriate thing that should be addressed in a decision, would be that - and we'd in fact addressed it in our translation document - that they would be classified on the basis of their position descriptions which are a legal requirement under their funding arrangements that exist, and that is why we favour the wording that we have put forward.

40 DEPUTY PRESIDENT ROBINSON: Yes.

MS HARVEY: So, if I could take you to TCCI.12. It's from the Draughting and Technical Officers (Private Sector) Award and the Clerical and Admin Employees Award. Now in relation - Mr Fitzgerald submitted these as exhibits in supporting his
45 argument in terms of his definition for how progression should be made. Now he submitted that this was an example of exactly the thing that he was proposing. Now,

5 what I wish to point out to the commission is that that is a total misrepresentation of
these two classification standards because if you go to the definitions on page 1 of
TCCI.12 where it talks about principal technical officer, principal draughting officer: is
an employee who has successfully completed a diploma or equivalent level of
10 accredited training within organisational policy guidelines and directives - principal
technical officer, principal draughting officer and then it just goes down to what it
performs. There is actually nothing in that definition that talks about - it talks about
being appointed on merit to a vacant position, and again if you look at the leading
15 technical draughting officer, again - and there is no restriction in that definition in
relation to them having actually be appointed on a vacant position.

15 There is in the principal supervisor training coordinator which was the one Mr
Fitzgerald referred to a requirement that the employee be engaged at that - sorry, that
they be engaged at that level which we don't dispute. I mean, clearly, you have be
engaged at that level by the employer according to a position description so we don't
believe this provides any comfort for Mr Fitzgerald in terms of the submissions that he
20 made, and indeed it would support the position put by the HSUA, and again, if I can
take you over the page to the Clerical and Admin Employees (Private Sector) Award
under the classification standards for a clerical assistant, Mr Fitzgerald drew our
attention to the requirement: an employee shall be graded at this level where the
25 principal functions of their employment as determined by the employer. There's
nothing in it about a position vacant in either of these two examples and indeed we
don't dispute that it's determined by the employer, but it's determined by a position
description and that's why we think this wording is very loose and why we prefer the
approach that we have put forward where they have to utilise the skills and a
30 translation based on a position description, but again, perhaps it's a matter that the
commission may seek to address in any decision in terms of clarifying this and I think
it is very unfortunate that there has been so much misunderstanding about the
union's position in relation to this because I think it's led us to unnecessary arbitral
proceedings in relation to the matter.

30 DEPUTY PRESIDENT ROBINSON: As long as I haven't got it wrong, that's the main
thing.

35 MS HARVEY: Yes. So, if I could take you onto the next page in relation to relativities.
The relativities proposed by the TCCI and the HSUA are completely different and the
metals application - the HSUA's application is based on the metal industry award. Now
there is no doubt that issues of relativities is a matter that is contested and I wish to
address that in detail -

DEPUTY PRESIDENT ROBINSON: I was aware of that.

MS HARVEY: - in section 5.2 of this exhibit.

40 MR FITZGERALD: I just wondered - sorry, and I know I - I realise I haven't got a
right of reply, but if that being the statement, the statement - the next statement
where Ms Harvey indicates the TCCI did not contest the relativities in the HSUA
applications, in fact, in my submissions, it is incorrect in that our contest was
displayed by our application itself, so I don't think it's correct to that it was not
contested. That's a gross misrepresentation I would submit.

45 DEPUTY PRESIDENT ROBINSON: Thank you.

MS HARVEY: Well this is going to be a slow proceedings. The TCCI did not context
the relativities in the HSUA's application. We maintain that position. They did rely on
an argument about the wage fixing principles which I will deal with in more detail in
5.1, so there was no evidence put by the TCCI opposing all the evidence that we

provided in section 5.2 of our submissions of comparisons with other awards, but I will come to that in more detail.

5 The TCCI did not seek to justify its own relativities despite arguing that they were processing their application under the structural efficiency principle. Many of the relativities would result in a cut in the award rate of pay and due to a significant change in the status quo, there is an onus of proof on the employer to justify their relativities which they have not discharged.

MR FITZGERALD: Well, again, I just - I don't want to interrupt, but again I can recall indicating a savings provision would ensure that that didn't apply.

10 DEPUTY PRESIDENT ROBINSON: Well, I guess there's an argument as to whether or not there is justification for a savings provision when the structural efficiency principle was being introduced and wage rates are being determined upon whether or not people are able to meet the definitions and the criteria to occupy the position.

15 MS HARVEY: Can I just respond that it said the award rate of pay. Now I accept and would support a savings provision, however, the structural efficiency principle does require the establishment of award rates by reference to relativities in other awards and within its own. There is a clear intention in relation to the TCCI's application as witnessed by their exhibit TCCI.9 was it, the one on costs, that - sorry, if you would just bear with me a minute - TCCI.10 -

20 DEPUTY PRESIDENT ROBINSON: Yes, we're right.

MS HARVEY: In relation to TCCI.10 there is indeed changes in the proposed award relativities in both the TCCI's application and if you go down the cost per annum impact column in relation to the TCCI's proposed translation, there is a clear change in the relativities which are indicted by those brackets which indicate less than the current rate. Now the only submission I put to you in relation to that at this point, Mr Deputy President, is that there is a change in the status quo in terms of the award rate which is regardless of the issue of savings and that there is an obligation under the structural efficiency principle where one seeks to change relativities, or to establish relativities that they be properly justified.

30 Now because it is a significant change to the status quo in relation to the TCCI's application, there is an onus of proof upon them to justify their relativities which they have not discharged. Contrary to the HSUA's position where we have presented extensive evidence in relation to the proposed relativities and none of which was actually contested in terms of the comparisons and internal relativities.

35 The TCCI's relativities under value the work in the industry and we submit that they do constitute a case of gender bias, and I will refer you to section 5.6.

We're dealing just with the differences at this point of time and some of this is just a filing exercise, and which order you choose to deal these with these discussions.

40 In terms of the next point of difference which was the accelerated progression. Accelerated progression is provided for in HSUA's application and this is a matter that is contested. The accelerated progression is on the basis of the completion of qualifications, and, the employee is engaged and competently utilising the skills at the appropriate level, so my comments in relation to the requirements from the employees also obviously must be transferred to this particular aspect of the application.

45 Now by comparison, the TCCI propose an alternative approach which would not recognise qualifications unless employees appointed on merit to a vacant position. Now the HSUA argues whilst this approach as it does not provide a skill - argued against

5 this approach because it does not provide a skill based career path and again it's related to the argument about - that we - that I was just putting to you about skills required. However the requirement to be utilising skill does not allow the employer to control progression through position descriptions, so it does allow the employer to control through position descriptions.

In exhibit TCCI.6 Commissioner Gozzi indicated support for the approach - and this is the exhibit that Mr Fitzgerald tabled - for the approach proposed by the HSUA, and I quote from that exhibit, where it said, on page 24:

10 *I am of the opinion that the definitions supporting the structure could be greatly enhanced if the criteria for progression from grade to grade also included suitable references to progression and/or completion of approved courses of study.*

15 So I think that that is a significant point in relation to the deficiencies that Commissioner Gozzi saw of the work value case that Mr Fitzgerald referred us to, and given that we are under a structural efficiency principle exercise that does include past work value that it is useful to look at these indications and certainly we thank Mr Fitzgerald for drawing out attention to it.

20 Because the relativities are so low in the employer's application the clause could act to in fact discourage training and now reward it. Now in terms of the TCCI application, if you go to the - if I could refer you to HSUA.4.1

DEPUTY PRESIDENT ROBINSON: Yes, I have.

25 MS HARVEY: And you will recall that I'm actually using this as my index in terms of going through these issues. So on page 3 to 4 is accelerated progression. You can see that - that the - the - the relativities are set down there for the particular qualification levels and that in terms of the TCCI's application, if you look at 105, which is set an advance certificate, 105 in the TCCI's application is in the same level as the hundred per cent mark, and in fact it's just automatic progression. So - and if you look at the associate diploma - 115% - which is also in a similar position in the next level, that there really is no accelerated progression at all, and in fact you could end up by - if you examine the application closely - in fact it's disadvantaging people for having undertaken qualifications and training if you used their accelerated progression clause and applied it in an accelerated depression manner.

30 If you wish me to take you to more detail I can by referring you to the actual application.

35 DEPUTY PRESIDENT ROBINSON: I'll ask you for it

40 MS HARVEY: Okay. Also the - a point that's not noted on my document or my exhibit here is that the TCCI also argued that existing qualifications should not be recognised at all and the HSUA's totally opposed to this and we did present information and evidence to you in these submissions done by Mr - Mr Brown in relation to the fact that the courses had already been appropriately - appropriately accredited and set at appropriate qualification levels using the agreed national approach. So we totally reject any suggestion that existing qualifications should not be recognised as it clearly disadvantages those employees who have already attained qualifications, and there is extensive evidence from both the TCCI and HSUA employ - witnesses - that such qualifications are used in the industry.

45 If I can take you now onto the compression of management responsibilities - again a contested matter. The HSUA argue that the employer's application compressed

relativities by deleting higher levels and pushing minimal management responsibilities lower in the award. This restrict career paths and is not justified in terms of the SEP and a particular aspect of the SEP that we refer to there is the establishment of appropriate relativities on the basis of level of skill, responsibility and work environment.

So the TCCI argued strongly against level 6 and 7 in the HSUA's application and their arguments were based on first of all the wage fixing principles which I'll go into more detail in section 5.1 of this exhibit, and further, that without the higher levels, the objective of creating - in terms of our response to it, without - without the higher levels included in a skill based career path it will frustrate the objective of creating skill based career paths.

If I could just indicate, the italics is the points that the TCCI raised. The non italics is the actual response from - my response to the points that are actually raised.

The TCCI also suggested that there would be role conflicts by including what they identified as middle management into - into the award - role conflicts between what they identified as middle management and award employees. However, they provided no evidence of role conflict whatsoever. The award already covers middle management, and I'll come to this point in - a little later. So that if there was to be role conflict, one would expect that evidence of that could have been presented and we submit that there certainly hasn't been any evidence of that to date and that there are numerous examples of awards that cover higher levels and where there is no difficulty experienced at all with role conflict. And certainly in my organisation's point of view in the - in the public and private sector, we cover employees to extremely high levels. It's not unusual for me to sit down and negotiate with one of my members whilst that person is representing a management position.

Now that is a very common part of industrial relations and it's never - certainly never presented a problem to my organisation and certainly in my experience hasn't presented a problem vice versa.

DEPUTY PRESIDENT ROBINSON: It might be a bit difficult sometimes wouldn't it, when you've got a bit of a conflict between a - two members, one at a higher management level and the other at a far lower award level?

MS HARVEY: Well it hasn't been. We're an industry award, and we cover all classifications. I've sat down and negotiated many times with Martin Jarman, and as well as numerous people who are members of my organisation. And I mean we understand, as do our members who are employed in those sort of levels that people have roles and functions and that people fulfil those roles and functions, and certainly I don't even have to look at that level. I could take you to the example of already in a group home situation where we - in the case of Mrs Thomas who is a union member, who we regularly negotiate with. Certainly there's been no experience, in our submission, of any problem with that sort of relationship. And one would assume that people you have at those levels are professional and understand these differences.

DEPUTY PRESIDENT ROBINSON: Right.

MS HARVEY: Now in terms of lack of flexibility, the TCCI's argument on the basis of flexibility is extremely spurious. The HSUA accepts that no award regulation does give the employer flexibility, so does slavery - it does not justify it. The point is that in relation to this matter, is that it is a reality that awards do provide some sort of constraints on employers, because if they didn't exist I'm sure life would be much easier for an employer. But that is not the point. The point is, we do operate within a system that provides award regulation and we don't see why employees who are in an

employee contractual arrangement should be excluded from the benefits of award coverage merely because the employer finds it inconvenient.

5 In - the second dot point that the award, as determined by the scope, already covers middle management and is already being used by the - by the - by employers, and indeed employers cannot contract out of the award. And I was very interested in the comments that Mr Fitzgerald made in relation to the fact that there were people operating on contracts, that they weren't being - where overtime provisions were not being recognised. Now we're very interested in that occurrence in the industry because in our submission they're quite probably in breach of the award as it currently stands.

10 If I could just refer you to - to HSUA.5.2A which is the submission - the exhibit that dealt with advertisements. Actually I'll save time, Mr Deputy President, I won't take you to it - it's there. We'll be here all day if I take you through everything again. I'll just - if I just point out that in terms of that actual - that reference there, it sets out advertisements in the middle management area where it says that they're subject to
15 the WAVA Award.

No evidence was presented on as to how - how many employees are supposed to affected, and there is an enterprise flexibility clause in the award and my organisation unequivocally gives the commitment and has given the commitment previously to - to the TCCI that we would facilitate the genuine wishes of employees provided that they
20 do not confer a lesser benefit, so we are more than willing to give that commitment, that we would facilitate that process provided that, as I say, they meet the obligations under the facilitative provisions that they don't confer a lesser benefit.

Now I've offered on numerous occasions for employers to nominate the people who are affected, and that we would deal with that. So if that was there genuine wish, then
25 that commitment remains.

The HSUA has not - the TCCI argued that the HSUA has not discharged the onus of proof and that the level - that the levels were needed - particularly levels 6 and 7. The HSUA has discharged the onus of proof and we totally reject that submission. We've presented ads which show that employers are using public sector higher rates because
30 of the inadequacy of the current award whilst still using WAVA in terms of conditions therefore engaging in over award payment.

Secondly, that the witness that qualifications at levels 5, 6 and 7 are needed and are utilised. The requirements of the structural efficiency principle to create skill-based career paths, and the inclusion of levels 6 and 7 does not require an employer to use
35 those levels. They are - but there are employers who do require them and the example that I'd give there is Mr Neil Rodwell who was TCCI witness who referred to the use of his supervisors, grade 1, who he considered to be underpaid and he considered an appropriate qualification to be an associate diploma, who are currently in the award. Mr Fitzgerald also argued that levels 6 and 7 are inappropriate because they are a
40 medical model and that they are not needed by the industry.

We submit that the TCCI's submissions in relation to medical model are completely confused. Medical model is not defined by qualification of staff, but the paradigm in which they work.

45 For example, are they treating people as they are sick, rather than operating in an empowerment or a development model.

According to the TCCI's argument whereby they argue that 6 and 7 were in the medical model, the DD course which we see applicable at level 6, would be in the medical model.

Now I am sure that Mr Carney who appeared as a witness and all our other witnesses in relation to this matter would strongly contest the view that the developmental disability course at the Associate Diploma is a medical model.

5 Now, I really do believe that this medical model has been dragged out a bit like 'Reds under the beds' to create fear and concern.

Now I am not just saying this in relation to Mr Fitzgerald, so before he gets too upset about this it is an issue in the industry that there is a misunderstanding about what medical model means.

10 It is not an issue of a qualification which one has, it is an issue of the way that the person actually works with the client.

Now, if I could give you an example, say, a nursing home, which was used by Mrs Subonj and Mrs Keating as an inappropriate model because it was a medical model, we have classifications in that award that are below the trade rate; and, quite clearly, they are working within a medical model.

15 The issue is not the qualification, the issue is the paradigm in which people work.

20 Now the reason why the industry rejects medical model, which my organisation does as well, is that the medical model seeks to treat people with disabilities as though they are sick, as though they are some sort of external expert who can come in and control their lives, and doesn't recognise that they are members of the community like any other and that they should be supported.

And, certainly, our application we believe will facilitate and assist the development of a community development model in this industry.

25 Now, in relation to increments, we provided evidence and submissions in relation to increments which are listed there, and this was not contested by the TCCI in submissions.

the HSUA put forward agreed variations to the HSUA's application which was also contained in Exhibit 4.1.

30 Now, in relation to these agreed matters, we did propose some variations to our application subject to TCCI agreement and others we just proposed just to facilitate and remove unnecessary disagreement.

Unfortunately, the TCCI has not responded to those proposals.

In terms of (g) there were disagreed matters in relation to each level.

The HSUA identified disagreed matters in relation to each level, and that is on those transcript numbers.

35 The most significant disagreement, other than the one I was referring to before about levels 6 and 7, goes to the definition of direct supervision in level 3.

The TCCI argued strongly against the HSUA level 3 definition on the grounds that policy and procedures meant that workers had support when they were working alone.

40 The HSUA (sic) has completely misunderstood the HSUA's application. There is nothing in the HSUA's application about working alone.

The appropriate definition is that they would be working with direct supervision.

Now, if I can just take you to that because I do think that this point is very important in relation - if I can take you to Exhibit 4 - HSUA.4

DEPUTY PRESIDENT ROBINSON: Yes, we have that one.

MS HARVEY: HSUA.4, Tab 1, page 1:

5 *Direct supervision means that there is limited responsibility for the final outcome of work undertaken because limited discretion only is available to select the appropriate means of completing the task.*

Conformity with the instruction is measured by the satisfactory completion of allocated tasks.

10 So there is nothing in there about working alone and, indeed, if Mr Fitzgerald is correct in the submissions that he put to you that the policy and the procedures and the responsibility for outcome of standards is with management and that really staff are working under extremely clear guidelines and that there is little discretion required, then there is nothing stopping an employee being classified at level 3
15 whether they work alone or not.

And so, I think again, this has been an issue of misunderstanding about the HSUA's application.

20 However, we do submit very strongly that direct supervision is appropriate in terms of the definition that we put to you - put in our application - is appropriate at that relativity level, and we did justify that in relation to the evidence we presented in section 5.2 of our submissions.

The relativity in the HSUA's applications have been justified according to the requirements of the SEP, including level 3 definitions.

25 If I can now take you to perhaps the most significant debate in this whole case, which is the arguments in support of the application dealing with the wage fixing principles.

The HSUA seeks to process its application under the SEP, as required by the wage fixing principles: 'Any work-value change to the extent that it has occurred should be included in the SEP exercise'.

30 Now that is a virtual direct quote from the wage fixing principles, and I have listed the transcript numbers where we put our argument and where we identified in the next point the HSUA identified each element of the SEP as set out in the Industrial Commission's wage fixing principles. Addressed each one, and argued that our application was consistent with these requirements.

35 And again I won't take you to them again, but there is extensive evidence and this is extensive submissions made in relation to these points.

One of the most critical aspects of this case, and the area of the most contention is the application of the wage fixing principles.

Now, again, in setting out this section I have summarised the TCCI's argument in italics and our response in the normal print.

40 So the TCCI argues first that the HSUA cannot process this application under the SEP because the minimum rates adjustments have been completed. That the HSUA merely reserved its right at the time which confers no real significance, and that the only

principle available to the HSUA is the work-value principle, and that the HSUA has not met this test.

5 In response, the HSUA's agreement to the minimum rates adjustment process which included substantial concessions, and particularly the concession in relation to five rather four increments and phasing it in over a longer period of time, was conditional on further work on the skills analysis for which the parties were seeking funding.

This agreement was recorded in transcript and confirmed by the TCCI advocate.

Further, it was reinforced by the Reasons for Decision by the commission.

10 The transcript and the Reasons for Decision were submitted as evidence. the HSUA would not have agreed to the MRA process if these commitments were not forthcoming.

15 The HSUA did not merely reserve it right. An agreement with the employers was recorded in the Reasons for Decision. The employers have not denied that such an agreement existed, rather they have sought to hide behind the concept of 'without prejudice' which is not relevant because the agreement was not conditional.

Now that reference goes back to the submissions I made in relation to the concept of 'without prejudice' where we presented extensive evidence in relation to our interpretation of going to arbitration and the concept of 'without prejudice'.

20 Failure by the commission to uphold agreements recorded before it would be against the public interest as the system would be inoperable, as the parties would have no confidence in the system.

Even if the commission found against the above argument, the HSUA's application would still be consistent with the wage fixing principles as it meets the test of the SEP.

25 There is no requirement in the SEP that restructuring cannot occur after minimum rate adjustments.

The TCCI presented no evidence to support a contrary view.

30 By comparison, the HSUA presented evidence - and evidence as opposed to merely submissions - presented evidence from the 1993 national wage case which was adopted in full by the Tasmania Industrial Commission that there is no restriction on SEP exercise and, in fact, that the commission encouraged the process as ongoing.

Now, if I can just take you to HSUA.5.1. To Tab 3, page 25.

DEPUTY PRESIDENT ROBINSON: Yes.

35 MS HARVEY: Right. Halfway down the page, and there were many quotes that I took the commission to, but I don't want to go to them again, but I think this one is very important. In the third paragraph it says, and I quote:

40 *Consistent with that rationale, it is our intention that members of the Commission at the time an award variation is sought will raise with the parties the continued implementation of the award restructuring program commenced in April 1989, including MRA's and the development of new classification structures, competency-based standard definitions and translation arrangements.*

Then skipping a point, it says:

5 *The Commission is prepared also to explore with the parties, including by way of provisions of Section 133 of the Act, the means by which the move to enterprise bargaining can be given greater emphasis, and whether the relevant awards need further restructuring to ensure their ongoing relevance.*

So, again, stressing the view that award restructuring is an ongoing process and an award can be restructured again, even if it had once been restructured.

10 Now, the check on the union on double dipping which is an issue that Mr Fitzgerald raised, is that they must justify any proposed changes in terms of the award structure in terms of the SEP requirements in relation to relativities.

It is not open to a union to come to the commission and say we just want to restructure, without justifying and providing very precise information in the way that my organisation has done in relation to any change in proposed relativities; and to show that they are consistent with the requirement of the SEP.

15 The TCCI itself is being inconsistent. Its application contemplates wage increases, yet it seeks to process its application under the structural efficiency principle.

Not only does it contemplate wage increases, it also contemplates award rates decreases.

It did not at any time seek to process its application under work value.

20 A full bench of the Tasmanian Industrial Commission has already rejected a similar argument, as the TCCI, by the state government in T.2399.

And, again, if I can refer you to this. I will try to keep these to a minimum, Mr Deputy President.

25 But, in Tab 3, the same document - HSUA.5.1 - Tab 3, page 3 - I have lost it myself now - sorry, it should have been Tab 2, page 3 - and I put these in my original submissions to you, and I take you to them again, these two quotes. They are very important, and it is the bottom two paragraphs, and I quote:

There was no opposition to the concept of the creation of four new operational streams.

30 - and this was for the public sector SEP exercise -

35 *There were, however, differences as to the number of levels in some streams, some differences as to the classification standards, and as to whether we should determine rates of pay for the streams. As to the latter point, the TTLC was in no doubt that we should determine rates of pay, but representatives of the Minister expressed the view that any increases in rates of pay would be contrary to the wage fixing principles and unsubstantiated in terms of work value.*

40 *We reject the Minister's submission on this point, because any broadbanding or structural efficiency which by its very nature contemplates a change to existing structures should take into account the value of the work required to be performed, as identified by the new classification structure. In that regard, the*

wage fixing principles provide for changes in work patterns, conditions of employment, employee flexibility and the removal of demarcations to be recognised in an appropriate salaries and classification structure. In addition, the Commission has determined in other structural efficiency exercises involving a reorganisation of the work in classification structure, including broadbanding of classifications, increases in excess of 6% without the resort to special case provisions.

5

This is a full bench arbitrated decision from this commission and one that clearly has extremely strong weight in terms of interpreting the wage fixing principles in the manner in which the HSUA is seeking to interpret them.

10

The HSUA on the next point is not seeking to move an entire classification of employees as occurs with a work-value case.

Rather, we are seeking to establish a skill-based career path and then to assess the individual against the criteria.

15

This, indeed, answers the rhetorical question that Mr Fitzgerald put forward of what is the point of the work-value principle.

The point of the work-value principle is where one seeks to move an award classification of employees from entirety to a different rate of pay.

20

We are not seeking to do that. We are quite clearly setting skill-based career structure and then assessing the individual against that.

And the next point is that the HSUA relies on any one or all of these arguments in terms of our submissions, and that if one were to be found wanting, certainly any other we believe would be sufficient to justify the HSUA's application.

25

The next point the TCCI raised was that the HSUA could not go beyond existing classifications in the award, i.e. the 115%, without a work-value case of addressing first award principles.

The HSUA does not accept that its application extends the award to award-free areas.

The incidence of the award is set by the scope which explicitly covers the industry as a whole. There are no exclusion of occupation groups.

30

Levels 6 and 7 of the HSUA's application covers work in the existing classifications. For example, the definition of Supervisor Grade , Residential, is equivalent to a level 6 position.

Now if I could, I will just run through these:

35

The TCCI witness Mr Rodwell, referred to this classification as being underpaid. A functional programmer level 1 could be on level 6 or 7, depending on their duties.

For example, the O.Tasmania at Devonfield that Mr Craig Roley referred to in his evidence, who is currently employed as a function programmer level 1 and receiving an over-award payment.

40

Another example is Grade 1 in supportive employment, which could be a level 6 depending on what they do, it defines it as a foreman in charge of a workshop.

So I urge the commission to look carefully at the definitions that currently exist in the award, because what we are proposing is consistent with the existing scope. Not only the existing scope of the award but also the existing scope of the definitions.

5 Even if the above was rejected, and it was determined that we were seeking to apply it to new levels, the HSUA's application is consistent with the first award and extension to existing awards as relativities have been set by reference to the value of the work, as required by the SEP, and is required by that principle.

10 It does not say in that principle that you are required to do a work-value case. It just says that you need to set relativities by reference to the value of the work, which is indeed what one does in any SEP exercise.

It is not unusual in a SEP exercise to establish higher relativities. It is part of the process of establishing skill-related career paths, as required by the SEP.

15 For example, the Medical Diagnostic Services Award which we have already presented in evidence, was extended beyond just its very narrow definition to higher levels, and the Administrative and Clerical Employees Award, which Mr Fitzgerald tabled, did when these were restructured include rates up at higher levels.

MR FITZGERALD: Did previously, too.

20 MS HARVEY: The matters contemplated in the HSUA's application had already been considered by a work-value case in 1988 and, therefore, could not be used in an SEP exercise. This was the argument of the TCCI. There is no evidence at all presented for this argument. It is absurd to suggest that an SEP exercise which pre dates the SEP itself precludes an award from being restructured. There is no such exclusion in the wage fixing principles themselves and the wage fixing principles say exactly the opposite, ie, that structural efficiency principle exercises should incorporate all past
25 work value considerations, and I refer you to - although I won't take you there now, but to the exhibit 5.1, TAB 1, page Roman numeral vi.

DEPUTY PRESIDENT ROBINSON: That `exorcises' should be `exercises', presumably.

30 MS HARVEY: Yes. The next dot point is the one which I indicated could be interpreted as new material. The practice of SEP following a work value exercise is not uncommon in the TIC - in the Tasmanian Industrial Commission, for example, the Physiotherapists, Occupational and Speech Pathologist Award was subject to a work value case in 1987. I was matter T.3636 and has been subject to the recent public sector SEP exercises. Certainly it's our contention there would be other examples of
35 this but we thought that one was suffice particularly when you consider that it was a full bench matter dealing with the public sector restructuring.

The HSUA application would have to have special case status. This was a third principle that the TCCI identified and nominated for the HSUA application but not its own. It is unclear how this suggestion relates to the other two proposals that the TCCI put forward.

40 The SEP principles require minimum cost. Now, in relation to this, our response is that Mr Fitzgerald is guilty of some very selective quotations which totally misrepresents the TIC and the AIRC's intentions in relation to the structural efficiency principle, and if I can refer you to - I'll just take you to one to give an example, but in TCCI.9 on page 6.

45 DEPUTY PRESIDENT ROBINSON: Yes.

MS HARVEY: Mr Fitzgerald placed great weight on the first sentence in the second last paragraph:

We expect that any resultant restructuring will be done primarily by consultation at minimal cost.

5 However, what he did not do is read the rest of the paragraph which includes a conclusion. It says:

We expect that any resultant restructuring will be done primarily by consultation at minimal cost. However we are not prepared to allow the restructuring of some awards without regard to the relationship of restructuring - restructured award
10 *one to the other and the overall cost impact. For this reason -*

- and this a conclusion -

- for this reason, at this stage there should be no restructuring outside that which is allowed in national wage cases or by specifically constituted full benches.

15 So that - the point I make here, Mr Deputy President, that when you read the whole quote in its entirety the commission is referring to the issue of costs, but in determining its decision, it establishes that's why it has set the SEP process; that's why it has set the relativities and that it why it is awards one to the other is because it - that is the way that they seek to minimise costs. So to now argue that that
20 should be interpreted as meaning that an SEP exercise should not be determined on the basis of relativities, but should only be determined in relation to the issue of costs is a total misrepresentation of what that full bench decision was saying.

Over the page - it was not the intention of the Tasmanian Industrial Commission that cost considerations over-ride the objective of setting appropriate relativities. Such an
25 approach would frustrate the objective of, and I quote:

The need to overcome wage instabilities in the system and the creation of a national framework of minimum award rates in order to protect employees and particularly lower paid employees as and when the community move to a more flexible decentralised wage system.

30 And that's again from the national wage case full bench decision that was adopted by the Tasmanian Industrial Commission.

Now this also has some significance because Mr Fitzgerald also argued that this bench should be conservative in its interpretation of the structural efficiency principle because of the move towards enterprise bargaining. Now quite clearly, the intention of
35 the national wage case and it's reflected in the two quotes I've taken you to today, is that we would have two systems operating side by side. One of a nationally set - consistent set of wages and a minimum rate award set with consistent relativities and the other of enterprise bargaining, and indeed, in the national wage, the most - the 1993 National Wage Case the commission placed great emphasis on the need to get
40 the safety net right and the needs of - and the way of getting the safety net right is by doing structural efficiency principle exercises that have set appropriate relativities, according to the SEP.

So it's not a matter of importing the enterprise bargaining system into the SEP. The two are quite clearly suppose to operate side by side. Not only that, the minimum

award rates set are in fact, in the commission's view, the foundation of enterprise bargaining.

Now, the TCCI's application we submit is contrary to the wage fixing principles as it does not provide a skill based career path and nor does it meet the other requirements of the SEP, in particular the issue of relativities. So, again, I've just listed the transcript pages. I won't take you to those arguments again.

I now turn to the issue of the relativities, one of great significance. The HSUA provided extensive justification for the proposed relativities. This was not contested. The SEP requires the justification of relativities on the grounds of relative skill, level of responsibility and the nature of the environment in which the work is usually performed. This is a critical part of the SEP process. Again, this was not contested.

The HSUA produced an exhibit HSUA.5.2 which compared the three factors of the HSUA's application, that is, the level of skill, responsibility and work environment, with the Metal Industry Award and again we presented an exhibit and you've got the transcript numbers there. The SNC, the State Negotiating Committee skills analysis and thirdly, other relevant awards. These were then cross checked with the ASF standards and I will take you to section 5.3 and 5.6 in relation to this because you will recall they - this was the method recommended by the Sex Discrimination Commissioner as a check to ensure that there was not gender bias in the rates of pay when they were set. On all of these comparisons we submitted that the HSUA's proposed relativities are indeed conservative. None of those submissions were contested.

The SNC jointly undertook the skills analysis an agreed process, therefore the outcomes should have weight before the TIC. The HSUA outlined the process used for the join skills analysis, indeed we call the principal consultant who had undertaken it to - to provide sworn evidence in relation to that. The HSUA's application in effect is a broadbanding of the SNC proposal and the results of - sorry, the HSUA application in effect broadbanded the results of the skills analysis using the definition from the highest classification level in the broadbanded rates, so you will recall that when we broadbanded it, we used the rates from lower levels, but we used the definition at the highest level which is why we argued that it is in fact more conservative than the SNC proposal put forward.

Now, in terms of this being contested, what was contested was not the submissions that we put to you, Mr Deputy President, but the fact that we should be able to use that document and the fact that - and Mr Fitzgerald argued - and I'll come to this again - that we shouldn't have the right to use it because of this magical issue of arbitration, that all things that preceded before it should not be allowed to be considered, a view which we reject and which we believe we provided extensive evidence and submissions on that our view is appropriate.

Both the TCCI - we also submitted that both the TCCI and the HSUA's applications are based on the contents of the SNC skills analysis. Both applications seek to simplify it by broadbanding the proposed structure. This is to ensure that the final classification structure is relatively simply and to ensure that the department doesn't fund to the lowest possible denominator. Again, that matter was not contested.

Exhibit 5.2A of the advertisement setting out the industry requirements in relation to skills and qualifications. This exhibit demonstrated that all the skill levels and qualifications contained in the HSUA application are currently being utilised in the industry, and again this was not contested. The TCCI did not respond to the HSUA submissions in relation to relativities. This appears to the rejection of the right of the HSUA to process their application under the SEP. If the TIC supports the HSUA's submissions that the application is consistent with the SEP, the establishment of

appropriate relativities is critical. The TCCI did not contest any of the new material put before the TIC by the HSUA in relation to the appropriateness of the relativities, neither indeed do they put any evidence supporting their own and we would argue by that fact alone that the commission should find in favour of the HSUA's application.

5 The TCCI tried to undervalue the skills analysis because it had occurred before arbitration hadn't formally been endorsed, however the report was done jointly and reviewed by both parties at every stage of development, and again we had sworn evidence by Mrs Jones in relation to this matter.

10 In addition, the TCCI has relied on a large part on its own - on a large part of its content for its own application in the content of the SMC report.

15 The appropriateness of the metals industry relativities were not even discussed by the TCCI other than to say that any previous agreement was irrelevant once - irrelevant once arbitration commenced, ie., that all bets were off and that the benchmarks of qualifications and relativities were not commented on by the TCCI. The HSUA stated that they could not force the employers to agree to the metal industry relativities despite the early agreement recorded in transcript and a reason for decision, however the existence of a previous agreement would reduce the weight of any argument that they were irrelevant as the employers had agreed to their relevance for a substantial period of time.

20 In relation to its own application, as I've already stated, the TCCI did not meet the requirements of the SEP in relation to establishing relativities, although they maintained their application was processed under that principle. As established in TCCI.10, the TCCI's application contains numerous examples of cuts in award rates of pay as well as some increases. These proposed changes have not been justified in any way in relation to the relativities within other awards or even within WAVA as is required by the SEP.

30 Now in relation to consistency with the training reform agenda, again the TCCI did not contest the information that we provided in terms of its content although they contested the relevance and said that it was not relevant because it was merely speculative. Now in terms of the HSUA presented evidence in support of its application by demonstrating that its classification structure was consistent with the training reform agenda, the training reform agenda represents a consensus by industry Australia-wide on implementation of skill-based training structures which complemented restructured awards. As such, it's an important source of validation for the HSUA's application.

40 The critical points in relation to the application were: 1) the development of competency standards and disability industry - disability services - by the industry, supports the range of classifications in the HSUA's application. The ASF establishes a consistent gender neutral framework for skill levels across all Australian industries. These skill levels are aligned with training qualifications. The HSUA's application is consistent with the ASF range of levels, performance indicators, and career structures. So the ASF is another way of providing us with this benchmark which we're required to do under the SEP to benchmarks of qualifications and skill levels across all Australian industries.

45 The qualifications used in the HSUA's application are appropriately accredited and equivalent to those in the metal industry awards - a very important point which we substantiated. The application is consistent with the levels of qualifications determined by MINCO which supports the SEP. In particular it demonstrates that the classifications in the HSUA application reflect the career pathways and career structures which are developing through the TRA initiatives.

Finally, that HSUA's application is consistent with the training programs which are being developed and implemented in the disability service industry in Tasmania and which supports the structural efficiency principle.

5 Now as I said, the TCI did not contest the content of the HSUA's submissions. Mr Fitzgerald rejected them as being speculative and of doubtful value. The value of these submissions are inter alia that they provide a mechanism for cross-check of the accuracy of relativities in the structure of the HSUA's application. They ensure that the HSUA application is matching the skill based paths being established in training sector for disability services and validation that the qualifications in the disability
10 services in Tasmania are appropriately accredited.

Over the period that the HSUA was presenting submissions, the national training review agenda was under review. This review is now completed and the MINCO has considered a range of recommendations.

15 The recommendations adopted by ministers do not alter the accuracy of the HSUA's submissions in this area.

20 5.4 - inclusion of annual increments - there - we presented submissions which again were not contested. There is precedence in relation to the increments in minimum rate awards; that the HSUA's application states that the increments should be after the 1976 - 1,976 hours or 2 years, which ever is reached the sooner - and this was not contested by the TCCI. Neither did it put submissions in support of its own approach.

In terms of 5.5 with junior rates - and this was an agreed matter - the HSUA proposes consistent relativities, relativities to be calculated on the basis of the work performed and that junior rates are not to apply above level 3.

25 The HSUA's proposal is consistent with the policy supported by MOLAC - MLCC, ACTU, and ACCI. The TIC - what a mouthful of acronyms that was - the TIC full bench in T.2399 also removed junior rates which was a full bench arbitrated decision. The HSUA's proposal is supported by the TCCI. Leave was granted to the HSUA to apply to remove junior rates altogether at a later date. And as I say, the TCCI did not contest the HSUA's submissions.

30 If I can now turn to the issue of public interest, and this was a contested matter.

DEPUTY PRESIDENT ROBINSON: I remember.

35 MS HARVEY: The HSUA's submission, section 36(a), (b) and (c) were all addressed and section 36(a) was dealt with under section 7 of the HSUA submissions. Section 36(b), the HSUA contends that the application does not contravene section 36(b) because of the small number of employees affected by the award.

40 Section 36(c) - the HSUA put forward two main arguments; first, improvements in service delivery for clients, and second, the importance of avoiding gender bias. In relation to improvements in service delivery the following factors were identified: outcome standards rely on the skill of workers due to the labour intensive nature of the work. This is recognised in standard 4 which requires that there are appropriately skilled staff employed under relevant awards who are provided with ongoing training and support. The HSUA's application is supported by this standard. Now that matter was contested, however the next point was not contested, and that is, that the HSUA's application will assist with ease of planning and the capacity of services to negotiate
45 funding with the department by establishing a clear framework and a capacity of services to negotiate skill mixes to achieve outcome standards.

The next - the next point was not contested - that the equitable establishment of wages will improve retention of skilled staff. Retention of staff is important for the building of relationships between support workers and clients. Now in relation to that I particularly draw attention to the evidence of Mrs Knowles-Lock who was a - an expert witness and that of Mrs Dickenson who was a trained psychologist who talked about the importance of picking up behaviour and - behaviour issues - and picking up the needs of clients by having a long term sort of relationship, and I think Mrs Dickenson gave the example that the staff had worked out that if you patted someone - rubbed someone's shoulder or back, one of their clients, then epileptic fits could be avoided and that was something that they could only pick up through a long term relationship and observation.

DEPUTY PRESIDENT ROBINSON: Whilst - so it was not to contest, I think, there was a fair bit of material put forward by TCCI that retention and staff turnovers were not a problem.

MS HARVEY: Yes, that is true and I concede that and I suppose what I'm - what I'm trying to do is to take you through the key points of our submissions, and these were arguments and principle - arguments that we put forward and that issue that they raised was not a contesting of the principle that we're establishing; what they were contesting was in fact that there - that there was a turnover - not that keeping turnover down was important.

A skill based career path will provide incentives to train, improve skill levels and improve service delivery. This is a basic tenet of the wage fixing principles in Australia for the last 10 years. That was not contested. The TCCI's application does not do this as in effect it puts in place a three level structure. The industry is already using in excess of this number of levels. Obviously this was a contested matter and we maintain that we need the full range that the - that it's - the industry is inadequately covered at the moment and that's been evidence by the existence of the ads that are showing people drawing rates from other awards because appropriate rates don't exist whilst employing under WAVA, and also the existence of over award payments that were indicated in terms of Devonfield, and in the statements made by Mr Rodwell and Mrs Thomas in relation to the value that they felt that the work was underpaid, and I will be providing transcript numbers for you in relation to this, Mr Deputy President, when I come to my next exhibit.

Now, there are benefits for clients and the community in improving service delivery. Clients and their families can attain a better quality of life and service delivery. The community ultimately benefits by a lesser degree of dependency of service provision by the state, and this matter was contested by the TCCI.

Now, in relation to the gender arguments which is the next page, I've summarised what we put there as the arguments in relation to gender bias and we put in - and none of this information was contested at all - arguments that the HSUA's application was in the public interest by avoiding gender bias and the HSUA argued that avoiding gender bias and discrimination is both in the public interest. Both state and federal governments had legislated against sexual discrimination, that submissions of the Sex Discrimination Commissioner to the national wage case were tabled highlighting that some restructured awards had discriminated against women workers by establishing relativities in awards where women were the majority workers at rates less than in awards where the majority of workers were men despite equivalent levels of skills.

DEPUTY PRESIDENT ROBINSON: The federal commission hasn't responded to that, has it?

MS HARVEY: Well interestingly enough, I was at my national executive meeting yesterday and I understand the ACTU is about lodge an application under the new provisions that I referred to to review the Child Care Award which will be interesting.

DEPUTY PRESIDENT ROBINSON: Interesting, yes.

5 MS HARVEY: The - a couple of other awards have been nominated as well, but that's one of them.

10 The example of the federal award covering child care workers was cited. This award is particularly relevant in this case as it bears a strong similarity to the relativities proposed by the TCCI. A research paper was published by the University of Adelaide by Ms Rosemary Kelly documenting the gender bias in the Federal Child Care Award was tendered as evidence. The HSUA's application has met the test recommended by the Sex Discrimination commission to avoid gender bias by cross checking with the Australian Standards framework. And the HSUA submitted that the public interest benefits of its application outweighed any perceived disadvantages.

15 The TCCI by comparison argues that there would be an effect on employment if the TIC granted the HSUA's application. No evidence was actually presented in terms of the actual impact on employment, and Mr Fitzgerald made this assertion in relation to the Tasmanian economy as a whole in arguing against the submissions but by the HSUA .

20 He also argued that it was contrary to the decentralised direction of industrial relations to set awards through the TIC and therefore that the commission should adopt a conservative and minimalist approach and any other increases should be achieved through EB - enterprise bargaining. Well I've already addressed that issue so I won't touch on that again. Increases in costs may result in a reduction of services to clients.

25 The TCCI did not substantiate any impact on the overall Tasmanian employment level. In relation to the EB, there was no evidence presented by Mr Fitzgerald in support of his assertion. Further the current wage fixing principles make it clear that the SEP is to continue. The most recent national wage case made it clear that the implementation of the SEP is an important basis for establishing the safety net for 1993. Actually I should just say, not the most recent, the 1993 national wage case, so if I could just amend that.

DEPUTY PRESIDENT ROBINSON: Yes.

35 MS HARVEY: Process for translation. The HSUA propose a process for translation and requested that this be attached as a schedule to the award. Now the attaching of the schedule was not contested, but the actual translation proposed process was contested.

40 The differences between the HSUA and TCCI's proposals were identified, one was the issue of the translation schedule being attached to the award - the translation schedule that the TCCI proposed which the HSUA did not. The allocation of increments; the operative date, and the primary submission of the HSUA is that the operative date should be date of application and secondary submission is the date of decision.

45 The TCCI took great exception to the fact that the HSUA's proposal did not include a translation schedule and described our approach as laissez-faire. The TCCI admitted that there was a high level of variation in classifications used in the industry and this was supported by the evidence of Mrs Jones.

Whilst translation schedules may be convenient for employers, in this case it would result in the perpetuation of anomalous classifications which the TCCI admitted exists and a translation schedule does not remove the right of an employee to contest a classification, therefore the potential for dispute is inherent in any method of translation from one award to another and I also reiterate the point I made previously about it being important in an SEP exercise to classify individuals rather than moving to one classification to the other, which is more consistent with a work value type approach. So we would argue that the process of translation that we have proposed is certainly appropriate and that the evidence that we've provided - the submissions we have provided would support it.

In terms of cost implications, the HSUA's submissions on cost implications were adopted in relation to the public interest tests of section 36(a). We submitted, and this was agreed, that it is not possible to exactly estimate cost impact because we need to assess each individual against the proposed structure. However the largest impact is in the stage government administered area of accommodation and independent living services, and certainly that was - whilst we don't accept TCCI - which one was it -

MR FITZGERALD: 10.

MS HARVEY: 10 - and I'll come to that in a minute, it did indicate that it was an agreed matter, that the impact would be most in those two areas.

We also submitted that it was extremely important that wages are set according to industrial principles for all workers and that community services workers would not be - should not be discriminated against because they work in a funded sector. Now when I say that that's not contested, clearly they contest the whole evidence that I put on cost, but this particular point was not contested in terms of that you shouldn't discriminate against community workers just because they work in the funded sector.

Now HSUA presented two types of cost analysis, and only one of these was contested. The first was the per client cost between the government and the non government sector service provision, and that was the evidence that - the submissions that Mr Jarman made which I will come to in a minute, however the second evidence that we presented was in relation to the cost differences between a government and a non government group home, and you will recall that we went to the issue of the difference in the award rates, the difference in the sleepover rate between the public and private sector and estimated the actual cost saving by the sheer fact of running a group home in the non government sector, and that was not contested, although the first part of the cost analysis was.

These figures show the latter that the non government saves the government over \$63,000 per group home. With 75 group homes that equates to \$4.7 million dollars

The wage fixing principles are clear in relation to cost impact. Any financial difficulty needs to be dealt with through the economic incapacity to pay principle. This was the approach adopted by the teachers full bench decision, again an arbitrated decision and again a document we provided in evidence. Again that matter was not contested in terms of that particular approach that we were proposing.

The TCCI and Mr Jarman, from the department, contested the HSUA's submission that the process of community integration had saved the Department of Community and Health Services money on the basis of exhibit J.1. And you will recall that J.1 However neither contested the HSUA's submission that the differences in public and private sector award rates resulted in significant costs to the department in terms of providing services in the non government sector as opposed to the government sector.

5 The TCCI presented an exhibit outlining the purported cost impact to the HSUA and TCCI applications. The HSUA rejects this document on two grounds: 1) it does not quantify accurately the savings for employers in reduction in award classifications. And you will recall that when we got to the summaries in TCCI.10, they just wrote off the cost savings by saying that there would be a savings provision therefore there would be zero cost impact.

10 However the reality is if the TCCI's application was successful there would be a reduction in the award rate which would result in, over time, a saving to the employers. And indeed there is savings in HSUA's own application in terms of - you will recall that there were areas where there were actually savings - actually I'll take you to it. It might be easier than just trying to talk to it

It's TCCI.10 -

DEPUTY PRESIDENT ROBINSON: Yes.

15 MS HARVEY: If you go through what the headings there identify it as HACSU on page - turning over the page - through all of them. If you go down through the cost per annum of the HACSU column, in the brackets identifies the savings in classifications. Now we - in doing - in setting our relativities we did it according to the SEP, but there are definitely savings there that weren't identified. Now when Mr Fitzgerald concluded, when he went to the summary pages - and I take you - I refer you to page 2, all those items that were in brackets on page 1 have just been listed as no cost, no cost either way.

20 Now I think that that is not an accurate reflection of what the actual cost impact would be, even if one accepted the translation that the TCCI normally allocated for the HSUA's application from one award to the other. So we believe that it does not accurately quantify the savings for the employers in reduction - in the award classification, nor does it quantify the savings just through having a proper skill based award and a structural efficiency - start again. There must be something wrong with my brain.

25 We don't believe that it accurately quantifies the savings in terms of just the straight translation that they were identifying, nor in terms of the efficiencies that would be achieved through the structural efficiency process. And there are other efficiencies by virtue of having a skill based career path and removing demarcations which would provide savings to the employers.

30 It also misrepresents the HSUA's application and in particular the issue about working along, which I've already discussed. That it was totally - it totally misrepresented the HSUA's application. And it does not take into account over award payments and over classifications that already exist, and we've already seen evidence of that by sworn evidence and also through the advertisements, that they are already in place over award payments which obviously would have to be absorbed against any movement in the award. So that there could in fact be less in cost impact than that identified by the TCCI.

35 As I said, level 3 was misrepresented in terms of the actual application. I won't go on that matter again. Mr Jarman's intervention indeed supported the submissions made by the HSUA in that the minister was concerned to ensure that no client would be disadvantaged as a result of the increase in the award rates. And I've referred you to exhibit HSUA.10, which is the exhibit that we produced from Hansard, and also the transcript from Mr Jarman himself - the page number there 966, where he did not contest the submissions that the HSUA put, and that was whilst the minister was not prepared to write a blank cheque, and nor would one expect him to. He'd made it quite

clear that his department would be involved in a process of ensuring that clients were not disadvantaged. And that was the critical point that we were trying to make.

5 Now the HSUA is committed - we remain committed to lobbying the commonwealth and state governments for adequate funding. Now in terms of future issues the HSUA sought to formally seek leave on a number of matters to be reserved. This was granted by the commission. This included the scope of the award, the deletion of junior rates, the insertion of training clauses, extending the award to even higher classifications than currently exist - no prizes for guessing what the TCCI's response will be for that - and a review of the classification structure once the competency standards are finalised and the removal of Division A. And again transcript pages are listed there.

10 The TCCI made no submissions in relation to these matters but I did note that that formal leave was in fact granted by the commission.

Now - sorry did you want to say something?

15 MR FITZGERALD: Just in respect - only very briefly, and I think Ms Harvey has got another exhibit to present. But in respect to the HSUA's contention that where matters were contested or not contested, I just urge the commission to be - in our view we - I've been speaking very briefly to Mr Blackwood on the matter. There are a number of matters which we view - we see that were in fact contested, and particularly when you look at it in the light of the TCCI's application which was a contrary application to the HSUA application.

20 So in that regard we just urge the commission to properly consider whether matters were put in contest or not, and not necessarily accept the HSUA's submission that matters weren't contested in some instances.

25 DEPUTY PRESIDENT ROBINSON: The commission as constituted didn't come down in the last shower.

MR FITZGERALD: Yes. I didn't mean to put that submission in that vein at all.

30 MS HARVEY: I just wish to clarify, in light of Mr Fitzgerald's comments. What we're seeking to do is to identify the elements of submissions that were put and what parts were contested. I mean, there can be no doubt we've got two different applications before the commission.

DEPUTY PRESIDENT ROBINSON: Do you mean to say we haven't got an agreement?

MS HARVEY: No, exactly.

MR FITZGERALD: Not at this stage.

MS HARVEY: Exactly. But I think it is -

35 DEPUTY PRESIDENT ROBINSON: I picked that up.

MS HARVEY: It is an important process I think to identify the elements of argument that are agreed and not agreed.

Now wouldn't it be nice if I could finish before lunch.

40 DEPUTY PRESIDENT ROBINSON: It all depends whether we have lunch at 3 o'clock or not.

MS HARVEY: I haven't got much further to go.

DEPUTY PRESIDENT ROBINSON: Right.

MS HARVEY: Actually I think probably the best thing to do is to - I consider that to finish- it may be appropriate we have a break here and then start a bit earlier because it will probably take me a while.

5 DEPUTY PRESIDENT ROBINSON: You have been going for -

MS HARVEY: Unless people want to push on.

DEPUTY PRESIDENT ROBINSON: You have been on your feet for a long time, I must acknowledge that.

10 MS HARVEY: Well I'm happy to have a half hour break and then finish off, but it's up to the commission and those present and I'll fit in with whatever people want.

DEPUTY PRESIDENT ROBINSON: It doesn't worry me personally. I'm not quite sure -

MR FITZGERALD: Could we just go off the record for a moment just to see what - if it's possible, just to see what - how long will you be?

15 **OFF THE RECORD LUNCHEON ADJOURNMENT**

DEPUTY PRESIDENT ROBINSON: Yes, Ms Harvey?

20 MS HARVEY: Mr Deputy President, before the luncheon adjournment I'd just concluded going through the summary of HSUA and TCCI submissions, in HSUA.12. Now I'd like to hand up a document that deals with the evidence that you will recall that Mr Fitzgerald stated that cases such as these often rely on the basis of the evidence that's presented. And whilst we don't concur with that completely we think there's a lot they rely on, obviously evidence is important. And this exhibit seeks to outline some of the critical issues of the dispute and what witnesses have said. It's not a dispute though either; it's an arbitrated case.

25 DEPUTY PRESIDENT ROBINSON: This will be HSUA.13.

MS HARVEY: An inappropriate number to finish up on.

DEPUTY PRESIDENT ROBINSON: We can make it 12A. I gave the same offer to Mr Fitzgerald, as I recall.

MR FITZGERALD: We debated that.

30 MS HARVEY: If I could take you to the first page of HSUA.13, the TCCI presented, in our view, an inaccurate summary of witness evidence and inspections which the HSUA totally rejects. The HSUA contends that the evidence, including that from the majority of the employers' witnesses, supports the HSUA's application. So what we'd seek to do in this exhibit is to take you through some of the critical issues of difference in terms
35 of the evidence and to demonstrate why we believe that certainly the evidence that's before the commission supports the HSUA's application rather than the TCCI's.

DEPUTY PRESIDENT ROBINSON: Very well.

40 MS HARVEY: So if we could go first of all to the issue of industry requirements and client need. It's our view that Mrs Knowles-Locke evidence was very important as it set out the needs of clients, and she linked these specifically and directly to skill

requirements. She was in fact deemed an expert witness with extensive post graduate qualifications and high level work experience in the industry at a professional level.

5 Now Mrs Knowles-Locke actually identified the importance of good case management, and this is what's reflected in the outcome standards in the sense that we're looking at individual - looking at the individual needs of clients and designing programs and support systems that allow them to attain their greatest level of independence as is possible.

She stated when she gave this evidence that the hands on staff need to have the skills to implement the case management strategy and she stated that - and I quote:

10 *The skill levels of hands on staff should not be underestimated as they are the most critical in the education process given the high level of contact.*

Mrs Knowles-Locke went on to identify the minimum skill levels for employees to be able to work safely in the industry. And this evidence was not directly contested. And it's got the page reference to the - WS is obviously witness statement.

15 Now Mrs Knowles-Locke quite clearly supported a mixed staffing model. However she stated that in her view there would be a higher number of professionals in the non government disability services industry to provide these types of services. And she concluded saying that:

20 *A proper skill based award will assist in identifying training and skill needs of staff. This will mean better planning and case management for clients.*

25 Now obviously one of the very important issues is the appropriateness of the HSUA's classification structure, and this is an issue where obviously there's difference the TCCI and ourselves. We contend that we have discharged the onus of proof which Mr Fitzgerald alleges that we have not. And part of that exercise - I've already identified how we've done that in the more industrial framework, but in the evidence framework we have presented witnesses for each level in the proposed structure and this evidence established the classification levels in the HSUA's application are consistent with the current requirements in the industry, that the content of each level is appropriate and that all levels within the proposed classification structure are already being used.

30 And I've just listed there the witnesses that we called, their witness statement and also the level of which they provided sworn evidence about. And I've just made the point that whilst they provided evidence about their own level, in some cases they discussed the skill requirements of lower levels, for example, Ms Joanne Dickenson.

35 Now Mrs Knowles-Locke testified that she had studied the HSUA's application and that it was a good model for service delivery. You've got the extract there:

I have studied the HSUA's application for a career path in my experience it covers the skills required and groups them appropriately in a hierarchy of skills. I consider it a good model suitable for service delivery.

40 Now the HSUA exhibit 11 which contains inter alia PDs from the HSUA inspection sites and the TCCI's exhibit on Euphrasia's policies and procedures, TCCI.3, which also includes PDs from that service, supports the skill range and groupings that is contained in the HSUA's application.

Now Mrs Jenny Jones was in fact a critical witness, and again this goes to the issue that Mr Fitzgerald raised in his submissions, saying that this evidence had no

particular weight because it had been carried out prior to the arbitral process. And so she was a very important witness. She was an independent consultant employed by the State Negotiating Committee to undertake the skills analysis. As I've already stated both the HSUA and the TCCI's applications have drawn on this work, which attests to the usefulness of it to both the parties.

Key points in Mrs Jones' evidence were that the SNC skills analysis was a joint process throughout, and that the employers had a major input into the process.

MR FITZGERALD: Mr Deputy President, I just wonder whether this is going a bit too far in terms of Ms Harvey reviewing evidence which should have been reviewed in primary submissions, and whether it is a direct answer to the TCCI's submission. I question that aspect.

MS HARVEY: Do you want me to put submission on it?

DEPUTY PRESIDENT ROBINSON: Yes, I'll hear you.

MS HARVEY: I certainly would contest Mr Fitzgerald's view. This is a direct response to the submissions put by Mr Fitzgerald in the sense that he claimed that the skills analysis was not relevant because it happened before the process started and because - that it has never been accepted by the parties.

Now in responding to that aspect of his case, I need to re-emphasise - I'm not introducing anything new - re-emphasise in response to his case those parts of my submissions that have already been made that allow me to respond to the suggestions that he's made. I've also taken the opportunity at the adjournment to go back to transcript on the agreements, on the actual process and you will recall that we are in a funny situation in the sense that we've got two applications. It was always agreed that Mr Fitzgerald would be able to put his case and that I would restrict myself to responding on the basis of evidence that had already been put. But I was required to respond to his case because I hadn't actually had it before me at the time, nor did I - had I heard his evidence.

And so really I think that I've done nothing to transgress those agreed rules, and in fact I can cite the transcript page where this very issue was raised and you gave some direction on it, if that's useful. DEPUTY PRESIDENT ROBINSON: Yes, I'll allow you to continue on a - so far as I'm concerned - a without prejudice basis. I'll consider everything and weight it up in the end as to what should form part of a decision and what shouldn't.

MS HARVEY: Okay. So the skills analysis was a joint process throughout and the employers had a major input into the process. The process used was unbiased and credible, ie the DACUM process which is used by TAFE. That Mr Gates from the TCCI had worked with Mrs Jones throughout the project and that the HSUA's application was a broadbanding of her proposal. She further attested that the HSUA's application was preferable to the structure that she had developed on instruction from the SNC. She also attested that the progression was more limited in the HSUA's application than her own proposal because of the requirements to perform particular tasks, whereas hers had been - anticipated a progression based purely on skill acquisition, qualification acquisition.

She said that there were currently - she attested that there currently are people in the industry in all levels proposed by the HSUA's application, and that the higher levels are needed, and that training is used and needed in the industry.

A major aspect of the TCCI's evidence focused on opposition to level 7 in the award. However this evidence was not credible, for example, Mrs Keating argued that all

professionally trained staff were not appropriate because they took over. And he's got the page transcript number there.

5 In cross examination she admitted that she'd only contacted - she had only had contact with 12 professionals, that she defined professionals as degree trained and health professionals only, which is a very arbitrary definition. She believed that the HSUA's application will result in all support staff having degrees or diplomas, so she quite clearly didn't understand the HSUA's application, that she also admitted in cross examination that employing professionals directly would give the employer more control over the attitude of professionals.

10 Now in terms of Mrs Subonj and Mr Rodwell, they conceded in cross examination that there were services that required degree level qualifications and that those services should have the choice. And you will recall that I actually put to them ads from the industry and asked them whether they believed these people should have the right to employ qualifications if they so required it.

15 Mrs Subonj conceded in cross-examination that her real concern was that people employed at that level should be outside the award. And a similar view was expressed by Mrs Thomas. However under cross-examination Mrs Thomas admitted that she had never had any problems with flexibility under the current award and that she had not investigated the current enterprise flexibility clauses.

20 In my view none of the TCCI's witness evidence about job requirements was contradictory to the HSUA. For example, Mr Rodwell conceded that his support workers had a fair amount of discretion within the parameters of policy, and again there's a page number there. The exceptions were Mrs Keating and Mr Snadden. Neither of these witnesses' evidence was convincing and was inconsistent with the
25 inspection and other witness evidence, and I particularly say that in relation to Mr Snadden who seemed to believe that his service was in the wrong award because there were no differences between is services and open employment. And you will recall I put that question directly to him. This is despite admitting that his service had a dual role of social and production functions.

30 And in terms of stress levels, all of the HSUA's witnesses gave evidence that their work is stressful and that they have a high level of responsibility. Further that staff play a critical role in averting crisis situations by being aware of client needs. And I think I've already given the example of epilepsy where in the mail house if you rubbed a client's
35 shoulder then you could avoid epilepsy, and they also, particularly Craig Roley attested that skilled staff were able to pick up the dynamics and the indications that something was about to happen and avert it.

This is sworn evidence attesting to how witnesses experience their work. The TCCI denied stress by referring to a survey which was exhibit TCCI.15. This evidence should not have any weight, in my submission. The methodology is questionable. The
40 methodology was not in fact presented to us so we're not sure what it was other than it was a survey. I don't know what conditions under which it was conducted. There is no signatures attesting to its validity.

MR FITZGERALD: I just take strong objection to that, Mr Deputy President, in that
45 we raised this at the time. The majority of those surveys were in fact signed. I think there was one or two which didn't have it -

MS HARVEY: You're referring to the wrong survey.

MR FITZGERALD: - and we were happy to have that remedied by signature. But for Ms Harvey now to raise it -

MS HARVEY: It's a different survey.

MR FITZGERALD: Is it?

DEPUTY PRESIDENT ROBINSON: Well I remember asking some -

MR : It's not that one.

5 MS HARVEY: It's not that one.

MR FITZGERALD: Oh, which one are you referring to?

MS HARVEY: I'm referring to the one from Coastal Residential.

MR FITZGERALD: Oh, sorry. Well that's -

10 DEPUTY PRESIDENT ROBINSON: I do remember asking questions myself about the methodology, if we're talking about the same exhibit.

MR FITZGERALD: This one is not related to stress necessarily. It's relating to a whole lot of other factors so that's why I was misled in that regard.

MS HARVEY: Yes.

15 MR FITZGERALD: But if the same applies in respect to that - I'm not sure whether the submissions will apply in respect to those other surveys because we're happy to have that remedied if there is some question about its authenticity.

20 MS HARVEY: It doesn't apply. I was talking about the TCCI.15. There is no signature attesting to the validity. The survey only covers one service and does not contain any question about stress. However it was used as evidence that working environments were harmonious in this industry. So we reject that that evidence demonstrated that.

25 The TCCI also presented a survey it had conducted of selected services on turnover, absenteeism and grievances. We also submit that this survey should not be given any weight because it was explicitly an employer survey stating that it would be for use in the commission and therefore that there was no union involvement and clearly there is an incentive in terms of using it to oppose the union's case. And it was only of those services that had in fact been actively involved in the case.

There was a limited number of services used -

30 MR FITZGERALD: Well I just can't let that go, Mr Deputy President, because there are actual figures which were presented in that survey. If there is some question about its accuracy then it should be stated, but just because the union were not involved doesn't mean to say that the survey is not valid.

DEPUTY PRESIDENT ROBINSON: Well I'll assess that at the end.

MR FITZGERALD: Yes, okay, that's fine. Yes, thank you.

35 DEPUTY PRESIDENT ROBINSON: I don't think there's much point in re-arguing every point obviously on this.

MR FITZGERALD: Yes, well I don't want to on to my feet but there is that -

DEPUTY PRESIDENT ROBINSON: I'm listening to the HSUA's version of things in its right of reply. I'm aware that Ms Harvey represents the HSUA and noone else at this matter.

5 MS HARVEY: And also we submit that there are other reasons for low turnover and absenteeism, particularly issues such as levels of high unemployment, commitment to clients and a series of other matters that may not be reflected in those particular services. But we do not believe that they have proved that it is not stressful.

10 The TCCI's witnesses sought to play down the stress factor. They were in effect giving hearsay evidence as they were talking about other people's experiences in terms of they were attesting that the classifications we were seeking to cover were not stressful. Mr Rodwell and Mrs Thomas both acknowledged stress was an issue and that they had put in place procedures to try and reduce it. I just noticed, Mr Deputy President, that my second page number has fallen off there but I will get it and provide to both yourself and the TCCI.

15 DEPUTY PRESIDENT ROBINSON: Right.

20 MS HARVEY: Mrs Keating's evidence about her own son's behaviour demonstrated the level of stress workers with - with which workers have to cope, and she particularly referred to head butting, biting. I think at one stage she said that, you know, he could just go for people. I mean I think that was evidenced that that would be a stressful environment for anyone to have to work with.

25 Now also we - Mr Fitzgerald stated that inspections supported his view that work places were not stressful and that they were all harmonious and fairly easy - you know - they're non stressful and harmonious. We don't support that interpretation of the inspections. We believe that the inspections supported that there was a high level of stress and responsibility and I particularly refer you to Ellison House, where we met with the staff who talked about their experiences; with Burnie Independent Living Services, and also the Mail House down in Hobart. So in our view that certainly that there was equal evidence if not more in inspections and that work places can be stressful.

30 Now in terms of training and qualifications, the HSUA's witnesses all emphasise that training was required to work in the industry. Obviously the level of training varied according to the skill requirements of the job and I've already stated that - that - you know, that we accept that in some instances people may have qualifications over and above what is required of their particular job and that that's what Mr Craig Roley
35 attested to.

The TCCI witnesses all stated that training was necessary and that they either employed staff with qualifications and/or provided internal training. For example, Mr Rodwell states unequivocally that there is a need to improve skills and to have more training for workers in the industry, and that's at TP page 910 in cross-examination.

40 In addition the following points are worth noting: Mr Rodwell has stated that the AD - the - sorry - it should be the associate diploma course - was correct - in developmental disability was relevant to his regional supervisor's position. He supports the HSUA's application which nominates - this supports - his statements supports the HSUA - not Mr Rodwell, because I'm not sure what his position is - this supports the
45 HSUA's application which nominates this qualification for level 6 which would be the appropriate level for supervisors - his supervisors.

Further, Mr Rodwell stated that he believed that these employees were currently underpaid in the award. Mrs Thomas also stated that she didn't think her staff were

overpaid, given the TCCI's application would result in cuts to the award rate, her evidence was contrary to the TCCI's application.

5 Mr Rodwell also nominated the advance certificate course as being appropriate for key support positions. He went on to say that accommodation support workers with this qualification - and this was the advanced certificate - would not have all their skills and knowledge called on all the time. Again this supports the HSUA's application which places the advanced certificate course at level 6 which is at least one level above direct care support workers.

10 Mrs Thomas in fact nominated a higher level of training than the HSUA's application. She nominated the associate diploma level of qualification for support workers. Mrs Subonj stated that the developmental disability courses were valuable to her as an employer. Further, her services tell staff that they ought to do the courses and if they have shown good progression in the industry that they encourage staff and give them time off to attend.

15 Even Mr Snadden that his services did have staff with formal qualifications. The personnel manager who is responsible for the IPP process for DSP staff has an associate diploma which was a qualification that the services looked for in that position. This is consistent with the HSUA's level 6 position - level 6 definition. His service also employs two staff with advanced certificates in DD in the canteen where
20 there are high levels of dependency. His vocational trainer has a trade qualification and has completed a train the trainer course.

All the TCCI witnesses said that training was required and that there services employed staff with qualifications and provided internal training. And it certainly is our view, Mr Deputy President, in relation to this whole issue of training, that there is
25 - that it is important that we recognise that training is about giving people competencies and that training level qualification which we've lined up is identifying skills. Now all these services that are providing internal training, maybe because at this point in time they can't access the DD course or whatever, that doesn't deny the mere fact that they're providing internal training - that training is relevant at the level
30 which the HSUA has nominated. Indeed, if the industry - or hopefully we'll be able to restructure training in the industry and ensure that there is appropriate accreditation of courses that are provided internally and articulation into - into courses that are provided by the TAFE sector. And you will recall that I actually put that proposition to Mr Rodwell and he conceded that that was something that could be looked into in the
35 future and would be desirable.

In terms of policy and procedures, the TCCI seemed to argue that standards, policies and procedures meant that work required by staff was easier and hence less skill was required. This view is explicitly rejected by Mrs Thomas. This is very significant because the policy and procedure manual referred to was from Mrs Thomas' service.
40 The manual itself clearly shows that base grade support workers are required to use a high level of discretion and judgment. Now if I could just take you, as an example, to exhibit TCCI.3 page 25.

DEPUTY PRESIDENT: We're right. Page 25.

45 MS HARVEY: Okay. Page 25. We were discussing the issue about policies and procedures, and the view that policies and procedures somehow made work for staff easier. We'd certainly contest if anything, and particularly in this case, it would make it more difficult because there's a very high expectation resulting out of a policy and procedure.

50 So page 25 deals with the policy No. 14 - option is for decision-making and choice. And if I could just refer you to (iii), just the three points down there, it says: Progress

towards competencies by each resident will be regularly measured at vigilance by staff, the manager and the individual advocate in this measurement is vital to the maintenance of a challenging and meaningful program. Should difficulties with communication present a barrier to decision making, maximum effort must be made by management and staff to overcome the difficulties. Residents can make decisions when speech communication is impaired. Opportunities for choice will be offered using the total resources of the home and the community environment.

And right at the bottom there in point 7: Management and staff will be highly conscious that if there has been little experience of decision making before adulthood, the process of learning this skill and acquiring the assertiveness necessary to express one's wishes is likely to be a slow one. This is not an indication that the resident is incapable of achieving this goal. End of quote.

Now the point of taking you to this, Mr Deputy President, is that it makes it quite clear that there is a very high expectation on staff to actually work, to encourage, to support, to provide training with staff so that they can attain just one of these goals. And certainly if you go through the document there are many others where, rather than the policy and procedure making life more easy for support staff, it in fact places high expectations upon them.

Now if I can turn to the issue of crises. The HSUA witnesses stated that crises were not uncommon. They also didn't say they were an every day event, but they did say that they were not uncommon. And that experienced staff were able to avoid some of these, and I've already given the example of the Mail House and other examples we've seen.

The HSUA witnesses also attested that they had been in crisis situations without support, and I gave the example - I give the example there of Mr Craig Rowley who talked about one of his staff who he was supervising who'd been down in the town and one of the clients on a program with other clients - and one of the clients had for some unknown reason had a crisis and pulled hair out of the staff's head by the roots and that they'd had to come down and deal with that.

The TCCI witnesses attested that there were emergency backup systems for crises. This usually involved the use of mobile phones or the calling in of other staff. However the TCCI witnesses conceded that this was not infallible, ie a supervisor could be out, and that there was a period of time required to respond. Now that was different depending on the service. In the case of calling in other staff both Mrs Subonj and Mr Rodwell conceded that these staff would be at the same level as the other support workers, so it's not an issue of calling in a supervisor with more skill.

Mrs Keating stated that she dealt with crises for her son and that it takes her 50 minutes to get to his group home. Now I'm assuming of course that there may be other mechanisms of support there as well, but she was attesting that she was the person who was able to deal with it, when I put to her about how crises were dealt with.

Mrs Knowles-Locke identified in her evidence - and remembering that she's an expert witness - that there is a need for hands-on staff to be able to deal with crises rather than just calling in someone else. She stated that it is totally inappropriate just to ring someone up to come and deal with a crisis. This diminishes the junior staff members and lessens their effectiveness. And you will recall that she stated that why it does it gives a message to the client that someone else can act on me, but this direct hands on staff person can't. And we're not suggesting for a minute that backup support is not required, but what we are saying is that staff regularly - that staff do need to be able to deal with crises and that they need to be able to be confident in that and that that is in the interests of the clients. And even where there are backup mechanisms in place, they're not immediate and that sometimes they rely on just calling in extra

hands rather than someone who is more skilled. So that they do need to have the skills to be able to deal with those situations.

5 Now Mr Fitzgerald went to some length in attempting to discredit Mr Tony Medcraft, an HSUA witness. Mr Fitzgerald sought to discredit him because he was not aware that his supervisor had a mobile phone. Yet Mr Rodwell, his employer, confirmed that there is no mobile phone in the Devonport area where Mr Medcraft works, and that's at T page 907. In fact you will recall that we actually visited that site on the inspections.

10 Mr Fitzgerald also sought to discredit Mr Medcraft on the basis of his statement about making all the choices for clients in his group home. Again this was confirmed by Mr Rodwell in his evidence, that T pages 908 - 909. Now no-one for a minute is suggesting that that - you will recall that Mr Rodwell was discussing the difference between his service where he was going into homes and providing - it was a new service where they were providing sort of a certain number of hours a day as opposed to his group home. 15 And he was saying that that was a more subtle difficult service because you had to negotiate and you had to, you know, be flexible and that it was a much more subtle level of skill. And he referred - he said that that is much different to working in a group home where basically you were making all the choices.

20 And you will recall that in that particular group home there was a very high level of dependency and certainly I'm quite convinced from Mr Rodwell's perspective and from our member's perspective that their objective is to work towards greater independence. But I think it unreasonable to try to discredit Mr Medcraft when his employer made in fact the identical statement.

25 Now in terms of medication, the HSUA stated that staff do assist clients with medication, usually through dosette systems. However in the case of inspections at Ellison House and the Multicap Group Home, it is clear that staff are dispensing medications in at least those examples. I want to make it clear that this is not a practice that the HSUA supports but it is actually happening. We don't rely on it in terms of this application but I think that it's important that the commission is aware 30 of what is actually happening.

35 The HSUA witness evidence clearly stated that staff are required and do need to have a basic knowledge of medication, monitoring and its side effects. And you will recall that the TCCI in its evidence sought to play down the knowledge of the medication issue and the parties agree that staff should not dispense medication. I think there is agreement between the TCCI and ourselves in that respect. However there is a need to monitor medication and its effects. And again I give you the example of the TCCI witnesses who supported this, for example, Mr Rodwell where his supervisors are actually checking the medication that doctors prescribe and monitoring that and in fact may be referring it back if they feel that it's inappropriate. So there clearly is a 40 role. They don't need to be doctors, they don't need to be nurses, but they do need to understand the impacts of medication and its side effects so that they can fulfil their role of monitoring that.

DEPUTY PRESIDENT ROBINSON: They don't need to be a good mother.

MS HARVEY: I'm not even going to bite on that one, I'm afraid.

45 Cost. The HSUA argued that because of logistics and the cost difference between the provision of non government and government services that the government would have no choice but to fund increases in the award.

Mr Fitzgerald took some exception to this and accused the HSUA of having political overtones in its case, however, the TCCI witness Mr Rodwell conceded in cross-

5 examination that the government would have no choice but to fund award increases due to simple logistics, and this goes back to the issue that was not contested in terms of the HSUA's evidence and that is the cost difference between a government and a non government group home is very significant and that it really is not feasible to relocate all those people and try to put them back into government services.

10 Now Mr ... intervention sought to argue that the state government had increased funding as a result of community integration and therefore there was no cost saving. However, he failed to recognise that the state government has no choice as it was required to pass complementary legislation under the CSDA supporting community
15 integration. That's the Commonwealth State Disability Agreement. It was a requirement you will recall from the submissions that we put to you that the state pass complimentary legislation to the federal legislation. They had to go down that path. There's no choice at that. The issue is purely which sector you provide it in, public or private. You can provide community integration from the public sector by
20 setting up group homes covered by public sector awards, employed by state public servants in the community, and I don't think there can be any doubt that there is a cost saving to the government by running services in the non government sector which we have proven and which certainly has not been contested either by Mr Fitzgerald or by Mr Jarman.

25 In terms of behaviour - management, HSUA witnesses gave clear evidence about behaviour management and how this was a skilled and difficult task and again I've given you an example, and again I've given you an example of where to go in a witness statement to check that.

30 Mrs Knowles-Locke stated quite clearly that behaviour management can be very complex. She highlighted the need to avoid over controlling the environment and an aversion approach. This can involve a delicate balance, she stated, in terms of providing people with the opportunities to learn but not letting the environment so loose that they're finding that difficult to deal with which can precipitate a crisis. It's a fine delicate balance.

35 The need to avoid aversion approach to behaviour management was reinforced by TCCI witness Mr Rodwell. He further stated that the social role of support work for people with disabilities was more skilled than just pure physical support. Mr Snadden was the only witness who seemed to support an aversion approach to behaviour management not because of professional advice but because it seemed to work in the past I think were his words.

Both the HSUA and the TCCI in relation to duty of care evidence was - supported the view that support workers do have a duty of care and this is reflected in both the applications.

40 Now that actually concludes the major part of I suppose the information I wanted to present to you in terms of this conclusion of this case. If I could just finally say I certainly would submit to you, Mr Deputy President, that the case that we have presented has been thorough, that it has met every test that could possibly be envisaged or required of it and that its prime motive has been to ensure that the SEP is introduced efficiently and effectively to this industry which will result in benefits for
45 both workers and for clients and for the community. Indeed I believe that that is the intention of commissions around Australia that the SEP should be used to achieve that very result, and it's an extremely important that we have a strong commitment to.

50 By comparison, the case we've seen from the TCCI has been lacking. It has not met the tests that are required of it in relation to the SEP. It seems to have relied entirely on that - well not entirely, but very strongly on its particular interpretation of the wage fixing principles which we do not believe to be justified and as a result of that very

singular reliance on that one aspect of their case, they have failed to provide evidence in relation to the critical tests of relativities.

5 So we believe that in all the evidence that is before you, that we have supported beyond doubt our application, that it is justified, that it is consistent with the wage fixing principles; it is consistent with the requirements under the act in terms of public interest and we urge you to grant the application from the HSUA. If the commission pleases.

10 DEPUTY PRESIDENT ROBINSON: Thank you. This is something of a historic day. It would be remiss of me if I didn't compliment the respective advocates on their handling of this long and difficult and indeed most important case. It has involved obviously a great deal of work and I accept that it was spirited sometimes and that I guess that's only to be expected when you've got strong advocates who are committed to their cause and to those they represent.

15 So, thank you for all the work that's been done. I do have a lot of paper scattered in front and to each side and you won't be surprised if I say I'm going to reserve decision and I hope to complete it at an early date, certainly before the 1st of December when I hope to be out of actin for a while and I suppose I hope that the result is one which is understood for its clarity and logic by all parties and if it's appealed I - don't worry.

20 MS HARVEY: Before you rise, Mr Deputy President, I think that - I'm sure that I speak for Bill in terms of thanking you for your patience in this case. It has been very long winded, I know, but as you say it's very important, but I also think it's appropriate to thank Carol as well for all the work that she has put in, particularly in organising inspections and keeping all these masses of exhibits and witness statements et cetera, and the audio staff who have done a very good job, so - and particularly in getting transcript out early and we really do appreciate and I'm sure that Mr Fitzgerald would likewise.

25 MR FITZGERALD: Well I think that's the second or third statement I can endorse, Mr Deputy President.

30 DEPUTY PRESIDENT ROBINSON: Thank you for those kind remarks and thank you particularly for acknowledging the work done by Mrs Devine and indeed the rest of the staff of the commission. Thank you.

HEARING CONCLUDED

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