TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 3926 of 1992

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

re wage rates, classifications, definitions and conditions of employment

T No. 3987 of 1992

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

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

COMMISSIONER WATLING

HOBART, 18 November 1992
Continued from 17/11/92

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER WATLING: I'll take appearances, please.

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

COMMISSIONER WATLING: Good. Thank you.

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

COMMISSIONER WATLING: Good. Thank you. Mr Targett?

MR TARGETT: Thank you, Mr Commissioner. Following lengthy off record discussions I would like to amend document TCI.6.

There are a number of amendments which I would seek to make as a result of the extensive off record discussions. I think the most appropriate methodology would be to go through it page by page, if that's suitable to the commission.

COMMISSIONER WATLING: Right.

MR TARGETT: Beginning on page 1, Clause - Arrangement, the higher duties clause 22 - higher duties allowance - clause 22 should be Higher Duties.

Clause 26 - Lifting of Patients, should be Lifting of Residents.

On page 3 in Clause 7 - Definitions, level 1A in the first line: An employee at this level shall be a Level 1B administrative employee, as defined. The words administrative and as defined inserted there.

Page 4, level 2A on the first line again: shall be a Level 2B administrative employee, as defined.

The commission will pull me up if there is anything ....

Level 2B, in the second para, the second line: than required at Level 1B administrative employee, as defined.

Level 3A, the first line: shall be a Level 3B administrative employee, as defined.

Level 3B, the second para: than required at Level 2B administrative employee, as defined.

On page 5 at the top of the page, which is the end of Level 3, the sentence starting, indicative tasks, on the second line: to those of Level 2B: to be administrative employee, as defined.

Level 4, second para: than required for a Level 3B administrative employee, as defined.

Level 5, second para: than required for level 4 administrative employee, as defined.

Level 6, second para, second line of that: than required for level 5 administrative employee, as defined.

On the next page, level 6, first paragraph, the last line, it is: administrative employee, as defined.

At the bottom of that page under extended care assistant level 2, would be: extended care assistant means a level 1 extended care assistant, as defined, who has completed -

On the next page, level 3, in the entry point paragraph, it would be on the first line: Level 2, as defined.

Now on the third line, once again: Level 2, as defined.

On the top of the next page, page 8, second paragraph, the first line, the word staff would be replaced with employees.

Further down the page, In-service employee, Level 3, second par, second line: Level 2 services employees, as defined.

And in the next para at the same level: an employee at this level may be in charge of up to six lower level employees, I think would be better terminology than that which exists.

In level 4, if I could firstly refer to the wages relativity, I have put in there 92 per cent. That in fact should be 92.1 per cent.

The same level, second para, second line: Level 3 services employee, as defined.

Then over the page, at the top of the page, second para, the first line: up to 12 lower level employees.

Level 5, the last para, the first line: 20 lower level employees.

Level 6, second para, last line, that's level 5: services employee, as defined.

The same level, the next para, first line: up to 20 lower level employees.

Level 7, the third para, last line, the word staff would be replaced with employees.

The next paragraph, first line, at the end: 20 lower level employees.

Level 8, at the bottom of page 9, the last line: Level 7 services employee, as defined.

Page 10, at the top of the page, the third paragraph, last line, the word officers would be replaced with employees.

In general definitions: executive staff, last line, would be level 7, as defined.

There would be a new definition inserted after Part-time employee.

Projected roster: means an employee's normal roster, as defined, projected for the period of leave.

I am happy to assist the commission with extensive words after the proceedings, if that's of assistance to the commission.

The definition of roster: means a work pattern designed for a specific work area for all or any work performed outside the span of ordinary hours contained in Clause 24 - Hours, excluding work performed outside the span of ordinary hours and paid in accordance with Clause 30 - Overtime.

Page 11, definition of trainee clerk: trainee -

COMMISSIONER WATLING: Can I just say -

MR TARGETT: Certainly.

COMMISSIONER WATLING: - before you go on, in the definition of relevant award rate what's this bit about specified for the appropriate year of service?

MR TARGETT: I guess that - well, in real terms - that refers to the fact that level 1, for example, is a training level for a period equivalent to 1 year.

COMMISSIONER WATLING: Yes, but it says: the relevant award rate means the rate specified for the appropriate year of service applicable.

MR TARGETT: I take your point, Mr Commissioner. Perhaps it would be best to say: specified for the appropriate classification, and leave that entire line out commencing: appropriate year, so I will amend my document in that way. So, we take out the second line in its entirety. Thank you.

Page 11, trainee clerk: means an administrative employee, as defined, employed by - and then it goes on.

And the last definition, union, means a registered organisation.

The next area of change I seek to address is Clause 8 - Wage Rates.

During the conference proceedings Mr Warwick pointed out an error in the junior rates. In addition to that, on page 13 under services employees, level 4, the 92 per cent should be 92.1 per cent.

COMMISSIONER WATLING: Right. And that's at $408.60?

MR TARGETT: Yes. Correct, yes. That's correct. If I can refer next to the Section B - Juniors -

COMMISSIONER WATLING: Whilst we are here I might just exclude those two pages.

MR TARGETT: I thought what I might do, Mr Commissioner, is just quickly read into transcript some rates and then I'll assist the commission with the exact copies of the details subsequent to the proceedings. But I would like to put them on transcript for the sake of the record.

COMMISSIONER WATLING: Yes. I am just sort of altering two pages on this which is the actual Exhibit TCI.6.

MR TARGETT: Thank you. In Section B - Wages - Juniors, in reading firstly the administrative employees, the wage rates for those people are incorrect. The wage rates should be, and I will start at the top and work my way down: $187.90; $216.20; $251.70; $287.10; $319.10.

If I can now turn to the extended care assistant, etc. In the heading above the percentages, it has got percentage of wage rates for extended care assistant level 1; that should be level 2. And the dollar amounts once again are incorrect. The correct dollar amounts are: $179.60; $210.70 -

COMMISSIONER WATLING: Now, 179.60.

MR TARGETT: Sorry, 179.60; $210.70; $248.70; $286.70; and $314.30. I reiterate, these rates are prior to the 2.5 per cent national wage increase. These are the broadbanded rates.

In Section C - Wage Rates, trainee clerks: in the indented paragraph reads: by taking the appropriate wage rate for a junior administrative employee as prescribed in Clause 8, Section B - Juniors, classification 1 administrative employee of this award - and so it goes on - as is prescribed.

Turning to Clause 9 - Accommodation and Conveniences: subclause (a), the words, engaged in accordance with Clause 41

- Sleep Over, in the first line would be removed and replaced to read: an employee required to sleep at the employer's workplace shall be provided -

The next variation is on page 15, Clause 11 - Annual Leave, subclause (a)(i), part-way down it has clerical staff: I would change that to administrative employees, and underneath that it has: all other staff, I would change that to all other employees.

On page 16, the first half of the page, (ii), the heading, Executive Staff, would be: Executive Staff, as defined.

In the first line of that clause once again, executive staff, would be: executive staff, as defined.

The next alteration is on page 18 under subclause (i) Annual Leave Allowance in (i): 17.1/2 per cent of his/her classification rate immediately prior to going on leave, plus where applicable, any all-purpose payments. So the words, higher duties allowance, would be removed.

Page 21, Clause 13 - Call Back, subclause (a) line two at the end, the word premises would be replaced by workplace, and directly under that once again, premises replaced by workplace.

Subclause (c), the second line, the words span of would be removed.

Subclause (d), the second line, the words span of would be removed.

At the top of page 22 is the next alteration. It's in the second last line of that first paragraph on that page where it says: $8.30 per day for each 24-hour period on remote call.

Subclause (c), the last sentence: provided that by mutual agreement, etc., would be deleted.

Page 23, subclause (e), the last line of the first paragraph, the word, the, would be replaced by, this.

COMMISSIONER WATLING: ....

MR TARGETT: Sorry?

COMMISSIONER WATLING: Take me to that again.

MR TARGETT: Subclause (e) on page 23.

COMMISSIONER WATLING: Yes. Right.

MR TARGETT: Page 25, Clause 20 - Foul and Nauseous Linen, in the second line the words, an officer, would be replaced by the employer.

Page 26, at the top of the page, subclause (g), at the end of that para the words, hospital or home, would be replaced by workplace.

Clause 22 - Higher Duties, subclause (b), the last line on the left hand side, the word minimum would be removed.

Page 27, at the top part of the page, subclause (c)(i), second paragraph, the last line, which should be Clause 38 - Roster hereof - or roster, as defined hereof.

Page 28, subclause (b) towards the bottom of the page, the second line, should also be Clause 38 - Roster, as defined.

Page 30, Clause 26 - Lifting of Residents, in the first paragraph, last line, I would remove the words, or mechanical device, with a full stop after the word person, and in the second paragraph, last line, I would remove the words, or a mechanical device, with a full stop after the word person.

The same page, Clause 27 - Meals, the third line, the 30 minutes would be replaced by 45 minutes.

Page 31, subclause (3) Meal Charges: in the table under, all breakfasts, the correct amount should be $2.20.

Page 32, Occupational Superannuation, subclause 1(iv) would be deleted, and there would obviously be subsequential renumbering of clauses.

On the top of the next page, page 33, Clause 22 - Contributions, subclause (i): in the first line the words: or contractor, as the case may be, to be removed.

(iii) would be deleted.

(iv) would be deleted, with obvious subsequential renumbering.

In the existing (v) on the first line, or a contractor, would be removed.

Page 34, at the top of the page, second line, or contractor, would be removed.

And in the next line, or contractor, would be removed.

Page 35, at the top of the page there would be a new (iv) put in - work in accordance with clause 38 - Rosters - sorry, Roster as defined, subclause (f)(ii).

Subclause (b) on the same page, (iv), first line would be: An employee required to work in accordance with a roster as defined.

Same page, subclause (e), on the second line, the word, overtime, there would be a full stop after that and the words following it would be deleted.

I would just restate on the record, Mr Commissioner, moving to page 36, clause 36 - Parental Leave, we would be seeking an appropriate operative date of the 1st of January in a term suitable to the commission in that clause. I haven't inserted it for Parts B, C, and D, but in a form suitable to the commission. Moving onto -

MR WARWICK: I'm sorry, Mr Commissioner, I just missed Mr Targett's comments in relation to subclause (c).

MR TARGETT: Which page was it again?

MR WARWICK: 35.

MR TARGETT: Subclause (e).

MR WARWICK: (c) I thought. (e) did you say?

MR TARGETT: Yes.

MR WARWICK: I thought you said (c).

MR TARGETT: No, overtime, full stop -

MR WARWICK: I see.

MR TARGETT: - delete the words thereafter.

MR WARWICK: Thank you.

MR TARGETT: Page 55 would be the next page I'd refer to Mr Commissioner. Clause 32 subclause (b), third line, the number 40 would be replaced by 41. Page 56, subclause (f) would be deleted in its entirety with consequential relettering of the subsequent clauses. Page 57, clause 33 - Payment of Wages, subclause (c) would read: Where a holiday with pay falls on a normal pay day wages shall be paid on the day prior to that holiday and that day shall be the normal pay day for the purposes of subclause (d).

The next page alteration is on page 59, clause 38, rosters should be roster in the heading and in subclause (a), first line - middle of the line, should be: A roster as defined. On the next page subclause (b), first line: A roster as defined, should be inserted. Same subclause, (iv), in the

proviso, first line: Roster as defined, and in the last line of that same proviso: Roster as defined.

To go to the provided always after (vi) in the same subclause, second last line: Rosters as defined.

COMMISSIONER WATLING: Roster as defined?

MR TARGETT: Roster as defined. Subclause (d): A rostered employee as defined. On the top of page 61 there would be a new subclause (e) inserted prior to the existing subclause (e) and the existing (e) will become (f) and the words to be inserted would be: Where a roster as defined is established in accordance with this clause such roster as defined shall be documented setting out clearly the name of the employees required to work in accordance with such roster as defined the days, dates and hours during which each employee is required to attend for duty, full stop, and the existing (e) which would become (f) would be reworded to read the following: Part-time and casual employees engaged as a rostered employee as defined for work outside the roster as defined - and then in brackets - (documented in accordance with subclause (e) hereof) - close brackets - shall be entitled to the provisions of this clause with the following exceptions: (i) - where an employee works by agreement with the employer he/she shall not attract a penalty other than roster loading Saturday, Sunday and holiday with pay penalty provided that any time worked in excess of 8 hours per day shall be paid at double time except as provided in clause 24 - Hours, subclause (c) or - then move to (ii): where an employee is instructed to work he/she shall be entitled to overtime payments in accordance with clause 30 - Overtime, and I'll provide that in writing for the commission later.

Clause 39 - Saturday and Sunday work et cetera. Subclause (a), seventh line - sorry, sixth line, clause 37 should be clause 38 and then continue on: Roster as defined, and subclause (b) the last line, clause 37 should be clause 38, Roster as defined.

Page 63 - we're in the sick leave clause at this stage - subclause (c), fifth line, the words, medical superintendent or, would be removed, then subclause (d), second line, the words, medical superintendent or, would be removed. Subclause (e), third line, the word superintendent would be replaced by the word practitioner.

I'd next turn to page 65, subclause (m), halfway down the page on the first line, compromises, would be in the singular so it would be compromise. Clause 44, subclause (a) in the proviso, I would alter that to read: Provided that this clause shall not apply where the employer is prohibited from instructing employees to wear uniforms by any act of the State or Federal Parliament.

And that concludes the variations, Mr Commissioner. I would make the comment that I don't usually like to make such extensive changes in this sort of method but because of the circumstances of these proceedings I am left with no alternative.

COMMISSIONER WATLING: Righto. Well they were pretty easy to follow.

MR TARGETT: So I seek leave of the commission to amend my document as I've just described.

COMMISSIONER WATLING: There's no objection I take it?

MR WARWICK: No objection, Mr Commissioner.

COMMISSIONER WATLING: No objection. Righto. Leave is granted so from here on in we're working off TCI.6 as amended.

MR TARGETT: That is correct, yes. I would now seek, Mr Commissioner, to describe to the commission those areas of the document which, in the view of the TCI, are not agreed between the parties and those matters which require arbitration. And in so doing I will attempt to highlight the prime area of arbitration and also indicate to the commission those areas which would be affected consequentially by the outcome of the arbitration.

COMMISSIONER WATLING: Right. Just before you get into that, were you going to do anything with TCI.6 in terms of translation provision?

MR TARGETT: Yes, I am, Mr Commissioner. I'd propose - would you like to do that now before we get into the other area?

COMMISSIONER WATLING: I think so, it might be an idea.

MR TARGETT: Certainly.

COMMISSIONER WATLING: So, which - I take it then that that forms part of TCI.6 as amended?

MR TARGETT: Yes, certainly we can do it that way.

COMMISSIONER WATLING: So are the parties -

MR TARGETT: Can I -

COMMISSIONER WATLING: - happy that we take it as part of the amendments to TCI.6?

MR WARWICK: Sorry, sir?

COMMISSIONER WATLING: Are we happy if we just take this document as amending TCI.6?

MR WARWICK: Oh, certainly.

COMMISSIONER WATLING: Righto.

MR TARGETT: There are a couple of minor changes to this. Firstly, I'd like to take the advertisement off the top of the page. My typing isn't as good as some and I don't know how to take headers off computers yet.

COMMISSIONER WATLING: Right.

MR TARGETT: The alterations I would seek to make, Mr Commissioner, to this part of the document, Appendix A, on the first page under extended care assistants, firstly, nursing assistant, first year of service and second year of service should both be level 2. Third year of service and fourth year of service should both be level 3. Under therapy assistant, first year of service and second year of service should be level 2. Third year of service, fourth year of service should both be level 4. With those couple of amendments, Mr Commissioner, Appendix A is the implementation process as far as translation to the broadbanded classifications contained in TCI.6 from the existing classification levels.

Now, there are obviously some classification levels in the existing award which do not fit within the parameters of this document, for example, as we've already mentioned I think on one occasion to the commission, we are seeking to delete professionals from this award and they will be covered separately and will be addressing that a little bit later. In addition to that there is a position of secretary manager which is not covered under this new award.

COMMISSIONER WATLING: Righto, got that.

MR TARGETT: So that forms part of TCI.6.

COMMISSIONER WATLING: Now are we going to move to the non agreed matters?

MR TARGETT: Yes. I will go through this process firstly looking at each item individually and advising the commission of the consequential matters relating to that item, so I may go back and forward a little bit for that reason if that's okay.

The first area I would seek to advise is within clause 11 - Annual Leave. On page 17, (iii) of subclause (c), that provision is not agreed between the parties and we would be seeking to have that arbitrated. That which is contained in

TCI.6 in that component is the - what the employers are seeking in their claim.

Also impacted upon for similar reasons - do you want me to go into an explanation of each part as we go through?

COMMISSIONER WATLING: No, I think if we just identified now.

MR TARGETT: Identify them and we can address it during arbitration.

COMMISSIONER WATLING: Yes.

MR WARWICK: Can I just have that reference again, please?

MR TARGETT: Certainly, it's -

COMMISSIONER WATLING: Clause 11, subclause (c)(iii).

MR TARGETT: Also we - on the same page, subclause (g)(ii), and this is where we start flicking back and forth - for - as a consequence of this, we are also looking at clause 23 -

COMMISSIONER WATLING: Consequential amendments reflect then on clause 23.

MR TARGETT: Subclause (c) -

COMMISSIONER WATLING: Yes.

MR TARGETT: - (i).

COMMISSIONER WATLING: Right.

MR TARGETT: Can I say at this stage that we will be asking for this matter to be referred to a full bench.

COMMISSIONER WATLING: Righto.

MR TARGETT: That's those three items joined, and the reason we seek that to be joined to a full bench is the significance of these particular issues in relation, not only to the Nursing Homes Award, but there are potential impacts in areas such as the Hospitals Award and the private sector. We believe that it is of such significance that it should be referred to a full bench by yourself in the appropriate manner.

COMMISSIONER WATLING: Righto.

MR TARGETT: The next clause I would seek to refer to is clause 23 which is holidays with pay. Subclause (a).

COMMISSIONER WATLING: Hang on, just let me get that. Page - ?

MR TARGETT: 26.

COMMISSIONER WATLING: 26, right. So clause 23 -

MR TARGETT: Subclause (a).

COMMISSIONER WATLING: (a), right.

MR TARGETT: This matter is not agreed between the parties, the difference being we have removed half day cup day, so it's only a small component of subclause (a) but it impacts, I guess, on the whole clause, and the deletion of half day cup day once again, in our view, is of such importance that we would request the matter be referred to a full bench for determination because there are potential impacts in other areas and it is of significance.

Now that's the two full bench matters. If I can now refer the commission back to clause 14 which is on page 21. The clause is called .... remote. I'm now advised we're no longer arbitrating this. Is that right? We have agreement. That clause is now agreed. That's made my day. I apologise for having to refer you to something that's requiring arbitration.

COMMISSIONER WATLING: No, no worries. Just keep going while we're making progress.

MR TARGETT: Okay. The next one is clause 17 - Contract of Employment, on page 23. Clause 17, subclause (c), requires arbitration I believe and also subclause (d). They are not linked. I believe they are two separate issues.

If I can now refer the commission to clause 24 - Hours, on page 27, subclause (a) is not agreed in the area, firstly, of the preamble on the bottom of page 27 going to the actual span of ordinary hours, then consequentially, subclause (a)(iii) on page 28, I would -

COMMISSIONER WATLING: (a)(iii)?

MR TARGETT: Roman 3, sorry - I would point out it's not necessarily the whole clause but it revolves around the span of hours contained therein.

COMMISSIONER WATLING: Right.

MR TARGETT: In addition, subclause (b) on the same page, once again consequential. This revolves around the span of ordinary hours. If I could then refer consequentially again the commission to clause 30 - Overtime, subclause (a)(iii). In addition, clause 38, subclause (a) -

COMMISSIONER WATLING: What's 38?

MR TARGETT: That's roster.

COMMISSIONER WATLING: Roster.

MR TARGETT: It is consequential -

COMMISSIONER WATLING: Yes, yes.

MR TARGETT: - to the span of hours. And also - so we have clause 38 - Rosters, subclause (a) and subclause (c) -

COMMISSIONER WATLING: Right.

MR TARGETT: - consequential. Also within the - within clause 24 - Hours, there is a second issue that is in dispute between us unrelated to the first, and that is in subclause (c) -

COMMISSIONER WATLING: So that's clause 24, subclause (c)?

MR TARGETT: Correct.

COMMISSIONER WATLING: Right.

MR TARGETT: And it relates to the proviso within - only within that subclause going to the question of 10 hour days and that consequential area of disagreement as a result of that is in clause 7 - Definitions, subclause (b), general definitions, and it is the definition of rotating roster. Oh, my apologies, that one rates at - it's a consequential impact from the span of hours, not the 10 hours. Sorry. So clause 7 -

COMMISSIONER WATLING: So I should add that in the previous one, at clause -

MR TARGETT: The previous one. My apologies.

COMMISSIONER WATLING: Righto. So, it's clause 7(b). Right.

MR TARGETT: Now back to the 10 hour business. Consequential to that would be clause 30 -

COMMISSIONER WATLING: Right.

MR TARGETT: - overtime, subclause (a)(i). That completes the hours and consequential components of it.

COMMISSIONER WATLING: Right.

MR TARGETT: The next clause I would refer to is clause 32 - part time employees on page 56.

COMMISSIONER WATLING: On page 56?

MR TARGETT: Correct. On page 56 it was the existing subclause (i) but renumbered from my amendment as it is now, subclause (h) which is the last subclause in clause 32, part time.

COMMISSIONER WATLING: So that's the subclause starting: Where there is agreement between the employer - ?

MR TARGETT: Correct, the employer and the employee, yes.

COMMISSIONER WATLING: Right. Is there any consequential - ?

MR TARGETT: No, there are no consequential issues related to that one.

COMMISSIONER WATLING: Right.

MR TARGETT: Now, the next one's actually back a couple of clauses, the meals clause, clause 27.

COMMISSIONER WATLING: Page 30.

MR TARGETT: There are differences between us in relation to this particular clause. It is - the dispute in relation to my document is that I do not have within it a certain issue relating to the movement of wage rates in relation to the General Conditions of Service Award.

MR WARWICK: Meal rates.

MR TARGETT: Sorry, meal rates in relation to movements of those by the General Conditions of Service Award.

MR WARWICK: Mr Targett's comments are correct, sir.

COMMISSIONER WATLING: Right.

MR TARGETT: So I can't refer you to a specific subclause, but there is dispute over that clause in relation to that issue.

COMMISSIONER WATLING: Right, and as I understand it that the employee's application wants to include that it shall move in accordance with the movements in the General Conditions of Service Award.

MR TARGETT: That is my understanding, yes.

COMMISSIONER WATLING: Right. Is that your understanding, Mr Warwick?

MR WARWICK: That's correct, sir.

COMMISSIONER WATLING: Righto.

MR TARGETT: If I could now move to payment of wages which is on page 57, clause 33 - Payment of Wages, subclause (d) there is dispute between us over the proviso in subclause (d). There are no consequential issues in relation to that.

The next one is clause 38 - Roster on page 59. Oh, no, sorry, right of entry, clause 37, same page. There is dispute between us over clause 37 - Right of Entry as to the terms that should be contained within the award in relation to that clause.

COMMISSIONER WATLING: Okay.

MR TARGETT: Now back to roster. On the top of page 60 we have roster - clause 38 - Roster as defined, subclause (b) (i). There is dispute between us over that. I might, if I can, Mr Commissioner, just check with Mr Warwick. Were there any other issues on rosters? I seem to have made a note for myself there was another problem, but I can't find one.

MR WARWICK: In respect to rosters there's a .... majority and the question of the old additional penalties.

MR TARGETT: That's correct, there are some areas which were contained within the previous award relating to certain penalties applying in certain circumstances which we have removed. They're not contained within my document, but Mr Warwick wishes to insert those - well keep those in the award once it's varied.

The next item is on page 63. It is Clause 41 - Sick Leave, subclause (h). That subclause is in dispute between us, and requires arbitration.

Now, there are two other matters which aren't contained within my document TCI.6, which I understand there is dispute between us on, and that is the union seeks to include a new clause - or a clause for union deductions - or should I say, retain a clause for union deductions, and there is no mention of that.

COMMISSIONER WATLING: Nevertheless, the application is formally before us in terms of the HSU application.

MR TARGETT: Yes. And, in addition to that, there is a clause in relation to time and wages records.

Now, subject - and I think it would be appropriate if Mr Warwick may wish to ensure that I have got everything that needs to be addressed before we proceed.

COMMISSIONER WATLING: I might just count up how many matters I have got for arbitration.

I have got two matters that you believe should go to a full bench, and we've got eleven other matters for arbitration. That's not counting the consequential ones, but the matters to be determined.

MR TARGETT: That's what I have got. Eleven for arbitration, and two I have requested go to a full bench, total thirteen.

COMMISSIONER WATLING: That's it.

MR TARGETT: And then the consequential amendments that go with all of those items.

MR WARWICK: I have a slightly different count.

COMMISSIONER WATLING: Right, well let me go through them. The two matters to go to the full bench are clause 11(c)(iii) and (g)(ii), with consequential amendments being considered, and clause 23(c)(i). Right, well we might just go off the record and have a look at this.

OFF THE RECORD

COMMISSIONER WATLING: Right. So I think we have agreed off the record there that we have got all the matters clearly listed. Is that your understanding, Mr Warwick?

MR WARWICK: That's correct, sir.

COMMISSIONER WATLING: Right. Now, I suppose we'll head off and hear the arguments on the first matter that's - well -

MR TARGETT: Well, perhaps firstly, may I mention the full bench matters again, and I will combine those two, both the issues in relation to the annual leave clause as I have already listed, and also the - Clause 11 - Annual Leave - and the issue relating to Clause 23 - Holidays with Pay.

I would ask that the commission refer both of these matters for arbitration to a full bench because of the significance and importance of the content which we are asking to be arbitrated; and, as I have previously mentioned I believe, because of the significance in this award and in other awards which may or may not be impacted upon that it should be - or

consideration by yourself should be given to referring this matter to a full bench.

MR WARWICK: Indeed, we concur with that submission, Mr Commissioner. We would see it as appropriate for those matters to be dealt with in that way.

COMMISSIONER WATLING: Good. Right; thank you. Right, that now takes us to clause 17(c) and (d).

MR TARGETT: Mr Commissioner, if I deal with both of the issues separately.

If I firstly refer to Clause 17 - Contract of Employment. Subclause (c) as the first issue to be addressed. And, in doing so, I would draw the commission's attention to the contents of the Nursing Homes Award as it currently stands.

In the contract of employment clause which is currently clause 18, and contained within clause 18 currently there is a clause in similar terms to my 17(c) out of TCI.6.

The changes that I have made to the existing clause when putting forward TCI.6 essentially is that the provision as it currently stands enables, in my view, a part time employee to obtain a full week's wages if they are ready, willing and able to work, despite the fact that their contract of employment may be for only 20 hours per week.

The changes that I have made have been to prevent that from happening, and I have done so in accordance with the Industrial Relations Act, in my submission, where the act specifically provides for a full weekly wage to be paid where the employee is ready, willing and able to work for a full time employee with a specific exclusion for part time and casual employees.

And I believe the appropriate section in the act is section 49, subsection (4), headed Employee Ready Willing, and without going through the entire clause - although I refer the commission to it - it states:

> Except as otherwise provided in an Award or in disciplinary provisions of an Act, where, by reasons of any act, default or order of an employer, an employee (not being an employee who is employed on a casual or part-time basis) -

And it is that component of that section of the act which we have - or I have - put into clause 17(c) in the contract of employment where I have stated in my provision:

> - employees other than those engaged on a part-time or casual basis -

And I have attempted to use words which exactly reflect those which are contained in the Industrial Relations Act, section 49(4).

COMMISSIONER WATLING: Could there be an argument then to say that because the act overrides the award there is no need to put it in the award anyhow?

MR TARGETT: There is an argument to say that, yes, Mr Commissioner, but I have no difficulty with highlighting in an award provision some of the requirements - some of those necessary requirements - which are imposed on the employer.

If the commission saw fit that it was not necessarily appropriate to have that subclause in there, I wouldn't mind it going out; but I do believe that there is some merit for the purposes of those people in the field using the award to have that provision in there.

But if the provision is going to be in there, then I believe it should accurately reflect that which is contained within the act, and in the terms that I have put it forward I believe that does so without going into unnecessary and unwieldy words with very long provisions because they can then become confusing.

I think this particular matter is a very simple matter, and I don't propose to spend an inordinate amount of time addressing it other than to say we have attempted merely to comply or provide a provision which complies with the requirements of the act, and would ask that the commission include it in the terms which we have provided in TCI.6.

COMMISSIONER WATLING: Right. Thanks, Mr Targett.

MR TARGETT: Okay? The next part of Clause 17 - Contract of Employment, which is in dispute between us, is subclause (d).

Subclause (d) in my document TCI.6 is a -

MR WARWICK: Mr Commissioner, I'd just like to ask a question and I seek your advice. Would it be wiser, given the hour, whether I responded to Mr Targett on each of the issues as we went?

COMMISSIONER WATLING: Yes. I'm only letting him finish -

MR WARWICK: This clause? I see. Thank you, Mr -

COMMISSIONER WATLING: - this clause and then I'll give you the opportunity to address them.

MR WARWICK: Thank you, Mr Commissioner. I thought for the moment that we might be going to go through the whole thing.

MR TARGETT: Thanks, Mr Commissioner. So in relation to 17(d) the words contained in TCI.6 are a direct reflection of those words that currently exist within the Nursing Homes Award contained in Clause 18 - Contract of Employment, subclause (e).

Those words have been contained within the award for quite some time and we saw no need, based on the restructuring of this award, to remove that particular clause in that it certainly does highlight to the employers the necessity to ensure that they are not involving themselves in discriminatory practices against employees on the basis of sex, whilst still providing the ability for them to look at those inherent requirements of the job.

COMMISSIONER WATLING: On the basis of gender.

MR TARGETT: Sorry. Yes, on the basis of gender. While still providing them with the ability to not - or providing a provision which doesn't hamstring them against looking at the inherent requirements of the job as far as gender is concerned.

And, once again I don't intend to spend an inordinate amount of time, other than just to say the provision has been in the award for quite some time and has obviously served its purpose because there are, from my knowledge, or have been from my knowledge, no disputes over the issue of gender in relation to dismissal; and would suggest to me that the provisions contained within the award have obviously served - well, they have obviously served well. So, on that basis, I would ask that the provision remain.

COMMISSIONER WATLING: Good. Thanks very much for that submission, Mr Targett. Well, Mr Warwick, you are the next lucky shooter.

MR WARWICK: Thank you. I wonder if I might formally table as an exhibit the document which I circulated during the conference this morning.

COMMISSIONER WATLING: Right. We'll mark this document HSU.2, thank you.

MR WARWICK: Thank you. I wonder, Mr Commissioner, whether this would be an appropriate time to go through and amend certain aspects of the document.

COMMISSIONER WATLING: Well, how about -

MR WARWICK: And treat the amendments -

COMMISSIONER WATLING: Well, how about we deal with it clause by clause as we go? Have you got anything -

MR WARWICK: And amend as we go?

COMMISSIONER WATLING: Yes. Have you got anything in relation to clause 17?

MR WARWICK: I have a set of words, Mr Commissioner, which I haven't had an opportunity to have typed. They are fairly brief. I certainly can provide them to the commission -

COMMISSIONER WATLING: Right.

MR WARWICK: - in a short period of time, and if I could read those onto the record. These words would completely replace the proviso to subclause (c), and I would read:

> Provided that a part time employee, ready, willing and able to work in accordance with their contract of employment, and in particular ready to work the minimum number of hours they would have worked in a week, shall be paid the normal wages he/she would have received if the employer provides work or not.

Do I need to formally seek leave to amend those .... the application, Mr Commissioner?

COMMISSIONER WATLING: Well, if there's no objection to -

MR TARGETT: I have no objection.

COMMISSIONER WATLING: No - no objection then, and leave's granted.

MR WARWICK: Mr Targett's point is well taken, that it's possible that the words which did appear in the award may have meant that a part time employee be entitled to a full week's wages, notwithstanding the fact that they would not normally have been expected to work a full week. Nevertheless, Mr Commissioner, I believe the words of the old award contained at clause 19(b) are of some significance to the question. Those words say, that an employee, other than a casual employee, willing to work, who works for less than a full working fortnight shall be entitled to a full fortnight's wages.

Now the construction that those words leave Mr Targett with is quite correct - they're quite wrong. They do mean that an employee who doesn't work full time is entitled to full time wages if an employer doesn't provide work. We don't seek to have the provision in the award which allows that to happen. It is the case however, we believe, that it was fully

intended in the old award that if a part time employee presented themselves for work and the employer had no work then they would be paid the amount of money that they would - could reasonably be expected to have received as a part time employee.

We see that it's a reasonable desire on our part to retain at least what it was intended in the old award. I don't believe that the authors of the award when they wrote this provision intended that a part time worker should get full time wages when an employer had no work.

We - we don't believe that in the circumstances that it's an unreasonable request. There is some difficulty with the words of course. I'm hopeful that the words I've provided to the commission for .... my application will satisfy the - the desire we have to ensure that part timers are protected in the manner intended in the old award and also satisfies Mr Targett's concern in respect to people working part time and potentially be entitled to something they're not entitled to.

Turning to the - the second matter, which is subclause (d), Mr Commissioner, we believe that those words should be removed from the award on the basis that they have the potential to limit the capacity of employees working in the industry to seek redress before this commission under section 29 of the act as it stands. It is clearly the case that if an employer were to dismiss someone or to penalise an employee or take some other measure on the basis of gender then that action by the employer would be an award breach and consequently not within the scope of the jurisdiction of the commission.

It's clearly the case in our opinion, Mr Commissioner, that section 29 of the act as it currently stands intended to allow the commission to hear matters relating to the sorts of things comprehended by this clause and on the basis that it potentially inhibits or prevents, may prevent employees from coming before the commission, we see that it should most certainly be removed. If the commission pleases.

COMMISSIONER WATLING: Good thank you. Any right to reply there, Mr Targett?

MR TARGETT: Only on the question of the TCI clause 17(c) in relation to part timers, full timers, ready, willing and able to work. Perhaps as I don't have the form of words put forward by Mr Warwick to examine and contemplate, perhaps I would make the following point: it is, in my view, a matter for the commission to determine the principle of this particular issue, and if the commission determines the principle in favour of Mr Warwick, then I would ask that the commission gives serious thought to the form of words that should be used which may not necessarily be those put forward by Mr Warwick, or could be an adaptation of those words. If

in fact the commission is of a view to accept the principle put forward by myself, then it doesn't become an issue because there would be no additional words to be included.

So if I could leave it at addressing the principle and request that the commission, if Mr Warwick's arguments are acceptable, to give serious consideration to the words, because I believe it is an extremely difficult issue to come up with the form of words to cater for that which Mr Warwick seeks to cover. If it please the commission.

COMMISSIONER WATLING: Righto. That brings us to the next -

MR WARWICK: Mr Commissioner, before you press on, I think it's occurred to me that there is one matter which when going through the matters for arbitration, Mr Targett overlooked, and in HSU.2 - the second page of that document at the top of the page there's a section on acting executive staff and I think that that was one that we -

COMMISSIONER WATLING: Righto.

MR TARGETT: Well perhaps we could address that now.

COMMISSIONER WATLING: Righto.

MR TARGETT: Sir, we're talking about clause 11 -

COMMISSIONER WATLING: Clause 11.

MR TARGETT: - subclause (b) -

COMMISSIONER WATLING: Mm.

MR TARGETT: - and Mr Warwick seeks to insert a new subclause 3, as I understand it.

MR WARWICK: That's correct, in fact I seek to - that is my application.

COMMISSIONER WATLING: That's your application.

MR TARGETT: Well we are in fact in disagreement on this particular issue, Mr Commissioner, because we don't agree that there is a necessity for the inclusion of this particular subclause in the terms that Mr Warwick has put forward to be included into the award. There is a substantial difference in the award as we are proposing to that which was contained in the award in the past.

The - the provisions that are currently within the award were designed to reflect a time when the award covered all nursing staff up to and including the director of nursing which was considered to be executive staff. It was designed to cover

situations of administrators and the award, as proposed in TCI.6 in fact does not cover any nursing staff as the commission is aware, or the director of nursing, and does not cover the administrators in nursing homes. Therefore, we have put into this award one requirement only for executive staff, and that is, the administrative employee level 7, which is contained within the definition, to give them the option - or to give them the ability if they are at that senior level, which is below the administrator level and involved in such meetings as contained within the provisions of the award, to obtain that additional leave.

In putting forward the proposal that Mr Warwick's put forward, it does start - and perhaps I can paraphrase this a bit - it does start to move the additional leave a long way down the hierarchical structure, because what we're in fact talking about now is a situation where perhaps an administrative employee level 4 or level 5 or whatever, who may take over the position of the level 7 employee whilst they're on annual leave, to pick up these pro rata benefits which initially were designed for the purposes of administrators and directors of nursing, and we're now extending out that little bit further to level 7 to try and give some benefit and some comfort to the employees, to be pushed even further out to other lower level employees, we do not believe it is necessary, especially when you look at the circumstances that may exist, and if we can look at a scenario, a level 7 employee, as I've already said, is not an administrator in a nursing home - we're talking about a senior administrative employee - they go on leave for a week or 3 weeks, someone may be put in the position of acting in their position, but the likelihood or the necessity that they may be confronted with to attend meetings, et cetera, is minimal - if they did they would be entitled to be paid overtime when they attended those if they were out of hours.

If they were within hours there is no necessity for them to receive any other additional payments. And to then suggest that in addition to that they would also receive pro rata annual leave, we believe is just taking the issue a bit too far. So on that basis, Mr Commissioner, we would ask that that proposal by Mr Warwick not be included into the - into the award as he's put forward. If it please the commission.

COMMISSIONER WATLING: Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. On the basis of Mr Targett's comments that a person acting as an administrative employee level 7 would be paid overtime to attend work out of - outside of normal hours, on the basis that Mr Targett's put those on comment - comments on transcript, we would desist from the application.

COMMISSIONER WATLING: Righto. Well we can now say that that is now not required to be arbitrated - and it's clause 11. Is there agreement on that?

MR TARGETT: Yes, there is.

COMMISSIONER WATLING: Being agreement, we won't proceed to arbitrate and will .... that matter. So that takes us to clause 24 - Hours.

MR TARGETT: Mr Commissioner, clause 24 - Hours, is in two parts in our submission. As we've already put to you there is firstly the question of the span of hours, and secondly there is the question of a 10 hour night - or 10 hour - extension of the day to a 10 hour day.

We firstly wish to address the question of the span of hours and in essence I guess it's a very simple section, a very simple part of the award and I believe it can be addressed quite simply at the same time. We in redrafting the award or putting forward our proposal, we took into account the existing provisions that are contained within the award and currently there are two spans of hours in the Nursing Homes Award.

Firstly, there is what is currently called a day worker with a span of hours of 7 am to 7 pm. We then have shift worker that has a span of hours of 6 am to 6 pm.

The first reason that we looked at changing the span was to simplify the award. In undertaking the structural efficiency principle we believed it was time to bring this award into the modern day and make it simple and easy to understand which, in our view, would be a first for the industry. So we combined the existing spans, 6 am to 6 pm, 7 am to 7 pm. We combined them into one span of 6 am to 7 pm. The net effect of which is for day workers, it would enable the employer to bring day workers in 1 hour earlier in the day. And that is the only effect on day workers.

On shift workers, it gives the employer the ability to have shift workers -

COMMISSIONER WATLING: Do we have shift workers now?

MR TARGETT: The old shift workers, what are now rostered employees, to have their shifts not commencing until 7 pm where previously it was 6 pm. The reality of the situation in nursing homes is that shift workers are basically care staff. There are some others which I'll mention in a minute, but basically we're talking about extended care assistants who work shifts. They work afternoon shifts and the alteration from 6 pm to 7 pm on those people is non existent because the shifts that are put in place usually finish about 10.00,

10.30, 11.00 o'clock and they are starting in mid afternoon. So the change of span does not adversely impact these people in any way, shape or form.

The type of person that may be impacted upon - and I stress again that it is only an impact of 1 hour - that may be impacted upon are staff that assist with preparing and distributing meals, for example, in a nursing home whereby the meals might be taken a little bit later in the evening so they may keep the staff back a little bit to perform that function.

At this point in time the employers, because of the restrictions of the span of hours, have been not wanting to go past particular times because of incurring additional penalties. So there may be a movement there. But the overriding criteria for the employers in determining whether they will or won't move that span of hours, has been in the past and will continue to be, the requirements of the residents. And what I propose to do is in concert give a number of exhibits for the commission's consideration.

COMMISSIONER WATLING: This will be TCI.7. TCI.7 will contain five documents, one -

MR TARGETT: Five or four, Mr Commissioner?

COMMISSIONER WATLING: I've got five here, two of which are the same, so we've got four.

MR TARGETT: Right.

COMMISSIONER WATLING: So, one will be headed up Standard Monitoring Guidelines; the next one is Gazetted Standards, Special Gazette Number S303; the next document will be - it's got a title on the top in the first paragraph - Standards for Nursing Home Care 45D; and the next document is Charter of Residents Rights and Responsibilities in Approved Nursing Homes. They will all be falling under the heading of TCI.7.

MR TARGETT: Mr Commissioner, the purposes of providing you with TCI.7 is very simple. It revolves around the requirement on a nursing home to provide the residents of a nursing home the freedom of choice to determine their environment and their daily activities such as meal times, and it is fundamental to the operation of a nursing home that the standards that are laid down by the government are kept and we have included in TCI.7 for your consideration the standards laid down by the government which is Special Gazette Number S303 - this is a typed copy - and these are the standards laid down under the National Health Act to which nursing homes must comply.

I have also provided, in TCI.7 which is Standards for Nursing Home Care and then mentions 45D - and there's also 45E - those things which will happen to the nursing homes if they do not

meet the standards or comply with the standards laid down in the aforementioned S303.

Also for the assistance of the commission I've provided that part of the standards monitoring guidelines which are pursued by the department in inspecting homes relating to freedom of choice and that which they have to assess and comply with, and in addition, the charter of residents' rights.

Now the purpose - and I don't intend to go through these documents page by page, but the essence of what we are putting to the commission is there is a requirement on the nursing homes under the documentation contained in TCI.7, there's a requirement on the nursing homes to enable the employees - the residents to have a freedom of choice. If the residents exercise their freedom of choice for a later meal time, that impacts on the operation of the home and impacts then on the requirements for the employer to include - to bring in additional employees or keep them to a later time.

We could have asked for a far greater span of hours to cater for a far greater diversity of impact on that sort of decision by the residents but we very closely and seriously assessed the likelihood and the extent by which residents would seek to alter - may seek to alter their meal times in accordance with their freedom of choice so as not to unduly impact on the employees if we could avoid it, and it seemed, after extensive consultation with the nursing homes, that by using the span of 6 am to 7 pm - more specifically the 7 pm finish for all employees, it would minimise any adverse impact on the employees but provide far greater flexibility to the employer if - and it is - and I underline the word if - the residents chose to make decisions about their meal times as they are entitled to do under the standards established by the government.

I would add to that that extension in the span of hours, as minimal as it is, is in fact in accordance with the wage fixation principles where we are - where the parties are required to examine the arrangement of working hours under the structural efficiency principle and by moving the spread as we are suggesting, we believe it is quite consistent with the principles and I would go so far as to say by the union seeking to prevent any change to the span of working hours when it's evident from the industry that it is required is, in my view, going against the spirit and intent of the wage fixation principle and structural efficiency principle.

On that basis, we would request that the commission with our request for a standard span of hours of 6 am to 7 pm for the reasons as I have explained. If it please the commission.

COMMISSIONER WATLING: Good. Thank you. Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. I -

COMMISSIONER WATLING: Before I get you to respond, I take it then, Mr Targett, you're saying that if I look favourably on your claim then will it have any consequential impacts?

MR TARGETT: Sorry, Mr Commissioner, yes, the - if you look to agree with our claim then there are consequences to your agreement which we have incorporated into TCI.6 and we have listed in matters for arbitration under the hours clause when we went through that earlier.

COMMISSIONER WATLING: Right. So if I look favourably on your claim on this particular question, I won't have to turn to subclause (a)(iii) or (b) of clause 24, nor will I have to look at clause 30 - Overtime, subclause (a)(iii), nor clause 38 - Rosters, (a) and (c), nor the definition of rotating roster?

MR TARGETT: No, you would not be required to make any changes because I have put into those areas what I'm seeking from the commission.

COMMISSIONER WATLING: Righto.

MR TARGETT: Thank you.

COMMISSIONER WATLING: Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. It's interesting that - it is interesting to hear Mr Targett's interpretation of the structural efficiency principle. We certainly agree that it is a requirement of the principles that the parties examine the hours provisions of the award. It is not a requirement in our view of the existing structural efficiency principle that the parties therefore simplify the spans of hours in the award. The requirement is to examine the span of hours.

The reality is that - in our view that in an industry which operates 7 days a week, 24 hours a day will never be simple and the hours will never be simple, and we don't believe in fact, Mr Targett's award prescription will in any fashion simplify the operation in actual fact of nursing homes. They can only be simplified - the operation of nursing homes can only be simplified through consultation and negotiation between the employer and the employees and the union on a regular basis.

Mr Targett is quite correct in saying that day workers will be able, under his provision, to work an hour earlier. He did neglect to say that they would be able to work an hour earlier without the overtime entitlements that they are currently entitled to.

In addition, shift workers we agree, under Mr Targett's provision, will be able to work an hour later in the day. It may be the case that there will be no effect in that regard on nursing assistants on a roster as defined, but there may be day workers in the system - sorry, shift workers in the system who would currently work past 6.00 to perhaps 7.00 or 8 o'clock at night. Certainly, if they work through to 7.00 and currently attracted a shift penalty for doing so, they would be affected. I don't think there would be a large number of people, but they would be affected and they would lose penalty payments - the 15 per cent penalty payment and that is another point that Mr Targett neglected to point out to you.

And in that regard, sir, we would say that the structural efficiency principle does not say that employees are obliged to lose overtime payments or penalty payments as part of the structural efficiency process and we most certainly, Mr Commissioner, in the strongest possible terms oppose any alteration to the spread of hours which would lead to having that effect.

I think it's worth pointing out, Mr Commissioner, that the current award and the proposed new award contain a provision in Mr Targett's document TCI.6 - that's at (b)(iii) - and that says that: the spread of hours or daily hours prescribed may be altered as to all or a section of the employees by mutual agreement between the employer and the employees and the branch secretary of the union. We didn't reach agreement with employers on the basis of that clause from time to time. That clause has always been in the award to my knowledge. It is there to be used. We do not have employers coming to us saying that the spread of hours is terribly wrong and where employers have asked us to vary the hours provisions, we have entered into agreements, admittedly not many, but we have entered into agreements to resolve those issues and the hours have been varied in accordance with that provision.

Mr Targett has put to you, Mr Commissioner, that his submission is based on the requirement of freedom of choice of residents, yet he's failed to put before you any evidence that residents wish to exercise a freedom of choice to have an earlier or later meal. He simply wants to have the award reflect the capacity for them to have a later or earlier meal. The question is, do they want an earlier meal or a later meal. And there is no evidence, Mr Commissioner, we believe, before the commission in that regard. It is the question of when the employees - sorry - the residents wish to have their meals which should determine the ordinary span of hours. We certainly believe that that needs to be the criteria within the industry, but we point out yet again that there is no evidence to that effect.

We also would conclude our remarks by saying that we object to Mr Targett's proposition that our opposition to his proposal for a spread of hours from 6 am to 7 pm is contrary to the structural efficiency principle.

We would say, Mr Commissioner, that the presence of the flexibility provision (b)(iii) in the award over many years proves that we - in the past have proven - have been prepared to be flexible and the agreements we have reached in respect of that clause are also evidence of that fact, and we believe it's hardly a reasonable comment for Mr Targett.

COMMISSIONER WATLING: Did you say inflexible?

MR WARWICK: Sorry, Mr Commissioner?

COMMISSIONER WATLING: Did you say that in the past you've been inflexible?

MR WARWICK: Oh no, if I meant - if I said that I meant in the past we have been flexible.

COMMISSIONER WATLING: Oh right.

MR WARWICK: It's hardly fair to suggest that we have been inflexible. And - and as I say, in that regard there is no evidence to that effect before the commission. We believe that the prescription set out in clause 24(a)(i) of our document, which maintains the existing dual system of spread of hours is equally simple in terms of an award operation and expression - an award expression. I think it also is worth pointing out that the document that's being proposed throughout it distinguishes between rostered employees and non rostered employees.

It is a constant theme that runs throughout perhaps even a majority of the clauses in the award, and yet when we come to the hours provision, Mr Targett is adamant that there be one provision wherein the rest of the award there are dual provisions running side by side and we fail to see the logic of that approach.

COMMISSIONER WATLING: Is it a common approach of awards, say, of this commission to have two span of hours contained therein?

MR WARWICK: You would have to advise me in that regard, Mr Commissioner.

COMMISSIONER WATLING: Righto. Seeing that I'm not in the advice business I'll -

MR WARWICK: It certainly is the case -

COMMISSIONER WATLING: - take your answer on board.

MR WARWICK: - can I perhaps answer that by saying it certainly is the case in health worker and nursing awards generally.

COMMISSIONER WATLING: Yes. Well we haven't got nursing awards here, so -

MR WARWICK: We have, Mr Commissioner.

COMMISSIONER WATLING: In this jurisdiction? Righto.

MR TARGETT: I'll be very brief, Mr Commissioner. Firstly, I found most interesting that Mr Warwick can say that the residents' requirements will - should be the criteria upon which ordinary hours are established. If that be the case, perhaps what we need to do is take from the award all reference to ordinary hours and leave it in the hands of the individual enterprises to be determined by the residents' committee which is in place in those particular areas.

But having said that, the - this commission has on a number of occasions taken into account the implicit requirements of particular industries in establishing what the appropriate span of ordinary hours should be and I - with Mr Warwick raising this particular area in relation to this clause, I'd refer the commission to the - as an example, the Shellfish Award, where the hours clause has been specifically designed to allow the flexibility to cater for the inherent requirements of that industry. I'd also refer the commission to the Farming and Fruit Growing Award where once again the hours clause has been established to provide for the inherent requirements of that particular industry. And the employers in the nursing home industry are seeking nothing more than to make minimal alterations to the span of hours to cater for what the employers believe are the inherent requirements placed on them in this industry by the - the National Health Act.

COMMISSIONER WATLING: I think even in the Fish, Aquaculture and Marine Products Award we've got one span of hours for a certain part of the year and another span of hours for another part of the year -

MR TARGETT: Well certainly is -

COMMISSIONER WATLING: - depending on seasons and tides.

MR TARGETT: - it is certainly those types of provisions which have been put in place in this jurisdiction which support the proposition which I put forward in that the employers believe that inherently there is a need for this change to the span of hours and this - this jurisdiction has,

on a number of occasions, inserted provisions to cater for that - we seek nothing more than to do that.

Mr Warwick also mentioned that his proposal is equally simple to that which I have put forward. I find that an amazing statement when I have spent the last 12 months talking to employers right around this state for every nursing home who tell me that in the field it is a complicated system and they are looking for a simplification of the award. And that which we are putting forward is just - is - will achieve that simplification which the people in the field believe is necessary.

As to the question of these provisions currently being in all the health awards, that may very well be the case. Perhaps that is the case in the past and up to today. Perhaps there's a necessity to look at the span of hours in all health awards and bring them up into something which is reasonable today instead of living in the past on this issue. If it please the commission.

COMMISSIONER WATLING: Thanks, Mr Targett. Right, that now brings us to clause 24 and we're looking at subclause (c) - the proviso.

MR TARGETT: Thank you, Mr Commissioner. I'll be extremely brief on this. The proviso we have in subclause (c) principle, is to enable agreement between the employee, the employer and the union to provide for the ability to have people working of a night extend to a 10 hour night instead of being restricted to an 8 hour night.

It is a provision which is currently in the Nursing Homes Award and we seek to have that provision continued, the reason being that it is a provision which provides flexibility with some protections by the necessity for the unions to be involved in those sorts of agreements. It would, in my view, require a very onus on Mr Warwick to show that there are any abuses of these provisions, or there has been some inherent change in what's happening in the field to require the deletion of this particular provision. So I believe -

COMMISSIONER WATLING: Could you refer me to the clause that's currently in the award?

MR TARGETT: Certainly, Mr Commissioner. It is clause 24 - hours of work - in the current award.

COMMISSIONER WATLING: Right.

MR TARGETT: Subclause (b).

COMMISSIONER WATLING: (b)?

MR TARGETT: (b) - and it is the last proviso in that clause - it is an extensive clause.

COMMISSIONER WATLING: Right.

MR TARGETT: I just repeat that I believe there would be a very heavy onus on Mr Warwick to show just cause to remove a flexibility provision currently in an award and I don't believe there is anything which has happened in this industry which would suggest that it's created problems, so it should be retained. If it please the commission.

COMMISSIONER WATLING: Good, thank you. Mr Warwick?

MR WARWICK: Well, I think there's a certain logic in Mr Targett's argument, however, the whole thing may have been dealt with differently. There was a point in time when the question of 10 hour shifts was formally raised with the union by the TCI during the negotiations and I have to admit at the point in time I was unaware that there was a provision for a 10 hour shift, and as a consequence of that when we were going out to members we put it on the list of things that the employers were seeking. And in actual fact, we had a ballot on the matter - in fact we've had a ballot on most of these matters - a secret ballot of the membership in relation to these issues, and by a clear majority of the employees in the industry have said that they do not want 10 hour shifts.

Now -

COMMISSIONER WATLING: But they might have been voting on a principle they didn't know they already had.

MR WARWICK: Indeed - indeed they may have, Mr Commissioner.

COMMISSIONER WATLING: So should that then cause me to think that they were voting on a proposition on a false premise that the answer may have been different had they have known the facts?

MR WARWICK: No, I don't think so. But simply put to them the proposition that the employers wanted the capacity to introduce a 10 hour shift. They were the exact words that we put to the members. And there were two issues when we conducted the ballot and I think it's worth me saying, this issue and the question of rotating rosters and whether they should rotate or not rotate by a majority agreement or by total agreement, both of those issues when we put those questions to the members, the union consciously chose to not make a recommendation in respect of those two issues. We did make recommendations to others.

And as I say, notwithstanding that, it was a secret ballot. So I think that it's - it's important for me to make that

point and to point out that therefore means that the workers in the industry are not interested in 10 hour shifts. There are none out there, notwithstanding the fact that there have been - there has been the capacity by mutual agreement to have them. They are not being worked, and the workers are not interested. So -

COMMISSIONER WATLING: Yes, but what's the reason for me taking it out?

MR WARWICK: Well it's an exercise in futility, Mr Commissioner.

COMMISSIONER WATLING: In taking it out?

MR WARWICK: I don't think that - no - well, I guess when it's all said and done it doesn't really matter either way, because the employees aren't interested in 10 hour shifts. I guess there's a secondary position I'd put to you, if you were to be persuaded by Mr Targett's argument, then you should adopt his clause as a whole.

COMMISSIONER WATLING: Righto.

MR WARWICK: Thank you, Mr Commissioner.

COMMISSIONER WATLING: Mr Targett?

MR TARGETT: Well quite simply I don't believe Mr Warwick has put forward any cogent argument to justify taking the matter out. If the - if Mr Warwick reads the clause he will find that it is a clause by agreement. If the employees don't want the 10 hour shifts when it's discussed, they have the right to withhold agreement. There is nothing in there which in any way adversely impacts on the employees, and I don't think there's any necessity to pursue that line of argument any further, Mr Commissioner.

COMMISSIONER WATLING: Right.

MR WARWICK: Excuse me, Mr Commissioner, bearing in mind that we both have applications in and it's a matter of I guess - well I'm not sure that there's a reason for the right of reply system we've had developed, there is one comment that I would seek to make about this particular clause.

COMMISSIONER WATLING: Right, well I'm not going to stifle anyone.

MR WARWICK: Certainly. Thank you, Mr Commissioner.

COMMISSIONER WATLING: I'm going to give you ample opportunity to tell me what you want to tell me on each of the clauses.

MR WARWICK: Thank you. There is one difficulty with that clause and that is that if it were to be the case that a 10 hour shift were introduced, it may mean that people working on evening and shift and day shift may have lesser hours as a consequence and they may have to work - not work an hour at night and they may have to come in an hour later because the people on the 10 hour shift would be working those hours.

COMMISSIONER WATLING: But isn't the point though, if your members are that uptight about it and they don't want it, how would you get agreement?

MR WARWICK: Well, I'm just making the point, Mr Commissioner, that I believe if you were persuaded by Mr Targett's argument and rather than the majority of employees concerned within a particular work area, it really should be all of the employees concerned because the - the words Mr Targett has chosen suggest that a group of employees may be able to make - take a majority decision to work a 10 hour shift and in fact take hours off other people.

COMMISSIONER WATLING: Only in a certain work area.

MR WARWICK: Indeed. Well I don't think that that's clearly defined.

COMMISSIONER WATLING: But in a particular work area.

MR WARWICK: Well I think we need to be talking about all of the people who will be affected by the change. I think that would be a far more fair and reasonable award provision.

COMMISSIONER WATLING: So you're talking about all the people that might be in a particular area, or a majority of the people - the majority of employees concerned in a particular area requiring or voting in favour of it?

MR WARWICK: Well we would prefer a prescription that said that all of the employees concerned - with the agreement of all of the employees concerned in a particular work area and who may be affected. Thank you.

COMMISSIONER WATLING: Well, have you got any words - like if - this is a bit of a difficult area and it's up for arbitration and you're throwing in a few words. If you had some words, Mr Targett might even think you'd agree.

MR TARGETT: No I won't.

MR WARWICK: Would you like me to write that out, Mr Commissioner?

COMMISSIONER WATLING: Well, even Mr Targett might know what you're talking about if he's got it.

MR TARGETT: I guess to just speak on that which Mr Warwick has just raised, I acknowledge that there's a 10 hour work pattern of a night that may impact on the people in that work area that work of an afternoon or a morning, but the clause caters for that because it requires a majority of the employees concerned within a work area - not a time frame, not a time span - but a work area. So if they were working in a particular wing of a nursing home as a work area, all of the people concerned would be involved in the vote.

The other suggestion of Mr Warwick's was that it be all of the employees concerned, where I'm saying the majority, and in those circumstances would I agree to it being all employees because it creates a situation where you may have 30 employees wanting to go down a particular path and one, for whatever reason refusing, you then really do have the tail wagging the dog. The majority is the principle upon which this sort of provision should prevail. It is the principle upon which enterprise flexibility type agreements within the award are to be established. It is a general principle of fairness and equity which should exist in an award. So majority would have to be the way we see the clause operating.

COMMISSIONER WATLING: I put this scenario to you and see if you're reading it the same way as I am. It seems to me that in this clause a majority of people in the particular work area must vote in favour of the proposition, but only some of those may work the 10-hour shift.

MR TARGETT: Potentially possible.

COMMISSIONER WATLING: Right. So where, Mr Warwick, does that upset your scheme of things, because all the people in a particular work area would - would get a vote but only some of those may be required to work on that system?

MR WARWICK: The problem is, Mr Commissioner, that the majority of people may vote to work a 10 hour shift and take hours off a minority of people.

COMMISSIONER WATLING: Yes, but that's one argument.

MR WARWICK: Oh, it will happen.

COMMISSIONER WATLING: Well, it wasn't the question I put to you and it wasn't the question I related to Mr Warwick. It would be possible, and you're saying that you feel that the people affected should be the ones to vote - right? Now I'm saying to you that that's more restrictive than this provision, because this says the majority of employees

concerned in the particular work area will vote, not the ones that are affected by it.

MR WARWICK: Well surely people who lost hours would be affected by it.

COMMISSIONER WATLING: Well they'll all get a vote, won't they, in that work area?

MR WARWICK: Well is it fair for one group of employees - is that - is that just - I mean that's going to cause us an enormous amount of - enormous number of disputes if people vote, say, 11 out of 20 employees vote for a 10 hour shift and they work that shift, then nine other people lose 2 hours each - that's our problem.

COMMISSIONER WATLING: Well they've had a say in it though, haven't they?

MR WARWICK: Well they've had a say in it.

COMMISSIONER WATLING: So you've got three problems with this. You've got firstly, you want everyone to vote in favour - it's got to be a unanimous decision; secondly, that you don't want people working extra hours and other people losing hours, and probably your third position is that it shouldn't be in the award at all.

MR WARWICK: I think because of (a), (b) and (c) it shouldn't be in the award.

COMMISSIONER WATLING: Now, it is in the award at the moment, now are they arguments sufficient enough to take it out?

MR WARWICK: Well, as I say, I'm talking about a secondary position I'm putting to you, Mr Commissioner.

COMMISSIONER WATLING: Yes. Right. Have you got anything to put to me that would show me at this point - because it has been in the award for quite some time - that it has been a problem?

MR WARWICK: No, certainly I can't point to any area of difficulty, because as I said, the ballot showed that members aren't interested in working 10 hour shifts.

COMMISSIONER WATLING: Right. Good; thank you.

MR WARWICK: Hopefully we won't be back here with any disputes on the matter, Mr Commissioner.

MR TARGETT: I would make one last comment on that. If we're back here dealing with disputes on it it is because the union are creating a problem, because they have the right under the

clause to agree or disagree, and if there is a problem with their members the union can withhold agreement.

They effectively have the power of veto. And I am not quite sure that you could ask for anything more than that.

COMMISSIONER WATLING: Right. That brings us to the next point then, Clause 32 - Part-time Employees, the now (h) subclause - it was (i).

MR TARGETT: This particular subclause, the now subclause (h) of Clause 32 - Part-time Employees, is a new provision which we are seeking to have inserted into the award. It does not exist at the moment.

It is, in essence, the ability for a part time employee who works 20 or more hours per week to elect to take the 20 per cent loading in lieu of pro rata benefits.

The award currently contains a provision for employees working under 20 hours who receive the 20 per cent loading to elect by agreement to get pro rata benefits.

All we seek to do by inserting this provision into the award is to provide a similar provision for part time employees working in excess of 20 hours.

It is not a matter of imposition; it is not a matter of downgrading benefits; it is merely a matter of providing a facility in the workplace for employees to get the 20 per cent loading where presently they can't.

We would submit that it is also a matter of equity for these part time employees to have similar ability to change from benefits to a monetary payment as exists to the lower number of hours employees.

It is our experience that in fact this provision does have a certain amount of attractiveness to some employees that are working within the industry. As the union is well aware, in fact there are some employees who actually want this provision.

It is not one which we believe to be onerous in any way because the employee has a prima facie position of retaining the pro rata benefits, and they only change if they wish to change.

I do not believe it will necessarily be a provision which will be used across the board, because certainly some employees will want to retain the paid annual leave, etc. But there are employees working in the workplace who would far prefer to get the additional monetary payment than keep the benefits, for financial reasons.

It is, as I said, not an onerous provision; it is not one which detracts in any way from the employees' current rights and current entitlements; it merely gives them a flexibility which the employers believe some of them would want; and I see no difficulty in this commission inserting such a provision into the award in the terms that we have put forward, which is almost identical to provisions that currently are provided in the award.

We are providing a provision - or putting in a provision - which ensures that the employee has had the opportunity to consult with their union, if they so desire.

We are putting in provisions to ensure that if the employee at a later date decided to discontinue the arrangement they have the ability to do so, and those protections are built into our proposal.

We see nothing contained within the award which should offend the commission's sensibilities in this particular area, and would ask that the clause be inserted in the terms that we've put forward in TCI.6.

COMMISSIONER WATLING: Thank you.

MR WARWICK: Thank you, Mr Commissioner. I should indicate at the outset that the union's opposition to the inclusion of this particular clause is not necessarily one on the merit of having a clause of this sort or not, it is simply a matter that was raised very late in the day with us by the employers and certainly well past the time when we could have included it on the ballot paper that members considered; and, therefore, we don't have a vote on it, we haven't had a ballot on it, and we have no instructions from the members.

We certainly believe that it is something that we would put to them again, or we would put to them - I shan't say `again' - as part of a future wages system, and I certainly wouldn't want to stand here and say to you that they wouldn't agree to it.

Mr Targett is quite right in pointing out that it may be the case that employees may want it.

The principal issue, from our point of view, however, is that we are concerned - as I think the trade union movement generally is in relation to the increasing casualisation of the workforce not only in Tasmania but throughout Australia - and the question arises as to whether or not this provision that Mr Targett seeks will lead to further casualisation in the industry; and I would be particularly interested through you, Mr Commissioner, to hear his comments in regard to that, on the record.

It may be that Mr Targett may be able to indicate what his reading of the new clause is, and what impact that will have on the employment status of the people who elect to take the option that he wants them to have.

COMMISSIONER WATLING: But they would be part timers, though, wouldn't they?

MR WARWICK: Well I would be very interested to hear Mr Targett -

COMMISSIONER WATLING: Not casuals.

MR WARWICK: I would be very interested to hear Mr Targett's view on that, sir.

There is another concern which occurs to -

COMMISSIONER WATLING: Does that mean mine is irrelevant?

MR WARWICK: I would be interested to have yours on the record as well, Mr Commissioner, but I anticipate a bit of discussion between the two of you, in fact, and I'll be very interested to have that on the record.

There's a potential injustice in what Mr Targett is proposing as well. If you look at subclause (e) of the clause that talks about unpaid leave for people who get the 20 per cent loading. It says:

> An employee working less than 20 hours a week -

- and that's not the people in question -

> - who receive a loading in lieu of holidays with pay, annual leave and sick leave shall be entitled to elect to take up to four weeks leave without pay in any one leave year. Leave under this provision shall not be accumulative.

So these people that take the 20 per cent loading in lieu of annual leave, and they would continue working for the rest of their life as long as they continued to be employed, without a break, on the basis of the words contained in that clause - that subclause, I should say.

In conclusion, Mr Commissioner, the union does oppose the introduction of this provision. But, as I say, it is not a matter of merit particularly, rather than a simple matter of not having been able to consult the membership on this issue.If the commission pleases.

COMMISSIONER WATLING: Any further comments?

MR TARGETT: Just briefly. Mr Warwick raises a valid issue concerning subclause (e), which I must say had escaped my attention.

If the commission is persuaded by my argument that it should be included I would have no objection if the commission also believed it appropriate for change subclause (e) to ensure that anyone - an employee - receiving a 20 per cent - who receives a loading in lieu of - etc., would be entitled to the 4 weeks leave without pay. And I think that would probably be most appropriate in the circumstances, because it is a valid concern that Mr Warwick raises, and I think it is quite right that the commission should consider protecting them.

If the commission believes it is appropriate, I am quite happy to amend my document to make it so, from our point of view.

COMMISSIONER WATLING: Well, we may have agreement here?

MR TARGETT: I am quite happy to do that.

COMMISSIONER WATLING: Mr Warwick?

MR WARWICK: I have no objections to Mr Targett amending his document, Mr Commissioner.

MR TARGETT: Could I seek leave of the commission to amend my document, please, Mr Commissioner?

COMMISSIONER WATLING: You could, yes.

MR TARGETT: In subclause (e) on page 56 in the first line could I delete the words, working less than 20 hours per week, and I believe that solves the problem. I would also say that then means that subclause (e) may become a consequential matter to this arbitration.

COMMISSIONER WATLING: No objections to the amendment?

MR WARWICK: No objection, Mr Commissioner.

COMMISSIONER WATLING: Right.

MR TARGETT: Other than that, I don't have any other comments on this matter.

COMMISSIONER WATLING: Right. No other comments? Right, we'll move then to the next matter for arbitration, and that's now Clause 27 - Meals, and we're looking at whether or not this should be linked to the general movements in this - this clause should be linked to the General Conditions of Service Award.

MR WARWICK: Perhaps it is appropriate if I lead off on this issue, Mr Commissioner?

COMMISSIONER WATLING: Right.

MR WARWICK: If I could refer you to the meal clause of HSU.2, which I am sorry but this document hasn't been numbered. That is the eighth page of the document. I'm sorry, that is the hours clause.

COMMISSIONER WATLING: I think it's clause 27, a few pages over.

MR WARWICK: Yes. I'll have to trust that everyone has it. At the bottom of that page, Mr Commissioner, the words which previously appeared in the award relating to the General Conditions of Service Award that currently appear, and they say that: These rates shall be adjusted from time to time in accordance with the General Conditions of Service Award.

Notwithstanding the fact that they haven't been adjusted for some time, Mr Commissioner. We believe those awards have been in the award - the words have been in the award - for some time and should continue to do so.

COMMISSIONER WATLING: Right. I'll just ask the question then, is it your view that in the future that this should be the only method for adjusting the rates in this award, and if it is your view that it isn't the only method, how will this commission then deal with it on a separate application if the clause clearly states it shall be adjusted when the General Conditions of Service Award is adjusted?

MR WARWICK: Well, we would simply seek to make an application to review the meal provision, Mr Commissioner.

COMMISSIONER WATLING: And then the commission would say to you, but there is a clause in the award that says how it shall be adjusted. Where does that leave you?

MR WARWICK: Well, does that therefore mean - do I take your comments to mean - that that would prohibit us from being able to make an application for a general review of the meal provisions in the award?

COMMISSIONER WATLING: Well I think you are entitled to make an application, but it will certainly beg the question of why do we have an award that contains a provision that says how we adjust it if you want to adjust it by a separate application?

I would think that there would be some debate at the time, and I can hear the other side arguing that why are we listening to an application to vary the rates when, indeed, the award says how it will be varied.

I'm just posing the question that it may make it a little harder for you at the time when you lodge the application, because there would be an award provision clearly stating how the rates shall be varied from time to time. One might have to seek to delete the award provision first.

MR WARWICK: Well, can I take those words to mean then, Mr Commissioner, that if those words were not in the award there would be no limitation on our right to make application to vary the meals provision?

COMMISSIONER WATLING: I would have to say to you that as far as I am concerned you'd have a right at any time to make an application to vary the meal allowance clause in the award, and I'd take it at the time when you were doing that that you'd probably be looking at some index that might relate to the movement in food charges and costs.

That may be a more appropriate method of varying this clause than tying it to another award of the commission for variation.

I just think you'd certainly be at liberty to make application to vary it. You may have less argument at the time, because I am sure it would be raised that the award would contain a provision on the methodology of varying these rates.

MR WARWICK: Indeed, Mr Commissioner, on the basis of those comments, I'd desist from the application ....

COMMISSIONER WATLING: Right. Well, that means then that clause 27 - the addition to clause 27 by adding a new roman numeral three - is not up for arbitration.

That now then takes us to Clause 33 - Payment of Wages.

MR TARGETT: Yes, the matter in contention on this particular provision, Mr Commissioner, of clause 33 - Payment of Wages is subclause (d) and it is the proviso contained within that subclause which reads:

> PROVIDED THAT this subclause shall not apply where the delay is caused by reasons beyond the employer's control.

We have sought to insert this proviso into the award where it was previously not contained for the specific purpose of ensuring that an employer does not become liable to penalties which may be imposed by the rest of the clause in circumstances whereby, for example, a bank in transferring funds to employees' accounts does not do it as it should, and the employer suffers the penalty.

The object of the provision contained in this particular clause is to provide a penalty where the employer does not, for whatever his reason, provide payment of wages when he should.

But if the employer has complied with the requirements under the award and another party outside the control of the employer creates a difficulty in getting the money into the employee's account it is, in our view, unreasonable that the employer should be burdened with a penalty.

Whilst acknowledging that it may create hardship for the employee, and the employers are most sympathetic to that position, that in itself should not require a penalty to be imposed on the employer.

And the proviso we are putting forward is very straightforward and simple. If it is beyond the employer's control then the penalty should not apply to the employer. If it is within the employer's control, then fine, the penalty will apply, and we don't seek to resile from that position.

COMMISSIONER WATLING: Would it assist the dispute on this particular question if that clause was to also spell out if it was beyond the employer's control then the employer would provide some other method of payment?

MR TARGETT: I guess that depends on what that means.

COMMISSIONER WATLING: Well, it's really saying - just say, if you take your argument to the fullest - and the employer does all the right things and gets the take to the credit union or the bank on time but a computer goes down in the bank - or the computer goes down in the credit union and doesn't get it to the bank on time, then would the employer be prepared to look at some other method of making sure the employee got payment - it might be cash, even.

MR TARGETT: I'm sure the employers would have no difficulty with undertaking to try and get the money to them at the earliest opportunity, no difficulty at all, and certainly our variation in this particular area is not seeking to avoid those sorts of issues and I would suggest to the commission that the circumstances already in existence is that if an employer - if the employees don't get their money on time they do what they can to try and fix the problem immediately or make alternative arrangements. It is just purely a penalty.

COMMISSIONER WATLING: I'm just thinking that there may be no need to arbitrate this particular question if we looked at something like that.

MR TARGETT: Well I'm in Mr Warwick's hand as to whether he would be amenable to that. I certainly would be amenable to some form of words along those lines.

COMMISSIONER WATLING: They wouldn't be hard to find, I wouldn't think. Mr Warwick?

MR WARWICK: Well, certainly, sir, we don't accept a set of words which say that if it's not the employer's fault then the employee may never get their money and that's what this clause says.

COMMISSIONER WATLING: Well I'm not too sure it goes that radical, but -

MR WARWICK: Well it potentially does because -

COMMISSIONER WATLING: No, it -

MR WARWICK: - what if the bank goes bust, that's not the employer's fault and -

COMMISSIONER WATLING: Well, yes, we've got to be a bit careful of over exaggerating the point, but I think this section really deals with the penalty -

MR WARWICK: Yes.

COMMISSIONER WATLING: - and - for someone not getting it on time, but the proviso says that if it's not the employer's fault, then if it's not the employer's fault, then the employer may take the necessary steps to see that the employee is paid by an alternative method.

MR WARWICK: Well, I can see the merit, certainly, in your proposal. I presume you're saying that the employer -

COMMISSIONER WATLING: See, we're only really dealing with the question of where the employer has nothing to do with and then the employee may be waiting for a couple of days or a day for the bank to get it through and they may have a payment or something to make. This clause really deals with the employer being required to pay a penalty if he doesn't or she doesn't pay the wages on time. The -

MR WARWICK: The whole thing is a bit difficult though for us, really, Mr Commissioner. It was the employer's wish to have the direct bank deposit. It was -

COMMISSIONER WATLING: Well it's what the award says.

MR WARWICK: Yes, but it was a matter raised by the employers in the 4 per cent proceedings nationally, not just in this award.

MR TARGETT: You got paid for it.

COMMISSIONER WATLING: Well -

MR WARWICK: And -

COMMISSIONER WATLING: - hang on, that's not a legitimate argument.

MR WARWICK: Oh, well I'm not sure that - well, I'm sure -

COMMISSIONER WATLING: Well you got - you put it up as well on the basis that you get money for it. Like, if we're going to -

MR WARWICK: Well it was raised, not by us.

COMMISSIONER WATLING: No, but you were prepared to put your hand out for it as well to get money for it, now let's not kid each other. In fact, if I can remember correctly, you probably didn't have too much else other than this.

MR WARWICK: Well I wasn't around in those times, Mr Commissioner.

COMMISSIONER WATLING: Phew, that was a good one. But -

MR WARWICK: So - mind you, in my experience -

COMMISSIONER WATLING: - I think if we're talking about -

MR WARWICK: - that a lot of people in the hospitals in Tasmania did a little bit worse out of the 4 per cent than other people that I'm aware of in other states -

COMMISSIONER WATLING: Well I wouldn't back that in.

MR WARWICK: - but anyway.

COMMISSIONER WATLING: I've got 40 awards in my area and I wouldn't like to rate them.

MR WARWICK: I wasn't referring to the awards in your -

COMMISSIONER WATLING: No, no, but in rating them in the giveaway stakes, I don't think the hospitals were all that, sort of, poorly cook-chill. It was the major item - but anyway they're another argument in another time, but anyway. I'm really getting down to the principle here -

MR WARWICK: Well I -

COMMISSIONER WATLING: - this section really deals with the employer being fined -

MR WARWICK: Yes.

COMMISSIONER WATLING: - for a want of a loose term `for not paying the wages on time', and - but we're saying that this penalty won't prevail if it's not the fault of the employer or if they're beyond the control of the employer, then one must say then - or if it's beyond his control, what's he prepared to do to make sure they get some money, and -

MR WARWICK: Well we would say to that, Mr Commissioner, if he's not prepared to do anything he should be fined - he/she should be fined. I guess - how you write that in an award I'm not sure, but if they're not prepared to do anything about it -

COMMISSIONER WATLING: So, it's not much use exploring this then?

MR WARWICK: I appreciate your comments certainly, Mr Commissioner, and I appreciate that it's open to you to write whatever you think reasonable by way of a decision in respect to those words and I would put to you -

COMMISSIONER WATLING: I was thinking of -

MR WARWICK: - as a secondary position -

COMMISSIONER WATLING: I think I was just accepting or rejecting the claim -

MR WARWICK: Yes, indeed.

COMMISSIONER WATLING: - and not amending it. But if you -

MR WARWICK: Can I put to you, Mr Commissioner, as a secondary position and you are persuaded by Mr Targett's argument then it would be appropriate to put a qualification in, in the terms that you set - that you suggest, I'm sorry, and if you were persuaded to do that we believe that that qualification should be as strong as possible.

COMMISSIONER WATLING: Have you anything further to add on this particular point?

MR WARWICK: No, Mr Commissioner.

COMMISSIONER WATLING: Have you, Mr Targett?

MR TARGETT: No, I have nothing further.

COMMISSIONER WATLING: Right. That takes us to clause 37 - Right of entry.

MR TARGETT: This will be brief, Mr Commissioner, for me. We have put forward a proposal on a right of entry clause. The proposal we have put forward is in accordance with a decision handed down by a full bench of this commission on the 11th of November 1992 in T.4000 of 1992, and as a consequence of that full bench decision, we have written a clause which is encapsulated in clause 37 reflecting a couple of minor changes to the full bench decision which more accurately reflects the nursing homes, for example, previously the - in the full bench decision it mentions shops, factories -

COMMISSIONER WATLING: You haven't actually changed the full bench decision, -

MR TARGETT: We have not changed the full bench decision.

COMMISSIONER WATLING: - you've adapted it for the industry.

MR TARGETT: Nothing more than that and as that is a full bench decision of this commission, we would - and it was an appealed matter, we would strongly put to this commission that the clause that goes with the Nursing Homes Award should be in accordance with that full bench decision.

COMMISSIONER WATLING: We'll mark this exhibit then TCI.8. Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. I will also be brief. The matter is being arbitrated because - and I don't -

COMMISSIONER WATLING: We've got an exhibit here, have we?

MR WARWICK: - table a document, please.

COMMISSIONER WATLING: That makes it Exhibit HSUA.3.

MR WARWICK: Thank you. The matter is being arbitrated because - and I don't believe Mr Targett would be offended if I were to inform you that until recently his position was that there should not, in fact, be a clause. We, during the process of our internal discussions in the union, adopted a position and that position was that we should pursue the words contained in the Industrial Relations Act in respect to right of entry with amendments and adjustments and there are a significant number of them; I won't take you to them Mr Commissioner. I don't think it appropriate, but the words in HSU - the exhibit before you are simply the words contained in the Industrial Relations Act 1984, amended for the purposes of fitting them into: (a) an award; and (b) in particular, Nursing Homes Award.

The question before you, Mr Commissioner, is a fairly simple one and that is the provisions of the act or the provisions of the appeal full bench decision which was handed down last week. From our point of view I must say it is a far preferable position to the position we were in some time ago when we were looking at either having a right of entry clause or not having one.

In support of the exhibit we have put and our claim in that regard, we would make the point, Mr Commissioner, that the appeal full bench has made a decision in respect to an industry and an award in particular and while we acknowledge the full bench decision carries - a full bench, particularly in an appeal decision carries great weight, it's also - we'd also ask you to be mindful of the fact that the decision wasn't made in respect of this award or this industry, and I simply seek to make those comments, Mr Commissioner.

COMMISSIONER WATLING: Good. Thank you. Mr Targett, any comment?

MR TARGETT: Well I'm afraid I can't resist commenting on this one. We rely on the full bench decision and the reasons for that decision given by the full bench in its decision, but in addition to that the comments about it not being made in relation to this industry, implicit within the full bench decision on this particular matter is that the right of entry that was put in by the full bench was to reflect the act. It was not to reflect the industry. It was to reflect the requirements of the legislation of this state and was not in any way impacted upon by the industry, so on that basis, we don't believe Mr Warwick's arguments are valid.

MR WARWICK: Well I must - I can't let that go, Mr Commissioner. There is nothing in the act about - from my memory, about meal times and the full bench decision clearly says that it takes place in relation to meal times, the right of entry and the meetings that take place, and -

COMMISSIONER WATLING: The full bench actually inserted - re-inserted the original clause in the award that was changed and the full bench made some comments about the question of right of entry generally. There's no doubt about it that this particular clause the full bench relates to the metal industry, a very significant industry with a vast number of individual enterprises within the industry and of course what we are looking at here is a right of entry clause for an industry also, and I'm not too sure where they differ in terms of right of entry.

MR WARWICK: Well from my point of view I think that there are some limitations in Mr Targett's proposal in respect to, indeed, in officials may enter the premises or indeed hold meetings .... refers to meal times - they shall be conducted

at meal times. Now there is no limitation in the act; there's no prescription that we do that.

COMMISSIONER WATLING: No, the act says that it's the conditions contained in the award or the regulations - and/or -

MR WARWICK: Our proposal says: Any conditions contained in this award or the regulations, Mr Commissioner.

COMMISSIONER WATLING: In fact, the full bench decision is a direct quote from the regulations virtually.

MR WARWICK: Indeed. I don't think there's much point in pursuing it, Mr Commissioner, but other than to say we agree very broadly with the concept of a right of entry provision.

COMMISSIONER WATLING: Going into the award.

MR WARWICK: Staying in the award, I should say.

COMMISSIONER WATLING: Yes. Now we just might pause here for a moment.

OFF THE RECORD

COMMISSIONER WATLING: We now move to clause 38 - Roster, and we're specifically looking at (b)(i).

MR TARGETT: The issue in dispute between us on clause 38(b)(i) is quite a simple one in that the existing provisions contained within the award which are contained presently in clause 38 - Shift Work, subclause (b)(i) provides that rotation for rosters unless all the employees concerned desire otherwise. In our proposed - proposal for the award we have put in unless the majority of employees concerned desire or otherwise. The simple reason for doing that is circumstances and situations have arisen where non rotating rosters have been established by agreement by everybody, and then one employee for some reason decides to change their mind and they can then say: I no longer agree to non rotating rosters, they impact on everybody else irrespective of the views of all other employees bar one. We've merely changed the clause to say that it requires the majority of employees, and we've worked it on the basis that we believe in any agreed situation it should be a majority of people that have the say, not one individual.

The proposal we put forward does nothing other than provide for that. It is, in our view, an eminently fair and equitable arrangement to put in place for the - for the employees as well as for the employer, because obviously the employer can

be adversely impacted upon by the one employee, where the majority may still be happy, one employee can bring the whole thing undone.

So it's nothing more and nothing less than providing that provision in the award. I have difficulty accepting that the union should oppose such a concept of majority decisions, when I would have thought that the very foundation of the union movement, or that which they claim to be built on, provides for majority rule, then this particular provision should not create any difficulties, so we ask the commission to provide the clause 38(b)(i) in the terms which we've set out in TCI.6.

COMMISSIONER WATLING: Right, so this would mean that a rotating roster would be the norm -

MR TARGETT: Yes.

COMMISSIONER WATLING: - unless a majority decided that they didn't want it rotating?

MR TARGETT: That is correct.

COMMISSIONER WATLING: Right.

MR TARGETT: Whereas at the moment -

COMMISSIONER WATLING: Now when you talk about majority, is it a simple majority or a two-thirds majority or -

MR TARGETT: A simple majority.

COMMISSIONER WATLING: Right. And now you use an example at the moment where in the award - there is a provision in the award currently that talks about all employees must require it.

MR TARGETT: Yes.

COMMISSIONER WATLING: Now if they do vote in favour of it -

MR TARGETT: Yes.

COMMISSIONER WATLING: - and - and it's implemented -

MR TARGETT: Yes.

COMMISSIONER WATLING: - how can one employee's change of mind destroy it?

MR TARGETT: In our - in our submission, that it requires an ongoing continual agreement of all employees to retain it. Because the words don't say - the words in the existing award say that it shall be a rotating roster unless all employees

agree otherwise. As soon as we've got a situation where all employees don't agree to a non rotating roster then it is, in our submission, a rotating roster, doesn't have a provision for all employees deciding to go back to a rotating roster.

COMMISSIONER WATLING: All right.

MR TARGETT: And once you do not have full agreement, then you're back to a rotating roster based on the way the existing provisions are provided. Now that's okay. All we're saying is that for it to be all employees is inequitable and unreasonable. We're saying the same provision is fine if it is the majority of employees. If the circumstance was that it's a rotating roster unless all employees agree otherwise, so all employees say, okay, non rotating, and once that's in place, they can't get out of it, fine. But that isn't the way I read the award. I believe that once they do start to pull out of it, then they go back to a rotating roster. And what my provision provides for is a majority of employees say non rotating, then that's okay, it then requires a majority of employees to go back the other way.

COMMISSIONER WATLING: So you might need - if you were to have that all employees vote - have to vote in favour of it, you then have to have a provision of how it's then overturned.

MR TARGETT: You would have to, because at this point in time, in my submission, it only requires one person to say we do not agree - I do not agree with this any more, and then the whole thing is gone.

COMMISSIONER WATLING: Have you discussed the option with the union having all employees voting in favour of it, and - and then looking at a separate provision of - separate provision dealing with getting out of it?

MR TARGETT: No, the discussions we've had with the union have revolved around majority rule at all times.

COMMISSIONER WATLING: So it wouldn't make any difference to your claim if you had a clause that said all employees must vote in favour of it, then move to a situation where having voted in favour of it, how it's undone and by what sort of notice it's undone?

MR TARGETT: No, it wouldn't worry me. The concerns from the employers that have been expressed in our, you know, going around the homes to sort this out, has been the undoing of the arrangement. It hasn't been the - getting the arrangement in place, it's been the reverse, because the situations have arisen where there's been a disgruntled employee.

COMMISSIONER WATLING: So there was - so it - there's a - it's creating uncertainty all the time that it's -

MR TARGETT: Exactly.

COMMISSIONER WATLING: - it's not in for good.

MR TARGETT: That's right. Having said that, and I don't resile from what I stated, that if it was all to get into it and some other - some specific arrangements for getting out, you know, that wouldn't worry me, I still believe is a fundamental principle that these sorts of issues should be determined by the majority anyway. But, you know, if there was some other mechanism to overcome that, then I wouldn't be averse to it.

COMMISSIONER WATLING: Right, thank you. Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. Firstly can I say that I don't believe that whatever Mr Targett holds as his view of the attitude of the union that it's not a matter of philosophy or ethics, particularly philosophy ethics of the trade union movement. It's a matter of what works in workplaces, the award should deal with formulas that work, the current formula works. While Mr Targett suggests that the current system is open to being abused by individuals, we believe that a majority approach would also allow for influence and favouritism to be exercised workplaces. People, particularly employers, could use the majority provision to say to a slight - a number of people slightly above the majority, well, if you agree to work a non rotating roster then you can have the best shifts - and that's the danger in it that we see.

I think we need to go back and think a little bit about why rotating rosters are in the award - they're in the award because they're fair.

And - and I think even the definition which the TCI has put to us in respect of rotating rosters in which they've negotiated with us and put in the award.

COMMISSIONER WATLING: So is it your view then that all rosters should be rotating rosters, full stop?

MR WARWICK: No, it's not my view. Employees should have the right to have a non rotating roster, by all means. But if it's - if it's by a prescription that says that they all agree, then no employee is imposing on another, a non rotating roster. All of the employees.

COMMISSIONER WATLING: Right. How would you respond then to my question that I put to Mr Targett, if all the employees have to vote in favour of it, it must follow that there has to be some provision of how it's undone.

MR WARWICK: I think that's reasonable, Mr Commissioner.

COMMISSIONER WATLING: You just can't have a situation where by one employee saying, I now don't want to be in it, then it undoes it. You certainly - if you're objecting to the word majority of employees voting in favour of it, you must be abhorrent if - if one employee can take it away.

MR WARWICK: Yes, I think there's a definite problem there with that happening. I can see that. But there are equal problems on the other side, we believe.

COMMISSIONER WATLING: Would there be any -

MR WARWICK: People being played off against each other with a majority.

COMMISSIONER WATLING: Would there be any mileage in the parties going away and - and looking at that particular aspect and see if they can agree on some words?

MR WARWICK: Certainly if, if as the result of a decision, Mr Commissioner, if we were - if there was a recommendation coming from the bench to negotiate the matter further, we would welcome such a recommendation.

COMMISSIONER WATLING: Well I would have to say I don't agree with the system where one employee can undo the lot, because then the argument about majority - there's not even a majority - one could undo it.

MR WARWICK: Yes.

COMMISSIONER WATLING: So, you know, if you're really concerned about a majority of employees voting in favour of it, you must be equally concerned about one employee being able to undo it.

MR WARWICK: Yes. It's a difficult - it's a difficult question.

COMMISSIONER WATLING: May - maybe after having voted in favour of a non rotating roster, a majority of employees must vote in favour of removing it.

MR TARGETT: I have no difficulty with that concept at all.

COMMISSIONER WATLING: Rightio, well, I think what I'll do is that I'm going to request the parties to go into conference on this particular issue and - and advise me within the next 48 hours of their position on this particular question including documentation if required.

MR WARWICK: Thank you, Mr Commissioner.

COMMISSIONER WATLING: Right. So for the purposes of the record then, on this particular question, I'd be prepared to take your submissions in writing on this particular question. If you agree then that package will go into the agreed package - if you disagree then you should probably commit your views on this particular clause to writing.

MR TARGETT: That's most acceptable.

COMMISSIONER WATLING: And then the written submission on this aspect will be attached to the transcript.

MR TARGETT: Right.

COMMISSIONER WATLING: Rightio?

MR TARGETT: Yes.

COMMISSIONER WATLING: Now that brings us to the next clause, which is clause 41 - Sick Leave.

MR TARGETT: There is one issue still on the rosters clause, Mr Commissioner.

COMMISSIONER WATLING: Oh right, yes, sorry.

MR WARWICK: Commissioner, if I could refer to HSU.2; and it's the fifth page in from the back of that document.

COMMISSIONER WATLING: Right.

MR WARWICK: The hospital - sorry - the Nursing Homes Award currently contains the provisions contained at the bottom of this page starting at - of this clause - starting at 39(c)(ii) and going through to about halfway through the second page, Mr Commissioner. I've done some adjusting with these provisions. They've been - they have been amended from the original award to incorporate the roster - roster concept - roster as defined concept and rostered employees as defined, and also there were some shift provisions or shift definitions which appeared in the old award - they now appear as roman numeral four to this subclause.

The provisions, Mr Commissioner, basically say that in a circumstance where an employer imposes a non rotating roster on employees who desire otherwise, the employer is obliged to pay certain additional penalties. Those penalties are set out in C.3(a) which is during a period of engagement on a roster as defined works night roster only, or (b) remains on a night roster for a longer period than four consecutive weeks, or (c) works on a night roster which does not rotate or alternate with another roster or with day work so as to give such employee one third of his .... working cycle time off night

roster and each roster cycle. And then it goes on to say that those people will be paid 30 per cent more.

Those provisions have a long standing history in the award, Mr Commissioner, and the TCI - TCI has put to us a view that you can't have a non rotating roster unless the employees agree, but we would say that you can have a non rotating roster unless the employees agree, and you can establish one at the point of employment. I'm sure the TCI would argue that that's agreement. In our view it's not a genuine agreement.

If it's someone getting a job, they may agree to - to anything in actual fact. And this document - or this claim that we're making seeks to protect those people, that they can't be stuck on night shift forever without their agreement, or that they have to have some sort of time off. And we would - we believe in the interests of fairness and equity that those provisions should be retained in the award.

COMMISSIONER WATLING: Doesn't that conflict with (b) though?

MR WARWICK: With (b)?

COMMISSIONER WATLING: Yes. Because (b) says: shall be rotating unless - right? It's mandatory, that it shall be a rotating roster, and so -

MR WARWICK: Well I'm not sure that the - oh, that is correct, Mr Commissioner, that is what the award says, but I'm not sure that that's what's observed in the field.

COMMISSIONER WATLING: Well if it's not observed, isn't it then a breach of the award?

MR WARWICK: Indeed.

COMMISSIONER WATLING: So should it not be then pursued as a breach of the award if they don't observe the award?

MR WARWICK: Well the existing provisions in the award, the union can make a claim on an employer for those provisions.

COMMISSIONER WATLING: Well either this section has to say it's a rotating roster or it's not a rotating roster. Right?

MR WARWICK: Mm.

COMMISSIONER WATLING: It says that it shall be rotating roster unless the employees desire otherwise. Right? It shall be.

MR WARWICK: It comprehends both, Mr Commissioner, the potential for both. Well what it -

COMMISSIONER WATLING: Yes, it does.

MR WARWICK: - it shall be - what it really says is, that they shall rotate if the employees agree otherwise, they only get 15 per cent for shifts.

COMMISSIONER WATLING: Well - but isn't -

MR WARWICK: They don't get any additional penalty. This says if they don't agree they do get an additional penalty.

COMMISSIONER WATLING: Well why does - why doesn't the (b) start off by saying then, a roster, as defined, established under this clause - under this clause shall be either rotating or non rotating?

MR WARWICK: It's a good question - there's no reason for drafting purposes why it shouldn't.

COMMISSIONER WATLING: Well you might either try to enlighten me. I - I feel that (b) makes it mandatory to be a rotational roster unless the employees decide that they want something different - unless the employees decide they want something different.

MR WARWICK: Yes.

COMMISSIONER WATLING: Now, through the introduction of this provision, you're saying that clause (b) - subclause (b) isn't mandatory at all, because the employer can implement it by going to clause (c) - doesn't even have to have a majority of people.

MR WARWICK: Well does that mean that it's - well it says that the employer can override (b) but there is a cost to the employee. That's what it says - and a fairly steep cost I would have thought as well.

COMMISSIONER WATLING: What if I - what if I was to alter (b) to say that the roster - a roster as defined established under this clause may be either rotational or non rotational?

MR WARWICK: Oh, I don't think -

COMMISSIONER WATLING: Because we could do away with all those extra words then.

MR WARWICK: Yes, well I don't think I'd want you, Mr Commissioner, to - to do away with the provisions that says that all employees concerned desire otherwise. Certainly. Well, let me say to you, Mr Commissioner, if you see the two things as inextricably linked and mutually exclusive, one or the other -

COMMISSIONER WATLING: I can't see how you can say it shall be a rotating roster in one clause and then in the very next subclause say they can do otherwise.

MR WARWICK: But the clause itself says they can do otherwise.

COMMISSIONER WATLING: Well either the system must be a rotational roster system unless the employees decide. But that totally conflicts with the next clause that says the employer can decide to have a non rotational roster. Forget the dollars in it - look at the principle of it.

MR WARWICK: Mm. Well I don't see any reason why the clause couldn't include the provision. There shall be non - rotating rosters and non rotating rosters. If all of the employees wish to rotate they shall rotate.

COMMISSIONER WATLING: Well you can't say - it has to - shall means - it's fairly strong, right.

MR WARWICK: Mm.

COMMISSIONER WATLING: I think it would have to say may be either rotational or non rotational.

MR WARWICK: Indeed.

COMMISSIONER WATLING: So they've got the choice.

MR WARWICK: Indeed, but it would still say - I'd still need to go on to say that if the employees desire a rotating roster they shall have one, and they shall be 50 per cent as the penalty rate. If they choose to not work a rotating roster they shall have 50 per cent as a penalty rate, but if the employer chooses to have a non rotating roster the employer shall pay those penalty rates. That's probably the proper construction that should be on it, because there are rotating - there are non rotating rosters out there that people don't want to work. Notwithstanding Mr Targett's comments about it.

COMMISSIONER WATLING: Yes, but they can only have a non rotating roster if all the employees at this moment decide they don't want it. Right?

MR WARWICK: And when they do so, they forego the penalty rights - penalty rates in (c).

COMMISSIONER WATLING: Right.

MR WARWICK: And in rotating they forego the penalty rates in (c).

COMMISSIONER WATLING: So you want the employers to impose it so they get the extra money?

MR WARWICK: No, no, we want -

COMMISSIONER WATLING: Would you prefer -

MR WARWICK: - we want that clause in the award to act as a deterrent -

COMMISSIONER WATLING: So -

MR WARWICK: - against people working those unsociable shifts.

COMMISSIONER WATLING: So if you only want it in the award as a deterrent - right - wouldn't it be more appropriate then to say it shall be rotating? And then if they don't rotate it, that is a breach of the award.

MR WARWICK: Well, we would go to the Magistrate's Court, Mr Commissioner, and the magistrate would say, yes, Mr Warwick, the award has been breached. Ta-ta.

COMMISSIONER WATLING: But there is a penalty for breaching the award. You probably noticed one the other day with the estate agents.

MR WARWICK: Well, I am not sure that there is much more I can add, Mr Commissioner.

COMMISSIONER WATLING: Yes. But I am just trying to work out - if one subclause says you can't do it and the other subclause says you can - and now you are really saying to me that you just want it there as a deterrent because you really want them to have a rotating roster, unless the employees decide.

MR WARWICK: No, no, I don't want this to turn into a question of what I want, Mr Commissioner. I mean -

COMMISSIONER WATLING: Well that's what you said. You said you wanted it there only as a deterrent.

MR WARWICK: Well, we are going on the question of the work value - I'm extrapolating from the vote of the employees on the question of all, and you know, they want all people to be agreeable to a non rotating roster, and these provisions comprehend what happens when a non rotating roster is imposed.

So, I think that it is a logical connection between the two.

COMMISSIONER WATLING: Right.

MR WARWICK: Thank you.

MR TARGETT: The provisions being sought by Mr Warwick, in my view, are totally inconsistent with what's contained in the award elsewhere - primarily subclause (b)(i) - and I think from Mr Warwick's own mouth he has put forward the fact that what he seeks to put into this award is, in reality, a penalty for a breach of the award.

And it is our submission that the commission is unable to insert into this award a penalty for a breach of the award.

It is black and white that the employer is unable to impose a non rotating roster by virtue of the words contained in subclause (b)(i). If they impose a non rotating roster they are in breach of the award. That, in my view, is absolutely explicit.

If that is correct, Mr Warwick is seeking to impose a penalty for an award breach, and that cannot be done, in our submission. I don't believe I need to add anything further to that, Mr Commissioner.

COMMISSIONER WATLING: Anything else?

MR WARWICK: No, Mr Commissioner.

COMMISSIONER WATLING: Right. That takes us to the sick leave question - sorry - yes, the sick leave question, clause 41.

MR TARGETT: The essence of the dispute in relation to our proposal on sick leave in subclause (h) goes to part time employees and the quantum of sick leave that part time employees would receive.

The existing provisions contained within the award provided two sets of sick leave provisions. One for those employees working 20 or more hours per week, and those working less than 20 hours per week.

It is our submission that in an attempt to make the award simpler, to make it a fair and equitable document for all concerned, that the provisions for all part time employees should be the same, and the method used for calculating that is that they all receive straight pro rata sick leave based on the full time hours.

The calculation contained in our document in subclause (h)(i) is that which was contained in the - or is contained - in the original document in the original award for employees receiving - working - less than 20 hours per week. We have merely varied the document to apply that to all part time employees. It is nothing more than an attempt to create a matter of fairness and equity.

The existing provisions contained within the award in clause 39 - Sick Leave, subclause (h)(i) and (ii) are, in our view, iniquitous. They also, in our view, create substantial difficulty in applying sick leave as far as the employers are concerned, and it creates a situation where an employee that is working 30 hours per week receives the same sick leave as a full time employee, which is iniquitous; an employee working 20 hours per week receives the same as an employee working 30, which is iniquitous; and yet those working less than 20 hours, irrespective of what they receive - what they work - receive pure pro rata.

It is fundamental to our claim to provide a situation of fairness and equity in this particular set of circumstances. The provision that we are putting forward is already accepted by the commission in this award as being appropriate for part time employees in the lower category. We merely ask that that same provision be extended to apply to all employees.

In the change from the old to the new we do not believe that employees will be disadvantaged because obviously any accruals which they have received up until the time of the change of the award would be preserved, and that the savings provisions and the new calculations would then commence. On that basis, Mr Commissioner, we would ask that the provision we have provided in TCI.6 be inserted into the award.

COMMISSIONER WATLING: Good. Thank you. Mr Warwick?

MR WARWICK: Thank you, Mr Commissioner. We don't believe there is anything in the structural efficiency principle which requires people to receive less sick pay.

We don't believe that - well, we don't necessarily oppose Mr Targett's argument that there are certain anomalies in the system, however, we do oppose his solution which is to reduce the benefits which employees are entitled to.

The people who work more than 20 hours per week and who receive these benefits have received them for a significant period of time. We don't see any reason why they should surrender them. There is no obligation under the principle to surrender them. And if Mr Targett wants standardisation of benefits, then what's wrong with providing some sort of sliding scale for the people who work less than 20 hours a week? And that would be our secondary position in respect to that matter, Mr Commissioner. If the commission pleases.

COMMISSIONER WATLING: Mr Targett?

MR TARGETT: I don't think I need to add anything, Mr Commissioner. The simple fact of the matter is we're looking for fairness and equity, nothing more nothing less. We don't

believe Mr Warwick has addressed that issue or put forward anything which would suggest otherwise.

COMMISSIONER WATLING: Right. That brings us now to the question of, let me see, union deductions, union dues deductions.

MR WARWICK: Thank you, Mr Commissioner. The last page of HSU.2 contains the union's subscriptions clause which is much the same as the prescription from the last award except that it does not talk about quarterly in advance, rather it talks about fortnightly. The provision has been in the award for many, many years.

COMMISSIONER WATLING: Did it go in by consent or by arbitration?

MR WARWICK: Has it been in the award?

COMMISSIONER WATLING: Yes.

MR WARWICK: By consent, I believe. It surprises us somewhat that the employers in the nursing home industry appear to not want this clause in the award, notwithstanding our long and beneficial and mutually acceptable relationships with those people, and the low incidence of disputes in the nursing home industry reflects our good working relationship with those people.

In fact, we've had some discussions with the employers and we - as individual employers - and there was certainly wide consensus amongst them that the process of union deductions or subscriptions will continue.

And I must say that it surprises us somewhat that there is not a matter of consent with respect to the continuation of such a clause in this award, and we oppose its abolition from the terms of the award.

COMMISSIONER WATLING: Now, could you tell me where it becomes an industrial matter? Do I have jurisdiction to deal with this issue?

MR WARWICK: I recognise there are certain difficulties in respect to the opposition with regard to arbitration, Mr Commissioner.

COMMISSIONER WATLING: No, but we can only include things in the award that are an industrial matter. Does this fall within that?

MR WARWICK: Well, I think it is something that needs to be tested, Mr Commissioner. I don't intend going through the cases in relation to the matter, or the possible relevant

cases in relation to the matter at great length, save to be the one matter that Mr Targett has put to me that he relies on.

That is .... versus Pyritous ex parte the ANZ Bank in 1973. There was a decision in respect of that matter.

COMMISSIONER WATLING: Which was in favour, or -

MR WARWICK: Which upheld that it was not a - union deductions was not an industrial matter - within the meaning of the Conciliation and Arbitration Act. And obviously -

COMMISSIONER WATLING: Is that because it didn't regulate -

MR WARWICK: Pardon?

COMMISSIONER WATLING: Is that because it didn't regulate the business of the employer and the employee?

MR WARWICK: Well, I am not - as I understand it, those were the terms of the definition - but it was particularly specifically with regard to the definition of an industrial matter in the Commonwealth Act, not the Tasmanian Industrial Relations Act 1984. So there may be a question in respect of that.

COMMISSIONER WATLING: So what was that reference again? Pyritous -

MR WARWICK: .... versus Pyritous ex parte the ANZ Bank 1973. Perhaps I'd conclude my remarks simply by saying, Mr Commissioner, that there is, as you are well aware, a political agenda in relation to all of this, but it's perhaps not irrelevant of me to say that it is my understanding that there is some move to retest the matter in the High Court, so perhaps I'll leave my comments at that.

COMMISSIONER WATLING: Good. Mr Targett?

MR TARGETT: Thank you, Mr Commissioner. I'll hand up these documents as an exhibit. I don't know whether you wish to number them together or separately.

COMMISSIONER WATLING: Right, well we'll number them together, and they will be TCI.9, and the documents are Minutes of the Automotive Industries Industrial Board, and the Appeal Tribunal Decision of Ogilvie, Heavey and Nutting.

MR TARGETT: Thank you, Mr Commissioner. I do not intend to go through these two decisions in great detail - in enormous detail. I provide them for the commission for one very fundamental purpose.

The decision of the Automotive Industries Industrial Board in A. No. 57 of 1981 determined the matter by the Assistant Deputy-Chairman Holden at the time that the question of union dues deductions was not an industrial matter in terms of the legislation of the Industrial Relations Act 1975, I think it was at the time. And, in doing so, refused to include the matter of union dues deductions into the Automotive Industries Award.

That matter then went to the Industrial Appeals Tribunal before Ogilvie, Heaving and Nutting where the decision of Holden was upheld by the Industrial Appeals Tribunal, and in that matter the tribunal examined in detail the question of industrial matter in relation to union dues and went through the provisions of the relevant legislation at the time.

When comparing the examination of that legislation by the tribunal with the definition of an `industrial matter' in the legislation that currently exists, namely the Industrial Relations Act 1984, the terms of both the Industrial Relations Act 1975 and 1984 - or the definition of industrial matter - are almost identical other than a few minor variations in the words.

And it is our submission that the decision of that tribunal and upholding the decision of Holden was correct, and applies today as it did then, despite the change in the legislation, because of the similarity in the words.

In addition to that, the tribunal also examined quite a number of precedents which have resulted from both the federal commission and other state commissions and applied those precedents to this jurisdiction, where appropriate. And I put that it is beyond jurisdiction of this commission to put into the award a clause requiring the deduction of union dues. If it please the commission.

COMMISSIONER WATLING: Thank you. Mr Warwick?

MR WARWICK: Nothing further to add, Mr Commissioner, other than I sincerely hope that this is not the beginning of a deterioration of the industrial relationships between ourselves and the employers in the industry.

COMMISSIONER WATLING: Well, any further matters that we need to -

MR TARGETT: Time and wages.

MR WARWICK: Well, records of employment, in actual fact.

COMMISSIONER WATLING: Time and wages records. We'll mark this exhibit HSUA.4.

MR WARWICK: Thank you, Mr Commissioner. This - the provision we seek, as set out in exhibit HSUA.4, is a direct and complete lift from the Industrial Relations Act 1984, with only the necessary amendments to make it relevant to an award format. Do you see it as necessary to take you through it and advise you of the various adjustments, Mr Commissioner?

COMMISSIONER WATLING: No, I think I am capable of reading it. I take it that you have only just adapted this to fit this industry.

MR WARWICK: I've simply - I've renumbered it, Mr Commissioner. The act does have some headings in relation to matters like True Record, Person Ceasing to be an Employee, and so on. I have taken those out because each of the subclauses in the award would stand alone. Wherever the regulations are referred to in the act I refer to the regulations of the Industrial Relations Act.

COMMISSIONER WATLING: Well, just take an example to (g). Why would we put (g) in there? Given that I have only given a quick glance at it. How can we put penalties in in relation to (f) for example? And (h).

MR WARWICK: Yes, I'd amend the application, Mr Commissioner, to doing that, taking those two subclauses out.

COMMISSIONER WATLING: So you want me to take the last page off? Get rid of (g) and (h). What about (f)?

MR WARWICK: Yes, that is hardly relevant, Mr Commissioner.

COMMISSIONER WATLING: Take out (f), right.

MR WARWICK: Given, jurisdiction matters.

COMMISSIONER WATLING: We are going at a pretty quick rate here. We might get back - what about (e)?

MR WARWICK: Yes, I don't think that serves much useful purpose, given that it is not a matter that's under the jurisdiction of the commission. I think that the rest of the matters are probably relevant to the commission's jurisdiction, Mr Commissioner.

COMMISSIONER WATLING: Right. Now, what about (d)? Can we force an employer by an award to make his records available to another employer on exchange of business via the award?

MR WARWICK: It may not be the case that you can, Mr Commissioner. Perhaps I'd seek to amend (e) and (f).

COMMISSIONER WATLING: Right. What about (c)?

MR WARWICK: I'm not sure. I'd be interested in your opinion.

COMMISSIONER WATLING: Well I think that's why some of these - you see, we have got to regulate the contract of employment between the employer and the employee in an award. The act provides to cover other things for other reasons. This is regulating the sale between one employer and another employer.

MR WARWICK: Well, we are left with (a) and (b), Mr Commissioner.

COMMISSIONER WATLING: Right. Let's have a look at (b).

MR WARWICK: I think it would be safe to say that it is subclause (a) that's the one we're particularly interested in. It really comes down to a matter - it's not a question of what the obligation of the employers are, Mr Commissioner, it's a question of whether or not they know what their obligations are.

COMMISSIONER WATLING: Yes. In a number of restructured awards that we've had in recent times both parties are agreeing to put in under the heading of records of employment a reference to the Industrial Relations Act 1984 saying that time and wages records are to be kept in accordance with the Industrial Relations Act 1984 and the regulations relating thereto; because the regulations are quite significant as well - they are more precise, in fact.

MR WARWICK: Well, first we should hear from Mr Targett on the issue, Mr Commissioner.

We believe strongly that there should be some provision in the award which alerts employers to the fact that their responsibility is to keep records.

COMMISSIONER WATLING: So, you wouldn't -

MR WARWICK: Employers in the industry are in the business of running nursing homes, they are not in the business of being aware of every facet of the law as it applies.

COMMISSIONER WATLING: So you wouldn't oppose a reference back to the act or the regulations?

MR WARWICK: As a secondary position, Mr Commissioner, we would see that as a reasonable outcome. If the commission pleases.

COMMISSIONER WATLING: Mr Targett?

MR TARGETT: Mr Commissioner, the position of the employers has simply been that because it is prescribed in the act or

the regulations they didn't believe it was necessary to incorporate it into the award.

If, in the interest of - to expedite this matter - if Mr Warwick was happy enough to put it in on the basis of the first part of (a) in that an employer shall make a true record, etc., down to the Industrial Relations Act 1984, for simplicity purposes I will withdraw any objection I have to having that included into the award.

It is not a matter of anything other than I don't see the necessity for it to be there, but if it is of such importance we're satisfied that a reference back to the act is all that's required.

COMMISSIONER WATLING: And the regulations.

MR TARGETT: And the regulations. That is all that's required.

COMMISSIONER WATLING: Well, can we get agreement on that?

MR WARWICK: No, I'd rather you determined the matter, Mr Commissioner, bearing in mind my secondary position.

MR TARGETT: Could I just for clarification purposes find out what Mr Warwick's first position is?

COMMISSIONER WATLING: The first position is (a).

MR TARGETT: Full stop?

COMMISSIONER WATLING: Yes. HSUA.4A.

MR TARGETT: I will agree to the inclusion of subclause - of (a) in HSUA.4. I don't see the necessity for it, quite frankly.

COMMISSIONER WATLING: Yes, well -

MR TARGETT: But to minimise -

COMMISSIONER WATLING: Maybe we'll just go off the record for a moment.

OFF THE RECORD

COMMISSIONER WATLING: Right, well I have heard the position of Mr Warwick and he has argued in accordance with exhibit HSUA.4, and in particular (a). Mr Targett has given his view on the matter. I think it's best left in my hands to

determine the issue. There being no further argument on this issue, any further matters?

MR WARWICK: I just seek to table a document, Mr Commissioner.

COMMISSIONER WATLING: Right, now seeing that we have been through the arbitrated matters now, can I take it that all the other matters contained in exhibit TCI.6, as amended, are agreed?

MR WARWICK: They are, Mr Commissioner, save that I would like an opportunity overnight to examine the translation schedule and contact you in relation to that.

COMMISSIONER WATLING: Right. In which case, you'll inform me tomorrow morning.

MR WARWICK: Yes.

MR TARGETT: It is agreed from my perspective, yes.

COMMISSIONER WATLING: Right. And, other than that, all the other outstanding things are agreed?

MR WARWICK: Yes, Mr Commissioner.

COMMISSIONER WATLING: Right.

MR WARWICK: With respect to exhibit TCI.6.

COMMISSIONER WATLING: Yes.

MR TARGETT: TCI.6.

COMMISSIONER WATLING: TCI.6.

MR TARGETT: I changed sides ages ago.

COMMISSIONER WATLING: Now, Mr Warwick, you want to tender another document on translation. We'll mark this HSUA.5.

MR WARWICK: I wonder, Mr Commissioner, if I might briefly explain the document, but other than that, seek to have it incorporated into the transcript as part of the record? The document recognises that disputes may arise in respect to translation to the new award. It says that:

> There is an agreement to use the consultative mechanism.
>
> There won't be a spill of positions in respect to jobs.

People will not be required to reapply for their positions.

Translation will be based in each case to the same rate of pay or the next highest rate of pay.

Translation will occur after the 2.5% state wage case decision of 13th August has been applied to the existing classifications in the award.

Well, that's more or less true. Indeed, we appreciate now that the broadbanding will take place before the application of the 2.5 per cent.

The document then talks at 4 as to what will happen by way of a grievance procedure where there are disputes, and it is fairly much the standard grievance procedure in that regard, we believe, which says that:

Any matter which cannot be resolved will end up here for determination.

At 5 the document says:

The parties agree to negotiate on all training matters relating to the restructuring process.

COMMISSIONER WATLING: So, can I just ask that the employer forward their documentation to your federal body, do they? In (a), the second paragraph.

MR WARWICK: No. That's intended to be the Tasmanian branch, Mr Commissioner, and I'd amend the exhibit to that extent.

There is an agreement that:

The parties will negotiate on all training matters relating to the restructuring process, including job redesign, induction training, modular training, and union steward training.

And the document then at 6 says:

That translation will expire after 6 months -

- this agreement will -

- and nothing shall prevent an employee after this date from seeking reclassification based on the new standards.

Employees may seek promotion at any stage.

And identifies who the parties are.

The document is more or less for the purpose of circulation amongst the employees and the proprietors so they will know how to go about implementing the new award. And it is important, I think, they form part of the record of these proceedings.

Before I sit down again, Mr Commissioner, I'm unaware as to whether or not the commission has been informed of the document that sets out the salary rates which apply at the end of the broadbanding process. Perhaps Mr Targett could assist me in that regard.

COMMISSIONER WATLING: Right. Thank you. Mr Targett?

MR TARGETT: Thank you, Mr Commissioner.

COMMISSIONER WATLING: We'll mark this TCI.10.

MR TARGETT: TCI.10, Mr Commissioner, is a document which reflects in relation to each of the levels in the three streams, the final wages relativities, and the final wage rate at the completion of all wage rates adjustments and broadbanding processes, which includes the 2.5 per cent wage increase - the subject of another hearing - in addition to which there are phased in wage rates adjustments. The only alteration I would seek to make to this is on the second page, Mr Commissioner.

Level 4, the 92 per cent should be 92.1 per cent. That does not impact on the wage rate.

And I provided that for the commission's information to show that the relativities in TCI.6 - although they don't reflect the final wage rates in that document - how it will apply at the end of the day, at the end of the process, what the final wage rates will be, and also as an indication to the commission of the size of the adjustments that are required to move from our position in TCI.6 through to the final position.

We proposed that we reach the final position with another increase - well, at this stage, we are talking about 1 January - which would have to be subject to a separate application. In addition to that, a further increase on 1 July '93, and a further increase 1 January '94, and again 1 July.

So they would have to be subject to a separate application to move those rates.

COMMISSIONER WATLING: So is a phase in period -

MR TARGETT: Four steps.

COMMISSIONER WATLING: Four steps.

MR TARGETT: Correct. Commencing 1 January. Having said that, Mr Commissioner, the only point I would like to make before I conclude is that the processes that we've undertaken for this particular exercise, and the matters which have been addressed throughout these proceedings are, in our submission, in accordance with the wage fixation principles, the structural efficiency principle in total and, in addition, I do not believe that anything that has been put to this commission would in any way offend the public interest criteria contained within the Industrial Relations Act. We ask that the matter be determined at the commission's earliest opportunity.

COMMISSIONER WATLING: Is there any submission on the operative date?

MR TARGETT: Date of decision.

COMMISSIONER WATLING: Right. Mr Warwick, have you anything to add?

MR WARWICK: Thank you, Mr Commissioner. Simply in respect of the date of decision, we would make an application for today's date, bearing in mind that the matter has been a long, arduous process, and we've had a number of major significant questions to deal with, as you would be aware, in other areas.

Nonetheless, we have finally got to this point, and I think it is perhaps worth pointing out, to my knowledge, Mr Commissioner, that this is the - with the exception of the Public Sector Medical Practitioners Award - to my understanding the first paid rates award of the Tasmanian Industrial Commission to have been restructured. And that is something of a significant achievement.

And the task has been a significant one, and the employees in the industry are interested to know where the broadbanded rates are, and also where the 2.5 is.

Of course that's another matter, but on that basis, Mr Commissioner, and bearing in mind their patience, we would respectfully put a submission for today's date.

COMMISSIONER WATLING: Do either parties wish to address me on any further issues relating to these applications?

MR TARGETT: I have nothing further.

COMMISSIONER WATLING: Mr Warwick?

MR WARWICK: No, sir.

COMMISSIONER WATLING: Right. Well, that concludes these two applications.

HEARING CONCLUDED