

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T Nos 5044 and 5110 of 1994

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

re Clause 7 - Definitions and restructure
of the award

DEPUTY PRESIDENT

HOBART, 13 October 1994
continued from 7/10/94

TRANSCRIPT OF PROCEEDINGS

Unedited

DEPUTY PRESIDENT ROBINSON: Mr Jarman, your presence is welcomed here, I think.

MR M. JARMAN: Thank you, Mr Deputy President. Well, Mr Deputy President, we seek to appear on behalf of the Minister for Industrial Relations on behalf of the Crown. We seek leave to intervene in these proceedings in the public interest in accordance with section 27 of the act. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Section 27 of the act makes it fairly clear, I believe, but I give the opportunity for other parties to comment upon the application of intervention.

MS HARVEY: We have no objection to the government's intervention, in fact we welcome it in terms of clarifying the government's position.

DEPUTY PRESIDENT ROBINSON: Thank you.

MR FITZGERALD: We have no objection to the government's application for intervention, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: There is no objection. You have law on your side. You may proceed, Mr Jarman.

MR JARMAN: Thank you, sir. Mr Deputy President, the minister is seeking to intervene in this matter under section 27(1) of the Industrial Relations Act 1984 in the public interest. The public interest in this matter arises from the fact that the government provides a significant level of funding to organisations who deliver services to people with disabilities. The government therefore has a responsibility to ensure that a high quality service is delivered to those members of the community who require such assistance. It also has an obligation to ensure that the funds it allocates are used effectively to provide the best possible care.

The government also recognises that employees are entitled to be covered by appropriate conditions and to be remunerated in accordance with the level of the work they perform. However, there will inevitably be costs associated with this restructuring exercise and they will have to be funded from limited resources. The government has an obligation in the public interest to ensure that the cost impact will be minimised.

The Department of Community and Health Services allocates funding to the non-government sector primarily through three funding programs: the Commonwealth/State Disability Agreement, or CSDA; the Disability Services Grants Program, or DSGP, and the Community Integration Program, CIP. All services funded through these programs are required to be assessed in accordance with the standards for services for people with

disabilities. The CSDA is an agreement between the Commonwealth and the states and territories for the provision of services to people with disabilities. It came into effect on 1 July 1992 and the funding available to the non-government sector under the CSDA in 1994/95 is approximately \$9.8 million.

Under the CSDA the state has responsibility for the majority of service types such as accommodation, recreation and independent living training. One hundred percent of the funding which was available to organisations through the Commonwealth was transferred to the state under the CSDA. This, however, does not mean that the Commonwealth provides 100 per cent of an organisation's budget or that all costs are met by the Commonwealth. A large number of services seek financial supplementation from other sources such as fund-raising activities.

The Community Integration Program, or CIP, was introduced in 1991 to integrate residents of Willow Court into appropriate community base supported accommodation. CIP clients receive support in order to achieve optimal self-sufficiency and functional performance. The types of support also include day-time support and recreational opportunities. The CIP program is totally funded by the state government with no Commonwealth supplementation. A total of approximately \$12.86 million was allocated to CIP in 1993/94. The majority of CIP-funded organisations have been developed as alternatives to Willow Court. These organisations are 100 per cent funded to ensure that adequate levels of support are available.

The Disability Services Grants Program, or DSGP, is a state-funded program with an annual budget of \$700,000. Over 40 organisations receive grants through the DSGP. Many of these services provide an information or community education role which benefits a large number of clients. Funding for DSGP is guaranteed at 100 per cent of organisational budgets and a large number of service providers seek additional supplementation from other sources. It is estimated that only a few disability services grants programs will be affected by the WAVA award.

From the information I have provided it can be seen that a significant proportion, and we would estimate well over 50 per cent, of the total budget for disability services is solely funded by the state government. There is no possibility of obtaining additional funds from the Commonwealth for those services. I would also stress that for the remaining services, whose major income source is Commonwealth funding, there is no guarantee that any additional money will be available. The term 100 per cent funded can therefore be misleading if it is used outside its correct context, as it implies that services will automatically receive a budget sufficient to cover all running costs.

Standards for people with disabilities. In order to give a full picture of funding arrangements I would also like to briefly outline the standards for people with disabilities. All services receiving financial assistance from the Department of Community and Health Services must negotiate a funding and service agreement with the department. Part of these agreements require organisations to assess their services in accordance with the standards for people with disabilities which were introduced in 1992.

Throughout the implementation and assessment process organisations are strongly encouraged to consult with all affected parties, including service clients, family members and employees. Each organisation's board of management is required to complete at least one self-assessment against the standards annually. I would like now, if the commission pleases, to refer to some comments made by the Minister for Department of Community and Health Services in parliament. I understand that some reference has been made to those comments and that an exhibit has been tendered in these proceedings.

DEPUTY PRESIDENT ROBINSON: Yes, if I could be reminded of the exhibit number.

MS HARVEY: It is HSUA10, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Yes, you are right, Mr Jarman, an extract from Hansard was made an exhibit to the commission.

MR JARMAN: Thank you, Mr Deputy President. Well - - -

DEPUTY PRESIDENT ROBINSON: Have you got a copy of that document?

MR JARMAN: Yes, I believe I have actually, yes. The comments on funding which were made by the Minister for Community and Health Services in response to a question in parliament were, as I understand it, drawn to the commission's attention by Ms Harvey in previous proceedings. I would like to now comment further on what was said. The minister cannot write an open cheque. It is clear that the minister's main concern is to ensure that no clients of the affected services are disadvantaged by the introduction of the restructured WAVA award.

The funding issues will obviously have to be examined closely when award changes are finalised. It will only be at this stage that the complete financial impact can be determined. In other words, we cannot pre-empt a decision of this commission. A minister has a responsibility to ensure that all public funds subject to his control are allocated on a basis of highest demonstrated need and that the funds are effectively utilised in the best interests of client care. In order for the minister to be satisfied of this a number of factors will need to be looked at. These will include an assessment of organisations

capacity to meet the increases from within their current budgeted allocations and an examination of all options which may enhance effectiveness and efficiency in service delivery and administration.

AS the minister indicated in his comments, further discussions will also have to take place with Commonwealth representatives in relation to joint-funded services. While no guarantees of supplementation have been given at this stage the minister will continue to negotiate to achieve this outcome. It should also be emphasised that at present the cost impact is not known. As you would no doubt be aware, the Commonwealth Department of Human Services and Health is conducting a full financial assessment of the changes to the award. A more accurate picture of the total cost will be available when this process has been completed.

I would now like to move to comment on some figures that have been presented to the commission by Ms Harvey to support her submissions, and my understanding is that Ms Harvey previously provided the commission with some information regarding funding for Willow Court and community integration costs and alleged savings for the government. My submission is that this area is not black and white as portrayed in the HACSU exhibit. I feel it is appropriate that these figures be clarified in the wider context of the community integration program.

Disability reform began in Australia in the early 1980s and major policy and legislative changes occurred in Tasmania with the introduction of the community integration program, CIP, and the Disability Services Act in 1992. Both are directed at ensuring an expansion of opportunities for people with a disability with a focus on participation in the community. Government support is linked to achieving desirable outcomes for individuals with a disability, including increasing opportunities for self-determination, independence, choice, recognition and participation in all aspects of life.

The primary reason for the government's support of community integration is the belief that people with a disability have the same right to live and participate in the community as other people. CIP, which has widespread political and community support, was initiated to make real this belief. Since CIP began in 1990/91 the level of funding by the state government to the disability sector to provide accommodation and related day-time support in the community has increased from \$21.577 million to \$26.061 million in 93/94. These figures represent costs associated with the operation of the Willow Court Centre, and services delivered through the department's local offices and to the community integration program.

The increase not only reflects the government's commitment to integration, but also the higher costs involved in providing accommodation and day support in the community in comparison to institutionalised care. CIP clients generally require significant levels of supervision, both in terms of their

accommodation and day support. CSDA services generally provide support to clients whose needs are not as high as those in the CIP program.

The funding for CIP reflects the needs of CIP clients and is therefore generally greater per client than CSDA funding. In 1993/94 Willow Court Centre operating expenses totalled \$10.303 million. It is acknowledged that the cost of providing support to residents at Willow Court has increased over time. This is due to the higher level of support required by the remaining residents and the impact of the current infrastructure costs of the Willow Court/Royal Derwent complex.

It is the department's view that it is not valid to compare the current costs of supporting individuals at Willow Court to the costs of supporting individuals in the community. The current residents of Willow Court have significant needs, either because of their age, frail health or level of disability. Those individuals being supported in the community generally have a lower level of need than the remaining residents of Willow Court. The infrastructure costs of Willow Court also have a major cost impact on the overall operating costs of the complex and distort the final costs of running and operating Willow Court.

However, while the cost of providing services through the Willow Court Centre have in real terms decreased by \$3.263 million, the provision of services through the community integration program have cost the state government and additional \$9.597 million. The most valid comparison of costs would be for the 1990/91 financial year when the mix of client need between Willow Court and CIP was similar. In that year CIP expenses totalled 4.270 million to support 40 clients at an average of \$106,750 per client. The expenses at Willow Court totalled \$13.566 million at that time to support 221 residents at an average cost of \$62,385 per resident.

It is therefore clear that the comparison drawn by HACSU for operating costs and expected savings to the government, are not valid, particularly as the CIP and CSDA client groups with their different levels of care, have been grouped together in the total cost. It is also clear from the information provided that it is not cheaper for the government to have individuals cared for in the community than in Willow Court. This casts doubts on the other figures provided in the HACSU exhibit, especially the estimated \$13.2 million saving. If I could at this juncture tender an exhibit, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Yes, Mr Jarman. How would you prefer this be marked.

MR JARMAN: J1 would be fine.

DEPUTY PRESIDENT ROBINSON: J1?

MR JARMAN: Yes.

EXHIBIT J1 - DETAILS OF COSTS FOR DISABILITY SERVICE SINCE 1991 TO 1993-94 FINANCIAL YEAR

MR JARMAN: This exhibit, Mr Deputy President, just details the costs for disability services since 1990-91 up to the 1993-94 financial year and you can see that the cost for operation Willow Court Centre have reduced, but the costs for operating the CIP program have increased considerably but not necessarily in proportion.

DEPUTY PRESIDENT ROBINSON: Could I ask you a question at this point in relation to that, Mr Jarman? Whilst the figures speak for themselves at this time, would it be possible that over time when CIP - some CIP clients hopefully would be totally integrated and become totally independent, that the cost implications would then be different than they are now when you have got people from willow Court going into the community with a lot of support. If the program is successful, then I am putting it to you as a question, that hopefully all - or some, if not all, of those clients would become totally independent and no longer a cost to the community, and would the figures then be entirely different over time?

MR JARMAN: I will just seek an instruction on that but - - -

DEPUTY PRESIDENT ROBINSON: Yes.

MR JARMAN: - - - my understanding would be that that may be what we would all desire - - -

DEPUTY PRESIDENT ROBINSON: Yes.

MR JARMAN: - - - but it is not likely that that would be achievable because I believe that the clients that we do integrate to the community do have - are capable of adapting to everyday living standards to a certain degree.

DEPUTY PRESIDENT ROBINSON: Yes.

MR JARMAN: But they would need some continued support of some kind, so obviously that continued support would bring a cost with it.

DEPUTY PRESIDENT ROBINSON: And be ongoing?

MR JARMAN: Yes, that is right.

DEPUTY PRESIDENT ROBINSON: Yes. I must say that there have been arguments put to the commission during the course of the hearing, and of course we are not finished yet, but there have been arguments put that some programs are being quite successful and that there are people who are becoming less dependent upon the level of support that they started off with and that was why I asked the question.

MR JARMAN: Yes, I think that is a fair question, but I do not know that it can be answered in any simple way.

DEPUTY PRESIDENT ROBINSON: No.

MR JARMAN: I believe that all I could is reiterate what I have already said that there will be some improvement with some clients as a result of them being in a group home and being helped by people to learn everyday living skills - - -

DEPUTY PRESIDENT ROBINSON: Yes.

MR JARMAN: - - - but it is also my belief that some of those clients, and a fair percentage of them probably would always need some continued support.

DEPUTY PRESIDENT ROBINSON: Yes, thank you.

MR JARMAN: If it please the commission, I would now like to briefly summarise on the comments that I have made this morning. I would like to conclude by reiterating the government's support for the disability services programs currently in place. The government has a responsibility to ensure that clients covered by these programs have access to appropriate support and care. The government also has a responsibility to ensure that the funds allocated to organisations who provide services to people with disabilities are used effectively. It is evident from the submissions that I made here this morning that there are no easy answers to the issues associated with funding. The final costs have yet to be determined and unfortunately there are no guarantees of additional funds from the Commonwealth.

As I have already stated, all organisation will need to be assessed in relation to their ability to meet award increases from within their existing budgets prior to any decisions being made in relation to funding. Options will also be examined to assist organisations in improving efficiency in all aspect of their operations. If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Yes. Mr Jarman, would we - would I be able to expect that those you represent here today would maintain the continuing interest in the case and even take up my invitation to be able to have an input into the merit or otherwise of the claims currently before me?

MR JARMAN: Well, I would like to answer that in two parts, if I may, Mr Deputy President?

DEPUTY PRESIDENT ROBINSON: Yes.

MR JARMAN: We have had an interest in this case from the outset. You may or may not be aware we have had discussions with the union, we have

had considerable consultation with the - those people representing the non-government organisations, and of course the advocate appearing for those organisations, and we will continue to show an interest in these proceedings. As to the second part of your question, I think I am going to have to answer that in two parts as well.

Firstly, if there were an invitation from you to address issues on merit I would need to seek further instructions. I would say to the commission that it would be extremely difficult, if not unusual, for us to do that in that we are not directly related in the employer/employee relationship. Whilst we have a significant role in this exercise in that the government provides a deal of funding for these organisations, we nevertheless do not interfere with the way they carry out their day-to-day business.

DEPUTY PRESIDENT ROBINSON: Yes. Yes, I always look for every little bit of help that I can get, Mr Jarman.

MR JARMAN: I understand - I understand that, sir.

DEPUTY PRESIDENT ROBINSON: Thank you.

MR JARMAN: If the commission pleases.

DEPUTY PRESIDENT ROBINSON: Whilst Mr Jarman is here would the other parties like to make any submissions?

MS HARVEY: No, I do not wish to make any submissions. I was not formally notified till very late that the government intended to intervene today and so I have not really had an opportunity to discuss it in any detail with them. However, at this stage what I would seek is a brief adjournment till, say, about a quarter past 11. I have discussed it with Mr Fitzgerald and he has no objection, if that is acceptable to the commission.

DEPUTY PRESIDENT ROBINSON: Yes. What is your situation, Mr Fitzgerald?

MR FITZGERALD: I think it is a sensible suggestion, Mr Deputy President. We are happy to agree to that - an adjournment. It may in fact be a bit longer depending on whether that invitation of yours is taken up to discuss issues with the government given their last minute intervention which Ms Harvey was unaware of.

DEPUTY PRESIDENT ROBINSON: Yes, yes.

MS HARVEY: If the commission pleases, I would maintain that we just have it till a quarter past 11. There has been no discussion with my organisation about any discussions with the government whatsoever until just alluded to very briefly this morning - - -

DEPUTY PRESIDENT ROBINSON: Yes.

MS HARVEY: - - - and I consider it extremely unusual given the late hour where we are in these proceedings to consider any discussions.

DEPUTY PRESIDENT ROBINSON: Yes.

MS HARVEY: But I am happy to hear what Mr Fitzgerald has got to say and I imagine that I can do that within the timeframe, and if we need more time then we can adjourn then.

DEPUTY PRESIDENT ROBINSON: Yes. Okay, we will adjourn to a quarter past 11 and see how we go.

SHORT ADJOURNMENT

DEPUTY PRESIDENT ROBINSON: Yes. Mr Fitzgerald?

MR FITZGERALD: I think it is our turn to respond, Mr Deputy President. Just prior to that, if I could just for the purpose of the record - I may be overly cautious here, but I do not believe so - seek some confirmation from Ms Harvey on record in respect to a number of named employers which we have indicated to Ms Harvey in respect of federal log proceedings which I understand there is some undertaking that they will be specifically deleted from those logs.

We want to ensure that to occur so these proceedings can proceed unimpeded. I just wonder whether Ms Harvey can, again for the purpose of the record, to confirm those named employers who we have put to - - -

DEPUTY PRESIDENT ROBINSON: This did arise before.

MS HARVEY: Yes, it seem to be a bit of - - -

MR FITZGERALD: It did, but we had - we were asked to identify the employers, we did so, and we have not yet had actual confirmation from Ms Harvey. I understand there is no problem in that, but for the purpose of the record and I am thinking about potential federal proceedings, and I understand also that some of these aspects may be outside Ms Harvey's control and that they are federal initiated proceedings, but again I am only overly cautious but I would like for the purpose of the record that confirmation of those named employers served with the HSUA log will not be proceeded with by the HSUA.

DEPUTY PRESIDENT ROBINSON: Ms Harvey?

MS HARVEY: I must admit this is getting to be a bit of a yawn, but anyway, I say - repeat the commitments I gave previously to the commission on transcript in relation to this matter. Mr Fitzgerald has provided me with a list of names, I have faxed those to our national office and asked that they be removed and I tabled, you recall, as an exhibit in the last hearing a letter from our national office which - saying that they would remove anyone where a dispute had already been found where we already have an arrangement with the TCCI, and my position has not changed. The only thing that there is not, is a written confirmation, if you like, that they have been removed, but certainly I have discussed it with my national office. I have said here on transcript, I do not know what else I can do. If the commission please.

MR FITZGERALD: Yes, I can understand that but I just - I just make a point - and I realise it is out of Ms Harvey's hands, but you know, I suppose until we get the confirmation from the initiator of the log we are somewhat cautious, but - - -

MS HARVEY: You have.

DEPUTY PRESIDENT ROBINSON: I would have thought that one obvious sort of move would be to present before any federal commission the transcript, other exhibits, going to named employers so that at that end there can be a clear understanding - - -

MR FITZGERALD: I think that is to be - - -

DEPUTY PRESIDENT ROBINSON: - - - as to who is before that - that body and who is not.

MR FITZGERALD: Are we talking about section 111(1)(g) proceedings in that commission, and I understand that - the only point - - -

DEPUTY PRESIDENT ROBINSON: Oh, is that - that same is 41(1)(d), is it?

MR FITZGERALD: It is exactly the same, yes. You have got to keep a check of the federal act, it seems to change fairly regularly so.

DEPUTY PRESIDENT ROBINSON: It is getting bigger.

MR FITZGERALD: The only one who makes any money out of it is the CCH publishers, I think. But I just make the point that even since that undertaking by Ms Harvey in writing there does not seem to have been any action or initiation by her federal branch because those employers have in fact received notices in respect to hearings in respect to that matter, so.

DEPUTY PRESIDENT ROBINSON: I do not know what I can do. so long as there is that undertaking.

MS HARVEY: My recollection is they received the notice prior to Mr Fitzgerald providing me with the name with it. I have provided - - -

MR FITZGERALD: Well, that is not the case, I didn't give them a - - -

MS HARVEY: - - - a letter to the commission. I will follow it up again with my federal office and I think we are just waiting transcript space.

MR FITZGERALD: Well, no, we are not wasting - it is not a yawn either, it is an important matter. I would suggest, Mr Deputy President, because, you know, we have on one hand a very comprehensive case before this jurisdiction, and on the other hand we have Ms Harvey's federal branch by the initiation of federal logs saying, well you know, we do not really choose to proceed in the state commission, we will proceed in the federal commission. Now - - -

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: - - - that is not a - I mean, it is not a matter to be yawned at, as Ms Harvey described it, and it is something which needs to be taken seriously.

DEPUTY PRESIDENT ROBINSON: All right, well I think you have got a response.

MR FITZGERALD: Well, we understand that there is that confirmation but we eagerly await that written confirmation from Ms Harvey's federal union. I cannot see any problem with it. We have supplied the names and I cannot see any problem with Ms Harvey's federal union just simply writing and confirming those respondents have been deleted. It would certainly, on my instructions, put those who represent those organisations, mind at ease if that did occur.

MS HARVEY: I give Mr Fitzgerald a commitment I will appear as a witness on his part of the case in opposing the log if they do not get their letter.

MR FITZGERALD: Negative approach. Look forward to that. Mr Deputy President, prior to outlining our submissions, if I could present an exhibit in respect to - which clarifies, I think, further the position of the Commonwealth in respect to costing. I think that is something which you should have for your purposes.

DEPUTY PRESIDENT ROBINSON: Thank you.

MR FITZGERALD: Now, I am not sure what exhibit number we are up to but for purposes of identification, it is a letter dated 20 June 1994 from the

Department of Commonwealth - Commonwealth Department of Human Services and Health.

DEPUTY PRESIDENT ROBINSON: I think it will be TCCI.4.

MR FITZGERALD: If it pleases. And attached to it, Mr Deputy President, is just if you like, an update from the department as to the current state of a report which has been undertaken, and I will go to that in a minute, but the fax which we received this morning, to myself and Mr Peter Blackwood, if I can read into transcript. It is attached to the letter about the analysis of WAVA:

We have contracted KPMG Management Consultant to undertake the analysis and I expect him to finish within six weeks.

So our first hearing committee meeting is on today at 11 am. It is just by coincidence. However, you will see there, Mr Deputy President, in terms of the government submission this morning, the unknown factor, the missing factor in terms of funding, of course, is the cost and the impact and the commitment which the Commonwealth Department of Human Services and Health will have in respect of this award. And if I could just read that letter into transcript, addressed to me:

It has become clear during the course of discussions about restructuring of this award that both the Commonwealth and state government need to determine the cost implications of the proposed restructure as well as the recent increase in the sleepover rates. To achieve this the Commonwealth Disabilities Services program has offered to find an independent, in-depth cost analysis of the recent and proposed changes to the award.

Now, if I could just interpose there. As you would be aware, Mr Deputy President, that process is indeed very complicated. It would need to be based on not only the union's application but our own application. It would need to make certain assumptions in respect to where people translate. Now, in terms of the TCCI application, I suggest that that is very clear because we have provided in our application a translator schedule and that costing can be quite easily made. In terms of the HSUA application that costing is more difficult. So, it will take, and they have suggested it will be six weeks, and even though that may not be very helpful to the commission, we say that it is somewhat out of our hands. It has been instigated by the department and even though we are happy to assist in that costing, at the moment we are unsure of the actual cost impact of the two respective applications.

DEPUTY PRESIDENT ROBINSON: Yes, I would - I must say I would be concerned that if there is any sort of external exercise being undertaken which may otherwise be used in these proceedings, that I would be concerned if we were - if it was suggested that we wait upon some sort of information that it

would hold up the progress of this case. I am anxious to ensure that we conclude our responsibilities as soon as is reasonably practicable and that delays are not further experienced.

MR FITZGERALD: Yes, well we would share that position, Mr Deputy President, but as I indicated, in terms of the timetable which has been indicated, and the facts, and that is somewhat of an estimate, but it is indeed a massive exercise and we are happy to expedite it as much as we can but it is out of our hands, but I do understand the position in terms of an ultimate decision.

DEPUTY PRESIDENT ROBINSON: You see, the claim has been in for a long time.

MR FITZGERALD: It has, yes.

MS HARVEY: I just - if I could just seek clarification through you, Mr Deputy President. It is not being suggested that we await the outcome of this, is it?

DEPUTY PRESIDENT ROBINSON: Well, in case - in case it had, I just put in my two penn'orth.

MR FITZGERALD: Excuse me for a moment.

DEPUTY PRESIDENT ROBINSON: No, that is certainly not - no, I am presenting for your information particularly, Mr Deputy President, and in particular in terms of the submissions made by Mr Jarman this morning, you know, as I said, the unknown factor is the Commonwealth component, and regrettably that timetable does not help us much at all, in terms of decision but I can only place it before you for your information.

DEPUTY PRESIDENT ROBINSON: Yes, well I just wanted it to be on record though in relation to any potential for further delays.

MR FITZGERALD: Thank you, yes. Yes, I understand those. If I can just continue on with this just quoting this letter:

We will call for expressions of interest in the near future.

Interposing again, that of course, has occurred and KPMG have been engaged, and if I continue:

The commencement of the work will depend on the time of the commission's decision in the matter. It has been agreed that the most efficient way to proceed is to establish a joint Commonwealth state steering committee consisting of Mr Peter Holton and Dr Barbara Hayes, who are our representatives and an officer from our respective

Disabilities Services there. As neither the Commonwealth or the state are party to the commission proceedings, I would appreciate it if you could convey this information to the commission as appropriate. And if you have any queries regarding that, please contact Mr Mark Formada.

And that is simply what we have done. We have made it available to the commission. It may not assist - - -

DEPUTY PRESIDENT ROBINSON: Well, I guess we can - we can read from that is that - and taking of the exercise foreshadowed in the correspondence, will follow the handing down of the commission's decision and not precede it.

I understand that the actual exercise is under way now, and that would have been in a period prior to your decision, I would suggest, and not actually awaiting the commencement of the tasks following your decision.

DEPUTY PRESIDENT ROBINSON: Yes.

MS HARVEY: Sorry, I just want to make this extremely clear, Mr Deputy President, for the purposes of the record, because I do not want there to be any confusion in the future. I mean, a process is being undertaken, certainly without any consultation with my organisation, well, fine, I accept that, although I will be writing to the department with concerns about the lack of consultation with my organisation. However, I just want to make it extremely clear it is not being suggested for a minute that the commission should have view to some document that may be produced some time in the future which would not form part of transcript of these hearings. I mean, it has no bearing because it will not be finished within the time frame and it would be completely remiss of the commission to take account of any document that has not formed a formal part of the proceedings.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: Excuse me just for a moment.

DEPUTY PRESIDENT ROBINSON: I will not be waiting - I will not be waiting on that sort of exercise. We have had some extensive submissions already on public interest and I am sure there will be some further to follow, but there has to be a limit placed upon the time that the commission can actually give.

MR FITZGERALD: No, I understand the position of the commission and as I indicated we are simply providing it by way of information, and it is an unknown factor in terms of costs - - -

DEPUTY PRESIDENT ROBINSON: Okay.

MR FITZGERALD: - - - so if we are not able to accurately ascertain that tomorrow or the next day or the next week - it is indeed an extensive exercise.

DEPUTY PRESIDENT ROBINSON: Yes, I thank you for the information.

MR FITZGERALD: Okay. Now, Mr Deputy President, I will proceed to our response to the HSUA application, which is indeed a very lengthy case. We just noticed this morning in pages of transcript we are just failing to reach the 1000 page mark, but we are very close to it. Most of that case, of course, up until now, apart from our evidence of our five witnesses, has been presented by the HSUA, and I think in terms of that case it has been very extensive and the response which we will give will principally be covered - or principally will stand or fall on the evidence which we have given, which I believe in these cases are very important, but we will seek to summarise and counter some of the aspects which - or counter all the aspects which Ms Harvey has put up before you.

In terms of the format that our case is presented, we do not intend to present in the same format as Ms Harvey. We will present an outline of our submissions shortly, but we do not intend to present bound copies as Ms Harvey has done, but we will be presenting exhibits as we proceed. So, if I could present the first exhibit, which is the outline of our submissions.

DEPUTY PRESIDENT ROBINSON: TCCI.5.

MR FITZGERALD: Mr Deputy President, I present this just in terms of an assistance for you and for Ms Harvey in terms of the structure which we intend to take and by way of summary, if I can just go to that document, there will be, Mr Deputy President, if you like, a review - a very brief review of the history - nowhere near the extent of Ms Harvey. We are of the view that the negotiations which have occurred prior to this matter coming to you for arbitration are not relevant in terms of any commitments or otherwise coming out of those negotiations.

They are, in our view, without prejudice negotiations and regrettably, despite lengthy negotiations which I personally was not involved with, but the gentleman here today in the commission and Ms Harvey had a long involvement - they did not - they were not fruitful, and once those negotiations broke down then we would suggest that - if I can use a colloquial expression, all bets are off and it is for you to determine the matter. We did, as you will probably recall, have some argument. Ms Harvey did in fact withdraw her earlier exhibit in respect to that and revise it. We will be suggesting that any previous negotiations, including the commissioning of the Jenny Jones report, are not relevant in terms of the overall arbitration in this matter.

In terms of the industrial relations history we will be having a look at a very brief history, particularly in respect to a decision by Commissioner Gozzi, and we will be saying in respect to that, Mr Deputy President, that some of the matters which were contained in that decision relating to role valorisation, normalisation, some of the new approaches to the disabled were taken into account in that decision, and if the commission were to take notice of the HSUA submissions in respect to it, then there would, in our submission, be an element of double counting.

DEPUTY PRESIDENT ROBINSON: Was not the decision made by Commissioner Gozzi in 85 or 86 based upon work value criteria and was a consent matter?

MR FITZGERALD: Yes, it was, but we can say, and I will take you to that in detail - your memory is indeed good. In fact, some of the representatives of the employers here appeared as star witnesses in those proceedings and I will take you to some of that evidence as well.

DEPUTY PRESIDENT ROBINSON: I do a bit of reading.

MR FITZGERALD: Good. But, yes, it was a consent matter, but we say that - we will be saying, Mr Deputy President, that those matters - some of the matters which Ms Harvey has sought to justify her claim were matters which were already taken into account by Commissioner Gozzi in that matter back in 1986.

DEPUTY PRESIDENT ROBINSON: Yes. And yet your own application has got some variation to the structures, I am sure.

MR FITZGERALD: Yes, but our application, Mr Deputy President, I am just touching on the status of our application, is that it is within the current relativities as set out in the award at the moment. The maximum relativity in the award at the moment is 115 per cent, and our application does not transgress that, so in that respect we are simply - we are, in our view - and that is the status of our application - in terms of our summary so far, we are, in our view, in compliance with the principles, the wage-fixing principles, and we are, specifically in dividing, or in separating out into five levels, recognising particular skill levels within the current relativities and we say that that application is clearly within the wage-fixing principles.

DEPUTY PRESIDENT ROBINSON: Which particular principles?

MR FITZGERALD: We say that our application is pursuant to the structural efficiency principle in terms of dividing into skill-related career paths - - -

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: - - - but it will be our submission at length, Mr Deputy President, because the fundamental part of our submission is that particularly the HSUA application - and I am now going to a summary of our application in respect - our - sorry, our summary in respect of the status of the HSUA application is that particularly in respect to that claim we say that it has not been properly established in respect to the structural efficiency principle. The union have taken a very broad of structural efficiency, particularly those levels which are not currently contained within the award, and I refer to levels 6 and 7, those matters, and it will be clear on examination of the principles, wage-fixing principles, that those matters must be justified by some work value considerations.

It was mentioned during the course of this hearing as to which principle Ms Harvey was proceeding under, and it has just simply been mentioned as structural efficiency. We say that is a very broad-brush approach to structural efficiency and not the intention of it, and I will be taking you to specific sections - sorry, specific parts of the wage fixing principles which clearly show that particularly those additional levels cannot just be plucked out of the air. You know, there is no rationale necessarily to 160 per cent, which is the highest level of Ms Harvey's application, but must be established by some reference to what is currently contained within the award, and that will be cleared by the commission's own wage-fixing principles. I will take you to that during our submissions, if I can.

DEPUTY PRESIDENT ROBINSON: All right. I will await your submission with interest.

MR FITZGERALD: Thank you. In terms of the issues differences, Ms Harvey has made quite a bit, and I suppose we have chosen to run our case as we feel fit. We have not responded to Ms Harvey's request for an issue - sorry, for a differences document. What we see is more constructive in a more simplistic approach, is to look at the differences - or the issues differences and to outline those to the commission so you can see quite clearly where the applications are apart and the rationale on which we base our application as compared to the HSUA application.

In terms of the TCCI application, we will have a brief review of the TCCI inspections and confirm the aspects which are inherent in our application. We will also review the TCCI evidence and analyse our application, particularly as to how it meets the wage-fixing principles. Now, the specific issues which we will be addressing - and we will address those in terms of the evidence which we have presented particularly - are those set out in point 4. For the purpose of the record we have formal training, supervisors and support employment, which received much - or was the subject of much discussion, not only in formal evidence, but also in terms of - with some of the inspections, although not formally recorded. I do recall that it was - well, it certainly was mentioned at one or two of the inspection sites. We would be

looking at that, too, specifically in respect to the work value considerations as determined by Commissioner Gozzi in that earlier decision.

In terms of training - sorry, in terms of formal policies we will be looking at the issues there and in summary we will be saying that it is not an unstructured environment as suggested by Ms Harvey. There are - and there are a variety of settings, and for that reason it is very difficult for an award approach to this whole issue, because there are many organisations with highly-formalised policies in place which provide guidance and direction for employees and not as suggested by Ms Harvey in her evidence and submissions, particularly the evidence of, I think, Ms Brady, who indicated that staff, from memory - and I will be going to her evidence specifically, but staff do the best they can in a very unstructured environment. Now, we say that is a distortion of what actually is occurring out there in the field and we will be looking at those policies particularly.

But in respect to the variety of settings covered by the award, we will be submitting, Mr Deputy President, that the approach the commission should take is one that should be proceeded with with caution in the awarding of any claim. It should take a minimalist approach, if I can use that term, and given the environment which we are in, Mr Deputy President, which is one quite clearly, although there has not been any state wage decision in respect to recent national wage decisions handed down, but clearly we are in an enterprise bargaining environment and we would simply say, Mr Deputy President, that the commission should establish, as it has in the federal jurisdiction, very much a safety net based on - a safety net approach to awards based on the minimalist approach, which I will be putting to the commission.

In terms of training, I did indicate that a number - we will be indicating the number of organisation - organisations conduct particularly in-house training which are relevant to their particular needs, which support employees in the way they perform their duties. In terms of the medical model, Ms Harvey has already indicated that she is not in any way suggesting that - by her submissions anyway - that she is in fact proposing a medical model. We will be submitting quite clearly the evidence particularly of Ms Brady, was that where she did say that the services need to employ - and I stress that word - employ more specialised staff, would, we say that even though it may not always have been the submission of Ms Harvey the evidence was such that, of Ms Harvey's witnesses, was such that they were suggesting a medical model that, in our view, will be shown to be quite inconsistent with the approach for supervision of particular clients in this area.

We will also go to our evidence particularly in respect to generic services and the use of generic services by most, if not all services. There was some suggestion by Ms Harvey that generic services, or access to generic services was somewhat limited. We would refute that quite clearly. We will touch, or sorry, we will more than touch on the issues of skills required. It is inherent in our application that our application is based on the notion of skills

required by the employer. In our submission that will be the only way which practically this whole issue can be determined. Ms Harvey has suggested that, well, her first position has been the skills acquired through training they should be rewarded whether utilising them or not and she has settled somewhat on a compromised approach to skills utilised.

We will be taking you to specific awards, some consent, as you probably appreciate in this whole award restructuring process, Mr Deputy President, there have been few arbitrated decisions. In fact, we have sought research from our sister organisations interstate for assistance here where there has not been any information forthcoming about arbitration of fully - sorry, an arbitration of a reclassification exercise at all so that does not assist us in any way. But we will be particularly looking at the HSUA application in terms of the wage-fixing principles, particularly that in respect to levels 6 and 7 and also what we see is potentially significant movements within the levels as a result of the translation process suggested by Ms Harvey.

But that will be a major part of our argument, Mr Deputy President. We will present one arbitrated case which looks at promotional criteria and that will be in the timber industry, a decision of Commissioner Merriman, which confirms the approach taken by that commission in that it can only relate to - or progression can only relate to if there is a position available so that the concept of appointment is an important part, and an important part of our application - one which is notably absent in the HSUA application, and that, I think, is one of the few decisions which I am aware of relating to that particular concept. But there are a number of consent awards which endorse, or repeat that concept and we will be presenting those as well.

We will address the future training agenda and in respect to that we will say that even though we had some very lengthy evidence by - and submissions by Mr Brown and Mr Carnie, we would submit that the whole area, and I think it is somewhat implicit in some of the questions I will be taking you to today, some of the questions which you ask in respect of it. It is a futuristic approach. We are uncertain where the directions will take us in terms of competencies. They are yet to be assessed, so in that respect we will be saying that the union evidence and submission, even though extensive, was not very useful in terms of the industrial approach to these issues.

We will be looking at the issues of behavioural management, Mr Deputy President, in terms of assistance which services are able to access, particularly generic services, in terms of strategies which organisations have set up to ensure that there is a proper and strategic approach to these issues, but it is one which the union has made great play of a I think, in our submission, has overemphasised the particular aspects relating to behavioural management.

The other aspect which has been not only expressed in the submissions of the union, but also as part of the evidence by union witnesses, is the aspect of stress and staff turnover and grievances. We will be presenting a

comprehensive exhibit which refutes the notions or the indications by union witnesses that it is a high stress area. I think Ms Brady actually indicated in her evidence that at least in every service she visits at least there is one person often stressed. The evidence which we will present will be clearly refuting that, and that is that stress if very low; that staff turnover in the main is low. We will present very frank exhibits there. In some instances where it may appear to be high there are good and valid reasons why that does occur and we also surveyed the grievance rate, for want of a better title, both formal and informal, clearly showing you, Mr Deputy President, that the issues as made up by the union have been overemphasised.

We will be addressing the issue of medication and what we will be simply saying there, Mr Deputy President, is that it is a process which is well controlled generally from a dose set under the supervision of a pharmacist and as an issue which should not be - or should not be taken into account by you in the assessment, or in the ultimate determination of this case. We will be addressing the issue of public interest quite clearly and in connection with the funding issues, and as we have already indicated, despite the submission by Mr Jarman this morning and in turn, there are a number of unknown factors and we urge the commission to take those into account.

We will be showing quite clearly that Ms Harvey has taken a very narrow view in terms of section 36 of the Industrial Relations Act, particularly the levels of employment issue and we will be submitting that the levels of employment, that aspect in section 36, relates to the particular industry not to the content of the whole. We - - -

DEPUTY PRESIDENT ROBINSON: Does it not relate to both?

MR FITZGERALD: I will need to go to that section 36, but - - -

DEPUTY PRESIDENT ROBINSON: Yes, well, yes, okay.

MR FITZGERALD: - - - if I could address that when we get to that particular point.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: It certainly will be saying, Mr Deputy President, that it does relate to levels of employment in a particular sector. I have already addressed the issue of the variety of settings which appear up there and we saw a number both in terms of the HSUA case on inspection and in evidence, as well as the TCCI case in response both in evidence and in inspections and as I indicated, we believe the appropriate approach to take by the commission is very much a cautious approach, the minimalist approach and if there are other issues then those issues can be negotiated and agreed through the process of enterprise bargaining.

DEPUTY PRESIDENT ROBINSON: When?

MR FITZGERALD: Well, that is up to the individual services, I suppose, Mr Deputy President. It will depend very much on the requirements and the operations of funding considerations of individual services. Ms Harvey presented a number of exhibits comparing other awards - you did make the comment, Mr Deputy President, from memory, that you thought we might be embarking on an exercise of comparative wage justice, although that is something which is not specifically addressed within the wage-fixing principles at the moment.

We would say - we will be submitting that those awards, some based on medical models, or the medical diagnostic award particularly, are not appropriate in this industry and it does not assist us in any way by putting up classification structures and relativities in other awards. We need to look at it in terms of the relative skills in this industry. Now, one of the - and we will certainly be making a point of this particular argument, Mr Deputy President, one of the - what has occurred, I would submit is, the union have sought to justify their whole - and I will be responding - I will be coming to you in this point, particularly point 5, responding to the whole case on the basis - sorry, pursuing their case on the basis of structural efficiency.

What they have in essence done is provide, if you like a *de facto* work value case. But the missing element in that, and I do not think in any way the commission - well, the union have certainly indicated that they are not proceeding by way of work value but by a structural efficiency, but they have in many aspects, in my submission, presented a work value case which, the missing element being is the comparison between the skills, responsibilities and conditions in which the work is done as it is now, as it was previously.

Now, the commission's principles - and I will be taking you to those - are very limited in that regard. The datum point is in fact the date from the second structural efficiency increase. But what the union has done, in our submission, is present a *de facto* work value case which, in our submission, is completely devoid of any industrial merit. So what the union - our response to the union in that case will essentially be that the union have thrown up a number of issues under the guise of structural efficiency hoping that some of these issues will stick. Now, we do not believe that is a valid approach; it is a *de facto* or pseudo work value case which is not accommodated within the principles and we will be taking you to the principles specifically in that regard.

Now, Mr Deputy President, if I could present the Commissioner Gozzi decision? I will present both copies of it because there is an early decision and a final decision. I think if they could be marked all as one would be easier. They are both the same T number, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Yes. The reasons for decision dated 18 May 1986 will be marked TCCI.6 and the supplementary decision dated 30 June 1986 will be TCCI.7.

MR FITZGERALD: If it please. Mr Deputy President, if I could you to TCCI.6, which is the main decision? As I said, I presented the further decision for the sake of completeness and I will not be referring specifically to that. But the point of presenting this is that this award has, in our submission, had a history in respect to many of the aspects which Ms harvey has presented in attempts to substantiate her case. If I could take you particularly to page 13 - just prior to that, as you are aware, it was by consent and, if you like, there has been a consent work value case prepared. At page 13 where Commissioner Gozzi cites the principles of wage determination which applied at that time - and if I quote just from the first part of that paragraph:

In evidence it was said that the work value changes in question have developed since about 1980 and that they have taken place over the past four years or so. From the evidence presented I am satisfied that the work value changes in question do not extend back beyond that allowed by principle 4(c) and for the purpose of this exercise I have taken as the datum point 1 January 1980.

And I will just indicate that in terms of current work value cases before this commission the datum point is, in fact, the second structural efficiency increase date. If I can continue quoting:

The review therefore extends from that date until the conclusion of these proceedings at Tahune Fields on 24 April 1986.

It would seem to be a revisitation of a number of sites and you will see that many of the elements are indeed common in this case as they were back before Commissioner Gozzi in May 1986. If I can continue on page 14:

It is also appropriate for me to indicate that the parties, as would be expected, were totally committed to the fact that this work value review and the proposed restructuring of the relevant sections of the award has to meet the tests enunciated in principle 4; and that significant net additions to work requirements warranting the creation of a new classification, in each instance, must be demonstrated to the commission.

If I could just interpose there? I will be taking the commission to its own principles later. However, I would submit that the work value principle in terms of - as it existed back in 1986 has remained substantially unchanged. The requirements still are very much the same - and I will be taking you to that later. If I could continue - and I think I was up to enunciating principle 4:

and that significant net additions to work requirements warranting the creation of a new classification, in each instance, must be demonstrated to the commission.

there is a name from the past -

indicated that the strict tests of the principles would be satisfied through the evidence presented by Mr Daley, who is the general manager of the Devonfield Complex.

And if I could just go - I am sorry to sort of labour the point, but if I can just point out some of the aspects which clearly show that there is a commonality between proceedings there and as they are now. If I can just continue reading - I am sorry if I do include some parts which may not be totally necessary - and I do not want to labour the point too much - but just to clearly show you that really we have revisited much of what has occurred back in 1986. I will continue reading from the evidence:

The main thrust of the evidence presented principally through Mr Daley and supported by inspections at that location as well as at Oakdale Walkabout, Yallambee and Tahune Fields -

The only main missing link there in these proceedings is Yallambee which I think you have noted has in fact closed as a hostel; part of the Oakdale/Yallambee complex but has now closed. If I can continue -

was that very significant and real change has taken place in residential hostels and activity therapy centres. This has seen a clear move away from the traditional model of care to the provision of a client-centres service which has as its principal objective the maximisation of each individual's capacities. This is facilitated by one-to-one training and the implementation of individually tailored learning programs.

Now, if I can just take you to some of the evidence in this instant case, Mr Deputy President, much of what has been presented has been based on the new approaches of role valuation and normalisation and I think that is something which has come up regularly in not only the evidence of Ms Harvey's witnesses but also evidence as presented by witnesses by myself. Now, in that regard we say that this new approach is something which has already been taken into account in the assessment of wages, even though by consent, but it is something which has been taken into account by Commissioner Gozzi. if I can continue:

The nature of the change is referred to in the 1984 Devonfield Complex Annual Report -

which is exhibit HEF4 -

where at page 2 the following comments are made in respect of sections IV and VI of the award have been implemented to ensure that realistic and real life experiences are in operation.

Again, I just interpose. Nothing really very different to what has been presented by Ms harvey:

Residents have responded to development of their individuality and through informative choices to the institution model of control and rule rather than positive facilitation of skills development.

The depth and detail of this change was illustrated by the evidence and inspections. Mr Daley who was the principal witness in this matter, gave precise and -

dare I say -

impressive evidence. I was informed that prior to his appointment as general manager in August 1985 he was a member of the board of management of Devonfield for five years, during which time he was also chairman of the activity therapy centre, hostels and community living program committee.

We were informed by Mr Daley that it is something which he will take back to his board of management as a memento.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: I am sure - here we are touching I think on many of the aspects contained within the case presented by Ms Harvey. And if I can continue quoting:

The substantial changes outlined by Mr Daley can be summarised as follows: the old residential system based on the teaching of what may be termed living skills is part of what is referred as the normalisation program.

So they were terms which were used in - in - back in 1986. But much of that, Mr Deputy President, I would submit is inherent in the HSUA case and that - and that being used in an attempt to substantiate the industrial merit of the HSUA argument which in our submission is noticeably devoid of merit. And certainly in terms of - in terms of seeking to use those changes, those changes in our submission have already been taken into account when Commissioner Gozzi brought down that decision as set out in TCCI.6.

The - I do not want to labour the point too much, I think I have shown quite - quite clearly that there is - oh, there is a bit more which I think I should look at, and that is the work value changes and residential hostels where at the bottom of page 18 Commissioner Gozzi agrees with the work value - agreed work value case, that there have been significant changes and if I go over to page 19:

The changes are also complemented and highlighted by the significant training that is required to be performed by these employees in community attitudes to intellectually handicapped people.

Probably a term which is not currently in vogue -

The approach is no longer to keep these people closeted by to integrate them as far as possible into the normal community living implemented by Supervisors and Assistant Supervisors.

Now, we would say, Mr Deputy President, if I can just interpose again, that those - it was clear through the evidence, particularly the evidence given by our witnesses, and I refer to evidence of Mr Rodwell particularly, Mrs Thomas, Mrs Dianna Thomas, where they indicated that training programs have been - have been organised or have been arranged for employees. They provide support by this site training programs. Again there is nothing much different than what applied back in 86.

If I can continue, because I think again it just highlights the differences - sorry, highlights the commonality - common features which applied then as it did - as it does now:

In my opinion, an excellent example of the change in emphasis and the training role now undertaken and we conduct very extensive training programmes ..."

If I can just go over the page and quote Mr Daley again back in that case, in the second paragraph:

Mr Daley said - "...previously, back before the 1980's, a staff member may go and get a toothbrush and There are some 27 steps involved in cleaning their teeth.

And we saw an example of that where tasks were broken up to make the job easier.

DEPUTY PRESIDENT ROBINSON: Did we see anyone cleaning their teeth?

MR FITZGERALD: I do not think we saw anyone clean their teeth, no. I think it is important to have those moments of levity in this case, it has been somewhat - somewhat long. So, Mr Deputy President, also which I think was recognised, there was at page 24, recognition of the training aspects which again have been used by Ms Harvey to substantiate her case. If I can quote from page 24:

In reaching the foregoing conclusion, I recognise that the level of training skills job training and experience together with formal training.

Now we say that has occurred, if I can interpose again, we say that - that there is evidence of that again. The basis of the TCCI application is that the skills acquired through performing training are only - or we - the actual reward for those skills are those ones which actually are required by the employer for the employee to actually utilise.

Now, that is very much a different approach taken by Ms Harvey. Now, I refer particularly to the evidence of Mr Rodwell where I think he said that some of the skills which they had acquired in formal training were skills which they would not be able to exercise in that particular work place. And that is a fundamental issue difference between our application and - and the HSUA application.

And if I can continue:

Formal training skills, acquired through participation in approved courses of study progression in and/or completion of approved courses of study.

Now that is an approach taken by the commissioner in - at that time.

We are of the view that in terms of the application, the TCCI application, that accurately sets out the needs of the industry. We are very clearly of the view, and as I said I will be presenting supporting arbitrated - an arbitrated decision - that in terms of assessing the industry requirements of the employer - and I do not mean this in any arrogant way - the employer is in the best position to assess those jobs, those requirements, and for that reason a fundamental part of our application is that it must come down to the skills as assessed by the employer as required for that particular job.

DEPUTY PRESIDENT ROBINSON: Do you believe - - - - -

MR FITZGERALD: Now - - -

DEPUTY PRESIDENT ROBINSON: Sorry, Mr Fitzgerald.

MR FITZGERALD: That is all right.

DEPUTY PRESIDENT ROBINSON: Do you believe that the last paragraph on page 24 supports your case?

MR FITZGERALD: I do not think it does one way - or it does anything one way or the other, Mr Deputy President, it is - I just pointed out that it was an issue in those days, in that time. We do recognise formal training but we recognise it in the terms of the job requirements, that is the important distinction. Excuse me for a moment. Now, Mr Deputy President, I think it is important that we - we examine the Commissioner Gozzi decision because as I indicated in my submissions there are very many common elements, and if Ms Harvey, even though she is seeking to - to justify pursuant to structural efficiency, she is still attempting to use those elements again in the substantiation of this case, in our view, as I indicated, somewhat of a de facto work value case.

Now, following that decision and again without personal involvement I think the same applies to Ms Harvey, there were a number - or there were a number of courses of negotiations which did not prove to be fruitful and during the early 90s I understand that there were positions which parties had believed that they were able to receive - or had actually reached agreement which did not actually occur and in the early 90s there were, as Ms Harvey has already referred to, extensive without prejudice negotiations between the HSUA and the industry representatives under the auspices of what was seen as a state negotiating committee.

Ms Harvey has referred specifically to the metals relativities and the commitment to that. In our submission in terms of the position reached by employers is that they agreed to endorse a minimum rate and broad-banding exercise only up to the maximum relativity which is currently contained within the award and that is the 115 per cent level and that is the basis of our application. At that time we saw the union and we acknowledge that there was some reservation to come back and seek more.

Regrettably there was not able to be an agreed position reached and hence the union made an application with, in our view, excessive relativities and excessive structure in terms of the needs of the industries up to a level 7 structure with 160 per cent as the maximum relativity. What employers have done in terms of their application is acknowledge and agree that the minimum rate and broad-banding exercise has occurred but up to the maximum 115 per cent level within the current award.

We will be saying quite clearly that that - with the exhaustion of that process that it is not possible for the - by arbitration for the union simply to justify the application, particularly an extreme application as it has presented in the terms of the HSU application under the guise of structural efficiency. In our submission it is a distorted view of the principles and as I said, we will be taking it specifically to those principles.

But in respect to the reservation made by the HSUA that is something which unions and employers in fact are able to do at any time and I think for the purposes, all it does is just simply give notice for the purpose of the record. I know it is a common approach taken by - in the federal jurisdiction in respect to respondents but that does not necessarily mean to say that those employers are actually respondent, but just - all it does is just simply give notice to those employers that they may be proceeded against in the future some time and in the federal jurisdiction, just to use that analogy, it obviates the need for the union to re-serve a log of claims and create a dispute again.

Now, in respect to this reservation made by the union in this regard, we would submit that the reservation gives - it does not really assist in any way. The union could have made an application at any time without that reservation and we would submit that the reservation does not give this application - the union's application any special status. All it was doing was simply acknowledging that the union would be coming back before this commission to seek something additional to the minimum rate and broad-banding exercise.

But in respect to that history, and it is somewhat of a potted history, Mr Deputy President, we stress the point very clearly that those discussions, and again I do not think there is any special status attached to a state negotiating committee as it was then called. I think it was just a convenient forum which would allow the parties - and the parties were made up by representatives of the various sectors of the industry on the employer side and the union on the other side. It is simply a forum, a negotiating forum, and again I do not think that gives any special status just because it was under that forum.

Now, Mr Deputy President, following the break down of those negotiations and that occurred some time just shortly prior to my involvement, the HSU made an application which I think, and I am not able to obviously, because they are in our view, very much without prejudice negotiations but made an application which was, if you like, the union's maximum position and in response the employers responded by making an application which in our view clearly indicates what can be pursued legitimately under the wage fixing principles, that being the structural efficiency principle. That being up to the maximum relativity of 115 per cent.

Now, in terms of much of the work done, particularly the evidence by Ms Jenny Jones, we acknowledge certainly the work done by Ms Jones and obviously the very good work done, but I simply say that the report was never endorsed by either parties. Now, the report in that respect is - or the acknowledgment of the report by the employers is valid only to the extent of 115 per cent. There was no authority, although I think it was addressed in the report, but there was no authority to proceed beyond that point.

Now, that being the case we say that the evidence presented by Ms Jones, although well presented, does not assist the commission in any way because again it was during a period of negotiations - as you will probably recall Mr

Gates was also involved from our organisation's point of view. they were there engaged, I understand, to assist the parties to identify particularly the school levels within the industry, but we would submit that no special status should now be given to the Jones report, if I can call it the Jones report, simply because - I think probably to be a bit more respectful, the Jenny Jones report - we say that there should be no special status given to that report because it existed during a period of without prejudice negotiations and even though it may have been an attempt to assist the parties at the time, there was no endorsement of that report so we say that the evidence given by Ms Harvey by - well, the evidence by Ms Jones does not assist the commission in determining this application.

DEPUTY PRESIDENT ROBINSON: Is there not a difference between, as you say yourself, without prejudice negotiations and exercises conducted prior to any formal application coming before the commission, and once an application is made, which when there is actual evidence presented before the commission by persons, whether they be previously engaged in those - in other exercises or not, and I am referring in particular to skills analysis material which was presented to me in the commission. You are not suggesting, are you, that I should disregard every piece of evidence which was before me simply on the basis that there had been negotiations which broke down, for the want of a better word.

MR FITZGERALD: Well, what I am suggesting, Mr Deputy President, is that the Jones report was never endorsed by either side so most skills analysis, and you probably have been referring to other award areas which have been done to justify classification restructures, have been done on an agreed basis and certainly they can be presented as supporting material to assist and to have the commission ratify that structure but in this instance we have not got that situation applying.

There is no agreed method of proceeding even though the Jones report was commissioned to - with that in mind, to assist the parties, that never eventuated and therefore I would say, Mr Deputy President, in terms of the relative applications you can take whatever notice you may want to take of that particular evidence, but I would simply say, Mr Deputy President, that there was no endorsement by employers, particularly beyond the 115 per cent level contained within the current award so in that respect it does not assist us very much at all.

DEPUTY PRESIDENT ROBINSON: But we have moved from a possible consent situation now to an arbitral situation and if you are saying to me that if thee were things which were done which were not agreed, that I cannot take any notice of evidence which was presented subsequently because it is not agreed, I think that is a different question.

MR FITZGERALD: Well, no, I am certainly - I am not suggesting you cannot take any notice of it, no, but we would submit, Mr Deputy President,

it has no particular relevance in terms - because it was done during the period of without prejudice negotiations. There was no endorsement of that report at all, no final endorsement. Ms Harvey can use it in terms of attempting to justify her application but I think it is important that you know the way it was commissioned and the fact that it was never endorsed by the parties, even the HSUA.

If I could just move on, Mr Deputy President, to the status of the TCCI application it may be that I am able to complete by a quarter to 1 that particular aspect and I just present a further exhibit. Mr Deputy President, while I am presenting it, there may be - and it is just an easier format - there may be - and I think it was in fact presented by the union and there may be some repetition of exhibits.

DEPUTY PRESIDENT ROBINSON: This will be TCCI.8, Mr FitzGerald.

MR FITZGERALD: Thank you. Now, I think it may be convenient, I will probably be another five or 10 minutes, that I proceed this far and then - the major plank of our argument - our industrial argument is in fact to follow in respect to the HSUA application and that will take some time this afternoon. So if I could just complete this or attempt to complete this aspect of our submission relating to the wage fixing principles and the fact that in our submission the application does comply with the principles.

Now, Mr Deputy President, it would be my submission these principles are ones which emanated from the decision in September 93, I could be corrected on that date, by this commission and again I stand to be corrected but I think I am right, that they are currently the principles which apply in this jurisdiction. Whether that changes in terms of recent federal commission decisions remains to be seen.

DEPUTY PRESIDENT ROBINSON: Indeed it does.

MR FITZGERALD: But, yes, it is going to be an interesting exercise, one which we will leave for you to work out, I think. Now, in respect of - if I can just read the - and the principles if I can say have been continuing. They have been an on-going process since about 1987 with the introduction of restructuring and then the structural efficiency and if I could just quote from the preamble.

Consistent with September 1988, T1524 and T1525, and October 1989, T146 and August 1991, T3069 and February 1992, T3584 of 1991, there is quite a series of decisions of course, state wage case decisions, the structural efficiency principle provides a framework which it is intended that parties to an award co-operate positively in a fundamental - and I just stress that word - fundamental review of the award with a view to implementing measures to improve the efficiency of the industry and provide employees with access to more varied, fulfilling and better paid jobs and the measures should include

but not be limited to - I will not quote all of those because they are well known but simply to say that in terms of the TCCI application we would submit that the application is in accord with the intent of the wage-fixing principles particularly in respect to establishing skill-related career paths which provide incentive for workers to continue to participate in skill formation.

We have provided a five-level structure within our application which we believe is appropriate to the needs of the industries. We have not included what we see as mid-management positions embraced in the level 6 and 7 of the HSUA application but overall we believe we have clearly differentiated the skill levels required and that is manifested in the TCCI application. Now, we have also included - and I will make submissions at a later time on a number of conditions matters which improve the overall efficiency of the industry. They are, if you like, hang-overs of non-agreed matters as a result of previous discussions with the union. We would submit, Mr Deputy President, that the exercise of structural efficiency is not simply classification restructures which is the basis of the HSUA application but involves, as the commission's principles themselves say, a fundamental review of the award. Now, we - - -

MS HARVEY: Sorry, I am really not trying to be an obstructionist here but I am just concerned that the submissions in relation to conditions are in fact in breach of the previous procedural agreements that we had about how we were going to proceed with the conditions matters and certainly I have recognised the right of Mr FitzGerald to put argument about conditions matters at a later date. I just would not like us to get diverted given that we gave commitments to Mrs Dowd who is not here.

DEPUTY PRESIDENT ROBINSON: Oh, yes.

MR FITZGERALD: No, I am not sure whether Ms Harvey misunderstands me. I am not seeking to incorporate those matters at this point. We are certainly addressing the classification structure. Is that - - -

MS HARVEY: Yes.

MR FITZGERALD: Okay. I am seeking just to show that it is an exercise which involves a fundamental review. We would submit quite clearly, Mr Deputy President, that the TCCI application before you is consistent with the principles and it does establish skill-related career paths which provide an incentive for workers continue in - continue participating in skill formation. However, we have - and I will address this afternoon - confined our application to the maximum contained within the - maximum as outlined in the current award which is 115 per cent.

To go beyond that point we do not believe can be genuinely incapsulated under structural efficiency and I will be putting lengthy argument this afternoon, Mr Deputy President, particularly in respect of the HSUA application in that regard, which in our view seeks to significantly uplift

existing employees into new levels without any reference to any changes in conditions or skills required and responsibility undertaken and, more importantly, seeks to add two additional levels both of which, in our submission, are not currently encompassed by the award, both of which must have some reference point and that is, in our view, the work value principle.

Just before going to lunch Ms Harvey indicated in her submissions that it was structural efficiency that they sought to pursue their application under. I just pose the question - and we will be addressing this later this afternoon - if that be the case what then is the purpose of work value principle? Does it stand there as not being relevant? It has been continued during changes to the wage fixing principles in basically an unchanged format. It has been continued in the most recent national wage case of the federal commission and we would submit that it is there as a principle which should be complied with and simply cannot be ignored as Ms Harvey has done by her application. So it would be, Mr Deputy President, if that is convenient, a convenient time for me to stop and then proceed with our argument in respect of the HSUA application.

DEPUTY PRESIDENT ROBINSON: Very well. We will adjourn until quarter past 2.

LUNCHEON ADJOURNMENT

MR FITZGERALD: Thanks, Mr Deputy President. We have agreed, I think, because of other commitments of both of us that we would finish around about quarter to 4 but there is - if that suits the convenience of the commission and for future hearing dates there would seem no difficulty in me completing my submissions at the next hearing date. So that does not place so much urgency on today if that suits the commission's convenience.

DEPUTY PRESIDENT ROBINSON: Well, that would be great if we could finish without going into November.

MR FITZGERALD: All right. We will seek to do that. Mr Deputy President, just before we adjourned prior to lunch we were examining the TCCI application in terms of the wage fixing principles. We submit even though there will be some small increases that arise as a result of the TCCI increase in employees translating from a lower level to a higher level within our application, that those increases will indeed be minimal and we have complied with the overall spirit and intent of the wage fixing principles. However, I will now go to the HSUA application which we submit seeks to significantly uplift existing employees and embrace new levels of employees.

DEPUTY PRESIDENT ROBINSON: Just before you do, Mr FitzGerald, I am reluctant to interrupt advocates - - -

MR FITZGERALD: That is fine.

DEPUTY PRESIDENT ROBINSON: - - - particularly as I might delay their finishing time. But do you see the structural efficiency principle and the work value principle as being mutually exclusive?

MR FITZGERALD: It is a very hard question to answer that one, Mr Deputy President. Certainly there is reference within the structural efficiency to absorption to absorbing past work value cases. But yes, I think they are exclusive and I think they need to operate - quite clearly if I can put it - if I can answer it in terms and I am probably pre-empting some of my later submissions.

DEPUTY PRESIDENT ROBINSON: Oh well - - -

MR FITZGERALD: But that does not matter. That does not matter. If I could answer it in terms of - excuse me just for a moment. The two new classifications, as we see it within the HSUA classification, which have been and I think this is answering the question for you, Mr Deputy President, which have been embraced by the HSUA application. If I just take you to the work value principle on page 6 of exhibit TCCI.8, in fact, I am sorry, no it is not that. It is, if I could, it is in fact an extension of the new - to the new award, because I am looking at the wrong principle, I am sorry.

DEPUTY PRESIDENT ROBINSON: Well, let me help you, as I am inclined to help all applicants. On page 2 of TCCI.8 - - -

MR FITZGERALD: Yes.

DEPUTY PRESIDENT ROBINSON: - - - at the end of the structural efficiency principle it says, half-way down the page:

Structural efficiency exercises shall incorporate all past work value considerations.

Is that what you were looking for?

MR FITZGERALD: Yes. No, I am aware of that provision. It was talking about past work value cases there. The fact remains, Mr Deputy President, the work value principle has existed, and exists within these principles. I will take you to the most recent national wage case of the federal commission which also endorses it. But there is some reference to it in terms of this - and there is something to link with other principles and the one which I was referring to is, in fact, the first award and the extensions to existing awards, and that is at page 8. And it is (b), and if I can quote:

In the extension of an existing award to new work to the value of work already covered by the award.

And in that regard we say that particularly in respect to those two additional levels which we say are not embraced by the current award, there must be, the only way that you can proceed in terms of, and I think I am indirectly answering your question now, the only way you can proceed, maybe as part of an overall structural efficiency exercise, but specifically use must be made or sorry, regard must be had to the work value principle. So, I think they do operate independently, if I can - it is a very long winded answer but that would be my submission.

DEPUTY PRESIDENT ROBINSON: It gives a better - it is a potential dilemma, is it not, that you can have changes in work either through physical changes in introduction of new machinery and equipment and that sort of thing. But you could changes to work which arguably increase levels of skill, responsibility and the amount of training needed and indeed, we should add, different conditions under which work is performed under the work value principle, carry out an assessment of the changes by the sorts of things that they say we should do as to how you assess such change.

And then we have got to have regard for the fact that that work value principle is, as you correctly say, has been part of the wage-fixing principles for quite a long time. I forget how far back it goes, but certainly it was in existence, obviously when Commissioner Gozzi issued his decision in an interim decision in 1985 that has already been tendered this morning, but subsequently the structural efficiency principle was added and it - the work value principles still remained then and remains now, as does further variations to the structural efficiency principle, but there is a continuum, is there not, the way - - -

MR FITZGERALD: Well, I - - -

DEPUTY PRESIDENT ROBINSON: - - - amongst it - you have got to read, you know, a series of them before you can come to a conclusion as to their appropriateness in any given circumstances rather than just look at the ones that they will, as at this moment, without consideration of the history.

MR FITZGERALD: Yes, it is - it is somewhat of a dilemma, but in respect, Mr Deputy President, to the submission I made in respect to new positions, I think the position is very clear that in respect to that you cannot, as Ms Harvey has attempted to, just simply incorporate it under the general banner of structural efficiency. There is specific - there is a specific requirement to assess the value of the work in a - in relativity, for want of a better title, by better phrase, to the work already performed.

DEPUTY PRESIDENT ROBINSON: Well, the word, relativity, punctuates that structural - introduction to structural efficiency principle - - -

MR FITZGERALD: It does, yes.

DEPUTY PRESIDENT ROBINSON: - - - quite unashamedly.

MR FITZGERALD: Yes, but I would submit - yes, sir, I agree and maybe there is some overlap but in terms of the extension of the award to award-free areas, there is no doubt that I suppose that all leads to relativity. You must assess that work relative to the work already covered by the award.

DEPUTY PRESIDENT ROBINSON: Yes, but we are not talking about an extension of the current award to areas which were previously award-free, are we?

MR FITZGERALD: Well, we would submit we are, Mr Deputy President. Well, we are not, in terms of the TCCI application but the union are in that there were positions previously not covered by the award are now, in our submission, covered by the applications at level 6 and 7, and they are managerial-type positions which are, in our submission, currently award-free. And the principle in respect to that, even though I do acknowledge some overlap between the principles and the difficulty in discerning which prevails, if you like, putting it that way, the principle is very clear in terms of new positions, extending the award to previously award-free areas.

I just submit that in that regard, those positions, managerial positions, were not - are not, in my submission, covered by the award. And so that is what - and nor is the TCCI application seeking to cover them. It is the - and it comes down to the interpretation which you must place on, particularly the HSUA exhibit, which I will look at later.

DEPUTY PRESIDENT ROBINSON: Well, okay, if we accept for the sake of your argument, that you are correct and that previously award-free areas are now sought to be covered, then I am not quite sure what comfort you can make from first award principle (b), where it just says that:

The extension of existing award to new work or to work, to award-free work, the rates applicable to such work will be assessed by reference to the value of work already covered by the award.

Well - - -

MR FITZGERALD: Well, there needs to be, if that - I think I could draw considerable comfort from it, Mr Deputy President, because there needs to be, as there has not been in the HSUs application or submissions, some - all the HSU have done, if you like, is try to reference those higher levels by comparison with other awards. Now, that is not the correct approach. What the principles require is a referencing of those positions against positions covered by the award as it is now. And so that is where I think the HSUA argument is deficient, Mr Deputy President.

DEPUTY PRESIDENT ROBINSON: Well, I do not know that the HSUA argument relies upon, exclusively upon comparisons with other awards. It is a multi-faceted argument, as I understand it.

MR FITZGERALD: Well, I will make submissions on that. I would, with respect, I do disagree because I think the basis of the HSUA application and the relativities is comparison with other awards, and that, in my view, and particularly with respect to new positions is not one which is validly open to it because the union must, in accordance with that extension of the award to award-free area, have particular reference to the value of the work already covered. So, there needs to be some sort of assessment, and I submit work value assessment, for the union - from which the union can pursue their case on. Now, they have not done that, nor categorically or categorically they have denied that. They have - - -

DEPUTY PRESIDENT ROBINSON: Yes. I am sorry to be staying on this - - -

MR FITZGERALD: That is all right, that is - - -

DEPUTY PRESIDENT ROBINSON: - - - point because it is - but it is important. Are you saying then that the structural efficiency principle as first introduced, dealing as it did with the creation of career paths and enhanced training and responsibility, cannot now be used because of the fact that there has been a work value decision handed down in 1985?

MR FITZGERALD: No, I do not, but what I am saying in respect to those matters which I have incorporated in my earlier argument is that those matters are precisely the same matters which Ms Harvey is using to substantiate her case. Now, in my submission, and it is my submission, the only way she can legitimately do that is by the work value case, particularly in respect to those new positions, but also where there are significant increases. And you will see in the absence of a translation schedule of the HSU, which is in contradiction to the TCCI application, there are increases up to 35 per cent. Now, with those sort of increases there needs to be, in our submission, justification for those in terms of an increase in skills, responsibilities or the conditions under which the work is performed. Now, all of the changes which Ms Harvey has sought to use in a de facto work value sense are those which have been taken into account by Commissioner Gozzi.

DEPUTY PRESIDENT ROBINSON: But would that not - if the work value principle was to be followed, would that not fundamentally mean that the existing classifications would be reassessed and it would be determined whether or not there was the need to create a new classification because of the dramatic changes which have occurred? But did the structural efficiency principle not introduce some sort of attempt at stability on relativities and to say that, okay, take the tradesmen under the Metal Industry Award, carry out an assessment as to whether or not the same level of skills, competency,

responsibility, would have been exercised, and then fix a classification? If you come up with the result which coincides exactly with a comparable level of skills, responsibility, etcetera, then you will establish a 100 per cent rate

- - -

MR FITZGERALD: Yes.

DEPUTY PRESIDENT ROBINSON: - - - but in any case other classifications shall be assessed in relation to the benchmark, and it gave some examples in that 1989 whatever it was decision - - -

MR FITZGERALD: Yes.

DEPUTY PRESIDENT ROBINSON: - - - storemen and tradesman's assistant and so forth - - -

MR FITZGERALD: Yes, I recall that certainly.

DEPUTY PRESIDENT ROBINSON: - - - and said, okay, everybody else go away and use that type of formula and carry out your own exercises based upon some audit of skills.

MR FITZGERALD: I do not disagree - - -

DEPUTY PRESIDENT ROBINSON: And then that is what Ms Harvey is saying to us, as I understand it, that her organisation has applied that to the letter and come up with a result.

MR FITZGERALD: Well, I do not disagree with anything you have said in terms of summarising the intent of the structural efficiency principle, but it only applies, in my submission, to those positions already covered by the award at that time. To extend it, and that is the basis of our argument, to extend it there is need for reference to other principles, and particularly the work value principle. And there is - I think I have shown already that the principles specifically address the area of extending to award free area, and that is my interpretation, and it is my interpretation, in respect - by reference to the value of the work already covered by the award is - is essentially a work value case.

You need to be able to compare the work at level 6 and 7 to the lower levels contained within the application, and that is where I say that the HSUA case has been deficient. I suppose I can answer it by going back to the question which I posed just prior to going to lunch: what is then the purpose of the work value principle? You know, if this commission or indeed its federal counterpart felt that it no longer had any relevance in the overall concept of structural efficiency, then no doubt in its wisdom it would have deleted it, but it has maintained the principle.

DEPUTY PRESIDENT ROBINSON: Well, it has maintained both - - -

MR FITZGERALD: It has, yes.

DEPUTY PRESIDENT ROBINSON: - - - both the structural efficiency principle and the work value principle, presumably on the assumption that they serve different purposes.

MR FITZGERALD: Yes.

MS HARVEY: Perhaps it might assist the commission if Mr FitzGerald could address (d) in relation to first awards and extensions of existing awards.

DEPUTY PRESIDENT ROBINSON: What does (d) say?

MR FITZGERALD: All right, I am happy to but I am not sure if I am obliged to at this time. I do not think it really assists one way or another because we are not talking about a first award in this instance, we are talking about extension of an award to cover a previously award-free area, so I do not think that really assists in any way.

DEPUTY PRESIDENT ROBINSON: Well, anyway, I have opened up the argument and I do not know that we need to debate it ad nauseam at this stage.

MR FITZGERALD: No. Well, it will - well, it will, as I indicated, form the basis of our argument to a great extent in respect to the status of the HSUA application, and I am happy to take further questions if you wish to put them to me, but I think much of it will probably repeat some of the responses I have given to you already. I do not mean to be repetitious in that by any means.

DEPUTY PRESIDENT ROBINSON: I am not a person who debates those things to exhaustion.

MR FITZGERALD: No. There are better things to do with our times, I am sure. It is not one of those most enthralling topics, is it?

DEPUTY PRESIDENT ROBINSON: Well, it is an important topic but, as I say, having opened it up I just wanted to alert everybody to the fact that I am interested in - - -

MR FITZGERALD: Well, I think - and it is probably the first time it has been raised in this context, it is certainly the first time I have had to raise it in matters of this kind.

DEPUTY PRESIDENT ROBINSON: It has been exercising my mind for some time, I must admit.

MR FITZGERALD: Yes. Well, I think I can address it in terms of my submissions in any event, Mr Deputy President - - -

DEPUTY PRESIDENT ROBINSON: Right.

MR FITZGERALD: - - - as well as the cost considerations because the overall purpose of the structural efficiency principle was to transpose or translate from existing structures into new skill related structures with minimal cost. Now, we say that that sets the whole scene of the structural efficiency principle, and that - in accordance with the minimum rate and broadbanding process, and in this instance where the union's application potentially sees very significant increases granted to staff and that as an overall point is against the general thrust of the structural efficiency principle. I will produce some dicta out of cases, out of national wage cases, of the federal bench relating to the overall cost impact and I think that might assist in some way.

DEPUTY PRESIDENT ROBINSON: All right. I will not interrupt you.

MR FITZGERALD: No, that is - I am happy to answer it. Indeed, I think it is a very relevant point you raise and I hope I have clarified it by responding to it but I think it may become clearer once I proceed through my submissions.

DEPUTY PRESIDENT ROBINSON: Well, my attitude will become completely clear when I write my decision.

MR FITZGERALD: As I indicated, Mr Deputy President, I think this argument is probably the most significant industrial argument we will present in respect to the HSUA claim. What we see the basis of the claim is that there has been a massive amount of evidence and submission, I think something like 750 pages, do not quote me on the correctness of those numbers but it is a large number of pages of both evidence and submission, and I think I can only claim to have a few of those pages with a couple of threshold points we raised but I think the rest was Ms Harvey, and as I indicated in my preliminary submissions the presentation of that case was indeed well put to the commission.

But that does not necessarily mean that the application has industrial merit; in fact, we submit that it is devoid of merit. But the approach as we see it is that there has been a large amount of evidence and submission, it is really a scatter-gun approach, it is, in our view, under the general heading of structural efficiency, without drawing any conclusions of how it is subject to structural efficiency, how it is - can be compliant with a structural efficiency principle, and I suppose the union would hope that if enough mud is thrown, if I can use that analogy, some of it will stick. But it is in my submission a too simplistic approach and one which is against both the letter and the spirit of the wage fixing principles. What the HSUA have done is move from a current award structure with - as I indicate, the maximum relativity under that

structure is 115 per cent, and move that structure to a seven-level structure, two levels of which are currently not contemplated by the award.

Not only are there new levels - and as I indicated in my early submission or in response, those positions currently are - or currently embrace management or middle management positions, training development positions and those ones which the services believe are - structured their organisation to be free of the award.

DEPUTY PRESIDENT ROBINSON: Is there anything fundamentally wrong with an award containing what you say are management positions? I mean, you - - -

MR FITZGERALD: The problem I see with that is that it does remove the flexibilities which currently exist in the engagement. It is a bit like union and employer advocates. There is a fair bit of flexibility there in terms of hours of work. And I would submit that if those positions are contained within the award, then it does remove that flexibility. I do not think the TCCI would recognise anything such as Sunday work nor work performed after the normal office hours. And that is the sort of position which these categories fall into. Now, I would concede that some other industries do in fact embrace them. One I know of is, in fact the banking industry.

DEPUTY PRESIDENT ROBINSON: Well, that is right. I think I can think of awards such as the Chemists Award. You have obviously got awards in respect of sea captains and air pilots in the public service, not to the same extent now as they used to be but very, very senior bureaucrats.

MR FITZGERALD: I mean, there is no point in me trying to deny that there are directors of nursing positions in nursing awards, too, but we would submit that given - I mean, there has not been any demonstrated need, in our submission, and the onus - because what the TCCI is really seeking to do by its application is really maintain the status quo to a certain extent. Now, the onus, in our view, is on the union to show that that should be disturbed and there has not been in Ms Harvey's submissions or evidence any demonstrated need to cover individuals of that position.

DEPUTY PRESIDENT ROBINSON: Well, the question of onus is an interesting one when there are two applications before the commission.

MR FITZGERALD: Well, I think I can put it as simply as I have just put it, Mr Deputy President. Our application is effectively - and I agree that there could be some movement within structures in terms of translation - but effectively it is maintaining the status quo whereas the union's application seeks to change that dramatically. Now, that being the case, we would submit that the onus is very clearly on the union to prove their case. And, we would submit, in terms of those additional levels there has not been any

demonstration of the need to in fact - for the award to embrace those levels.

The other point we would make in respect to each industry will differ. But in respect to this particular industry there has been no acknowledgment by employers in terms of the application that they should embrace those higher levels of management. Indeed, our position is that they should not because our application does not embrace them. But one of the other reasons why I think there is is there is a potential for role conflict where those positions are often in a supervisory position, and particularly in disciplinary proceedings or such like it does, in my submission, cause a problem. But I cannot in any way deny that in some awards there are those sort of management positions covered.

But that does not necessarily make it right for this industry and, indeed, as I indicated, there has been no demonstrated need for those positions to be covered. And, indeed, I would say, Mr Deputy President, that it does remove - because once those positions are embraced by the award, then every condition in the award, including hours of work, overtime and such provisions, apply - and that is where the flexibility which the industry requires of those types of positions will be diminished.

DEPUTY PRESIDENT ROBINSON: But then would assume of course that the award does not make any special mention of those sorts of classifications in the conditions section.

MR FITZGERALD: Yes. I mean, it is possible for conditions to be - or certain conditions to be excluded or exempt from certain award conditions, but that is not contemplated within the HSUA application. If the HSUA application was successful, then management positions which were previously, if you like, having a packaging concept which would incorporate things such as overtime - that, in my submission, would not be possible because what would happen is that the new structure would come into place and the conditions would apply as they were now; and, for that reason, we would submit it is not in the public interest for those positions to be contained therein.

Now, one of the difficulties with the HSUA application, as I indicated, is the difficulty in ascertaining where people within the current award will translate to because there is no translation schedule. Now, if you contrast that to TCCI application - and I will just without meaning to turn it up, Mr Deputy President, in the TCCI application we have at page 16 of our application a very clear process of translation where the only real new level is level one. But, other than that, which is an introductory level, level 2, 3, 4 and 5, it is clear where the positions in the various sectors of the award will translate to.

Now, the difficulty with the HSUA application in the absence of such translation is that we are not certain and depends on the interpretation to a

great extent, because they are general descriptions rather than specific positions - we are not really always certain where employees currently classified, let us say, at the 100 per cent level in the award will translate to. But I will submit potentially they could translate to at least level 5 or even level 6. Now, that being the base, and potentially there are increases of up to 35 per cent - from 100 to 135 per cent. Now that, in my submission, is something which is not - and particularly as we have been through a minimum rate adjustment and broad-banding process - this award has been through that; we cannot ignore that fact.

That is not something which - the increases to that extent are not something which, in my submission, is contemplated by the structural efficiency principle, particularly given the overall rider, and that is that any change from an existing structure to a new structure should be done at minimal cost - and I will take you to those decisions shortly. In fact, if I could take you to those now?

DEPUTY PRESIDENT ROBINSON: Thank you. I think this will be TCCI.9.

MR FITZGERALD: Thank you. And there is a further one to come, but if I can give you that one as well? Just to identify, it is the August 1988 wage case and now I have got the August 1989 national wage case. It is somewhat out of order but it will not matter.

DEPUTY PRESIDENT ROBINSON: Thank you. TCCI.10 is national wage case August 89.

MR FITZGERALD: Thank you. If I could take you to TCCI.9 first - and this is quite self-explanatory in terms of what it is. I have just provided the cover page only plus the relevant dicta within the decision. And if I could take you to the paragraph just following the dot points:

It is not intended that this principle will be applied in a negative cost-cutting manner or to formalise illusory, short-term benefits We expect that any resultant restructuring will be done primarily by consultation and at minimal cost.

And I assume, if I can interpose, that by consultation is that the intent generally would be that the restructuring should be by consent rather than by arbitration. Now, however, the point which we do make - and I draw your attention to - is the specific reference to minimal cost. And the bench goes on further to say:

However, we are not prepared to allow the restructuring of some awards without regard to the relationship of the restructured awards one to another and the overall cost impact.

Now, in respect to TCCII0, which is the 89 decision - and it is a similar position in the quote, which is the bottom of page 8 and if I could quote it is - and this is specific in respect to translation of workers and if I can quote, sorry:

It is our intention that the translation of workers to new classification structures from structural efficiency adjustment.

And I would interpose there they are the two, structural efficiency increases and also, I would suggest, those increases which emanate out of broadbanding and minimum rate adjustment. So apart from those, any other increases should be, in terms of the full bench decision, done with little cost impact. So, clearly, Mr Deputy President, the overall intent of the structural efficiency exercise is not to create a vehicle for general and quite massive wage increases.

Now, in our submission, the union's approach, the HSUAs approach in adopting this very broad brush approach for structural efficiency is very much a gross distortion of the wage fixing principles. Now, if the commission and I think this is where it is essential for the commission, as I am sure the commission is always aware of its public interest responsibilities, if the commission does permit this open slather approach then at any time a union wished to pursue a claim, which may be - is not achievable by agreement, then all the union has to do is put it up, using the colloquial sense, under the banner of structural efficiency without any specific efficiencies occurring in terms of the fundamental review for the needs of the industry occurring.

Now that, in my view, is very much a long bow to draw in terms of the interpretation of the principles. So what the union is doing is taking a very much one way street approach to it without looking at the fundamental intent or the fundamental reasons why structural efficiency was introduced and that was a fundamental review of the award, not only in terms of classification structures but conditions matters as well. In my submission, it is totally fallacious for the union to argue that efficiencies gained are simply through the unions having access to a skill based career path and therefore training opportunities and therefore enhancement of skills which will effect - which will impact on the overall organisations, particularly if the employers, and I refer particularly to the evidence of Mr Rodwell where he indicated that those who had completed the DD course, as it is titled, some those skills which they learnt in that particular course would not be able to be utilised in the work place.

So we would say it is not valid for the union to put this argument that simply because you put them in a skills based career path that the organisation will benefit, particularly when some of these - and I refer particularly to the IPPs which we saw on inspection and in evidence and I will later be referring to the evidence from the department as to whose responsibility it is to implement or to be involved in the implementation of IPPs, but we would submit that in that

case there is adequate support, management support to assist employees in implementing IPPs.

The overall responsibility for such would lay with management not with the employees and, as I indicated, we will be producing a document which clearly indicates the departmental view on who has that overall responsibility, but that forms part of another argument we have. We certainly would acknowledge in that and just say at this time that lower levels of staff have some input but the overall responsibility lays with the management - with management.

It again comes back to this skills and once again some of our submissions will interlink but it then comes back to the skills acquired argument and it will be our submissions that you can only perform at a level which is required of the job at which, as I indicated, the TCCI witnesses have acknowledged that even though formal training gave a greater understanding the overall job and its functions it did not assist in any specific way as that particular job was only performed at a level required - required to be performed at a level as stipulated by the employer and I think Mrs Subonj particularly gave evidence in that regard.

In other words, there is no point in having training just for training sake if the job is not requiring those skills through training. Again, I just said we will elaborate on those skills - this issue when we come to that part in the submission. As indicated, Mr Deputy President, it is concerning and I think it is concerning in terms of setting any precedent in this area because, as I indicated, there is a certain absence of precedent, but it concerning that a union could at any time conceivably raise a claim based on structural efficiency with new relativities under the general banner of structural efficiency, that is certainly, in my submission, both - that, in my view, is against the spirit and stated intentions of the structural efficiency principle.

The other concern the TCCI has is that the union have submitted that following the minimum rate adjustment and broadbanding exercise the union reserves its position, I addressed this this morning, to come back and seek a further restructure of the award with, you know, a further revised structure and revised relativities. What has occurred, as you would be well aware, Mr Deputy President, on other award areas is that the parties have, through considerable negotiations, managed to achieve a consent position. Regrettably, the parties to this award were not able to resolve this matter and hence the HSUA have made application with a new seven level structure and the TCCI application in response is one within the boundaries of the current award.

In our submission, the union's application is premised on the assumption that the mere act of reservation of rights under the MRA principle enables it to access substantial wage increases both, as I indicated, in the movement of classification and skill levels within the classification levels and the creation of two new levels. This they now seek to do at the completion of the

minimum rate adjustment process and what we say is essentially the - at that point, at the completion of the MRA process a process of structural efficiency was essentially complete and although it is open for the union to reserve their position the mere acknowledgment by employers that rights are reserved does not give any special status to the HSUA application nor does it suggest any automaticity in terms of the HSUA application.

We submit, and we did discuss this in my response in terms of who has the onus, we submit that the HSUA still has the onus as they are the claimant seeking to substantially change the status quo. Again we would concede that our application does somewhat change the status quo but within the boundaries of the existing wage levels and clearly, as I indicated this morning, our application and our submission is consistent with the wage fixing principles in that it does provide career paths and recognises responsibilities and other matters which fall within the structural efficiency context but again, I would submit, without acceding the 115 per cent which is the current boundary of the award and all doing that within the August 89 and August 88 national wage case at minimal cost, which is the overall intent of the structural efficiency principle.

Now, I think that is something which we should not ignore, those two very explicit statements relating to cost, however the HSUA application in my submission falls a long way outside those statements. Now, in terms of the onus which we submit lies with the HSU to change the status quo, we say that the - that onus is not like - like criminal jurisdiction it is not beyond a reasonable doubt, it is on the balance of probabilities, and that is a - - -

DEPUTY PRESIDENT ROBINSON: I am glad you consented we have not got a criminal onus of proof here.

MR FITZGERALD: No I am just - I am just simply making the point that it is a lesser onus.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: We would - we would agree with that but indeed in our submission that onus because of what I put previously still has not been discharged. And I do not think there has been too many jail sentences coming out of the commission.

DEPUTY PRESIDENT ROBINSON: Nor anyone gone to the electric chair.

MR FITZGERALD: So, Mr Deputy President, it is - the commission in my - with - in my submission should not lose sight of the potential cost implications in terms of employees moving from one classification to another in terms of the HSUA application, and that - that could be quite considerable and it is a little difficult for us to - to ascertain, but as I indicated at least a

level 5 even level 6 could occur and that - that was - that is well and truly in my submission against the intent of structural efficiency.

Now, if the mere act of reservation of rights during the minimum rate adjustment process enabled one to later access substantial wage increases then all unions would simply have to do is just repeatedly reserve rights to ongoing - to ensure ongoing wage increases irrespective of their merit under the wage fixing principles, or lack of merit. As I indicated in my opening submissions this morning, Mr Deputy President, we - I have researched this matter in terms of interstate precedents and there have been any forthcoming so it does create somewhat of a difficulty - a difficult position for the commission, but it is indeed a heavy onus given that, I would submit, in this jurisdiction it is a first matter of its kind to have a fully arbitrated structure in this, in the private sector.

DEPUTY PRESIDENT ROBINSON: You are not suggesting we should only be followers?

MR FITZGERALD: No, I am not suggesting that, but I suggest, Mr Deputy President, because of that it does - there is indeed a heavy onus on - on not only the industrial parties but the commission itself to ensure that it is within reasonable bounds and also ensure it is within the statements as indicated in the two national wage case I presented. Just to repeat, the intent is not to provide a vehicle for general substantial increases.

Now, in terms of the HSUA approach, and I will in my response to the HSU case I will go specifically to some of the awards, but just generally this time in my submissions presenting exhibits from other industries such as the Medical Diagnostic Award is not particularly useful in that the requirements of that industry, unless there is some form of comparison, in if you like an apples-for-apples comparison which there was no attempt to do so, there is - it is not particularly helpful in establishing the relativities as suggested in the HSUA application.

So, clearly the conditions in work value terms, the nature of the work, the conditions under which the work is performed, skills and training required and the responsibilities may be substantially different and that is why we say, Mr Deputy President, that it is not a valid approach for the HSU to use this, as it was in the mid 80s, this comparative wage justice type argument, and I think I recall, although it might have been a comment in jest, Mr Deputy President, you made that, I think you said, we are not - it is not comparative wage justice but many a true comment - a true word said in jest, and I think what we see here is a pseudo comparative wage type - wage justice type argument.

And clearly the whole shift of wage fixing principles or wage fixation in this country is to move away from that and to - to take - move away from a centralist approach to, firstly an industry approach and now the enterprise

approach, and to make comparisons with other industries and set relativities in accordance of what their industry set is not in my submission a valid approach. Particularly the Medical Diagnostic Award is one which we have seen quite clearly contrast with the approaches in this industry - and I just refer you to the evidence of Mrs Keating who - who was able to through her own personal experience, one who now works in the medical model and her position as a - as a clinical nurse consultant to contrast that with one for her son who has a disability to - who has, we can see from her evidence, who has improved remarkably since moving away from that medical model.

So, it is quite ironical that the union seek to use that award, which is very - Medical Diagnostic Award as one which is - is very much a clearly medical model to justify relativities which - which is in an industry where we have clearly seen, and Mr Jarman's submission bears that out this morning, a move away from institutionalised care. And the overall thrust of the - of the structural efficiency principle is to make awards more relevant to individual industries.

So in that regard, Mr Deputy President, the approach by the union in comparing awards in other areas, and we have seen - and I will come specifically to the South Australian award because the award which Ms Harvey used there specifically excluded the Disability Services Award and I will take you to that when we actually make submissions finally in response to the union claim - but it is not in my submission a valid approach in this exercise.

Now, if the commission were to grant the union claim then I would submit that it would be against its own principles, and the commission in my experience has in making awards during recent years had very high regard for its own principles - wage fixing principles I am talking about - and as well

- - -

DEPUTY PRESIDENT ROBINSON: Of course.

MR FITZGERALD: - - - as well as the public interest and maybe its own principles as well. But I would submit if - if in fact the union's claim were to be granted then it would, in my submission, seriously infringe the commission's principles - own principles. So, in my submission given the lack of precedent would, even though you do not - you acknowledge and I acknowledge you also on that point, is that we are not simply following every other tribunal in the country - but with - - -

DEPUTY PRESIDENT ROBINSON: There would be plenty of occasions when you would not want us to.

MR FITZGERALD: Yes, that is true. But on this occasion because in my view the approach taken by the union is extremely vague in terms of the structural efficiency principle it - it would be, I think, a risky proposition to

grant the union's claim in accordance with that principle when clearly, in my submission, that is a very broad interpretation - in accordance with the very broad interpretation taken by the union. Such an outcome, in my submission, would make a mockery of the foundation underpinning the minimum rate adjustment principle.

As we saw - and that intends minimal impact, and also we should not lose sight of, in terms of acknowledgment by this tribunal and its federal counterpart, that in applying the minimum rate adjustment process the unions were required to give a commitment to the absorption period for over award payments and the intent of that being is that any change should occur with minimal cost impact, and this commission has in fact endorsed that approach by separating, as it is required to by its own principles, into a base rate and supplementary payment and existing over award payments can be absorbed into - into supplementary payments.

Now, that being the intent, the intent is of course that any change to a new structure should occur with minimal cost impact. Now, I would submit, Mr Deputy President, that clearly I have proved to the commission that in terms of the exhibits which I have presented, is that the structural efficiency principle does not exist as a vehicle for widespread and substantial wage increases.

The minimum rate adjustment process which is now complete, in our submission, should fully exhaust any further wage movement under this principle, notwithstanding the unions mere act of reservation of rights. Other wage movements within existing broadband levels, and as I indicated they could be quite severe, and the extension to the existing awards - the existing award and to new broadbanded levels, level 6 and 7 are referred to, should in our submission - because the unions have - really have exhausted what is available to them under structural efficiency, should and can only be tested against other criteria under the wage fixing principles.

Now, the HSUA - and it is indeed a risky path they took, I would suggest, in terms of their application have - and it is not open for the HSUA in my submission to at this stage take another path, the HSUA have remained committed only to the one path and that is the broad-brush approach to structural efficiency. That in my view and my submission severely limits the success of the claim if you, Mr Deputy President, are to accept our argument. I concede, Mr Deputy President, that it comes down to an interpretation of the wage fixing principles but I would submit that the only interpretation you should accept is the - in this instant case is the one which I have just put to you considering particularly the statements made in the August 88 and August 1989 wage cases in respect to the intent. Now, it is quite clear that the union's application if granted could not be implemented without substantial cost impact and then that is quite clear in my submission - is against the general thrust of the structural efficiency.

DEPUTY PRESIDENT ROBINSON: You cannot tell me any precise sort of figure of the effect?

MR FITZGERALD: Well, we have done an examination of the unions claim obviously, Mr Deputy President, and we would say employees who are sitting at the 100 per cent level at the moment could potentially translate - I suppose that is the worst possible scenario - to at least 135 per cent and, I mean, there could be lesser amounts of course. It depends again - because the union's application is laissez faire in terms of translation - it could be at a lesser level but potentially that does exist. Now, that does not exist within our application, Mr Deputy President. Now, I suppose one of the unknown factors generally has been the cost impact and I can understand it from your perspective that it is difficult - - -

DEPUTY PRESIDENT ROBINSON: Yes. When you say to me that the cost implications are substantial it follows that I would be interest in knowing, you know, what you mean by substantial? Could you relate it in terms of potential costs as compared to overall funding in a particular area or could you relate it to - as an example to a particular employer, be it Oakdale or Devonfield or - - -

MR FITZGERALD: I think that would be useful and if we could - rather, if I could take that on notice, please, Mr Deputy President, and present a couple of examples both in employment services and moreso, I would suggest, in accommodation services and just show you but it is our submission that there are potential increases, and we are happy to show an example of that and if I can take that on notice, up to at least 135 per cent. Now, that is indeed significant. Now, that will not be the case - - -

DEPUTY PRESIDENT ROBINSON: Not 135 per cent increase?

MR FITZGERALD: No, from 100 per cent to 135 per cent.

DEPUTY PRESIDENT ROBINSON: Yes, right. That is 35 per cent.

MR FITZGERALD: Yes, 35 per cent increase, certainly. Now, that will not - we would see that is not going to be the case in every translation of every individual employee.

DEPUTY PRESIDENT ROBINSON: No, that is why I ask.

MR FITZGERALD: And it would be an impossible process to do that for the whole industry but I think probably - thinking further - it may be better for us not only to do it in respect of one individual but a particular service showing that there might be a variety of outcomes and we would be happy to do that exercise. It would, I think, would clearly prove our point which we are making but I thank you for your question there. Mr Deputy President,

excuse me for a moment, Mr Deputy President there is one other arm to our argument in this respect and that is in respect to special cases.

Now, I concede that the commission earlier refused to refer the matter to the present - that is probably the wrong word to use - found against our submissions and we accept that decision. You will recall that we did make submissions that we felt that the case was being proceeded as a test case essentially and that it would have - I am sorry - have flow-on implications and should be referred and you proceeded - which as I indicate we accept but that was only in respect to the full bench decision - that was only - and you will recall that we made submissions that the matter should be referred to the president pursuant to section 24(4)(b) which I quote:

*The commissioner who conducts the hearing and application
..... refer it to a full bench.*

Now, that argument was put and you determined it. However, I would submit that in addition to that argument there is contained within the commission's own wage-fixing principles of September 1993 - sorry, December 1993, was it not when I think about it, I think it might have happened right on Christmas but it - - -

DEPUTY PRESIDENT ROBINSON: Why test our memory when we have got it all here?

MR FITZGERALD: Look, it is an insignificant point, TCCI.8 anyway - - -

DEPUTY PRESIDENT ROBINSON: 24 December 1993.

MR FITZGERALD: Yes, I recall that as a fairly special date, thank you, but I would submit that those principles particular in respect to the special case principle and if I can quote, and that is on page 5 of TCCI.8 and I quote:

*Except for the flow-on of test case provisions any claim for increases
..... by a full bench.*

The last part of the special case provision does not do anything more than either have the commission as currently constituted or a full bench but this particular - and I would submit that this particular case has not been given any special case status and, indeed, it would be too late for that now to be given but we would submit in terms of our earlier submissions that the increases which are sought by the HSUA applications are those - are increases which in our submission are those which are not allowed elsewhere in the principles and for those reasons the commission is bound to process it as a special case.

DEPUTY PRESIDENT ROBINSON: It would make it easy for me if I referred it now.

MR FITZGERALD: Referred it to a full bench. I am not sure whether your colleagues would entirely agree with you there.

DEPUTY PRESIDENT ROBINSON: I am sure what their opinion would be and no doubt whatsoever.

MR FITZGERALD: We are not submitting that it should be at this stage unlike our first submission when we took that threshold point but we are saying that it is indeed, in our submission, a matter which - to be processed as an alternative submission it must be processed as a special case and, again, if the commission does not accept that in terms of employees moving within the classification level as proposed by the union then I would submit that the union - the commission is bound to accept this in terms of the creation of two new positions. Now, I suppose it would have been open for the union to, in respect of those positions, to pursue in accordance with the principles, that being the work value principle, but they chose not to. They chose to pursue the whole matter pursuant to the structural efficiency principle.

Now, given that particular case then I would submit that as the union has its - I would submit that it is mandatory. It will be processed as a special case as determined by the commission. Given that has occurred then the union case does lack industrial merit in that regard.

DEPUTY PRESIDENT ROBINSON: But are you saying under that special cases section of the principles that the present matter does not fall within any of the principles? That is what it is saying, is it not?

MR FITZGERALD: Well, that is right. Any matter that does not fall within the principles can be processed as a special case. We are saying that the matter does not fall within any of the principles and therefore the only way it can be processed is by a special case.

DEPUTY PRESIDENT ROBINSON: Well, would that mean that if I upheld your submission and rejected the union application that they would have a second string to their bow, that they could then seek the special case hearing?

MR FITZGERALD: That is something for the union to address I think, Mr Deputy President. As to what option the union took, it is really in their hands, but we would be saying that in respect to and this submission, if it were successful then the commission could in fact dismiss the matter pursuant to section 21C which, and I quote:

At any stage of these proceedings dismiss -

sorry, the preamble to it is:

The commission may, in relation to any matter, at any stage of these proceedings dismiss a matter, or part of a matter, or refrain from further hearing or determining the matter.

DEPUTY PRESIDENT ROBINSON: You will get a walkout if you quote all of that, will you not?

MR FITZGERALD: Get a what, sorry?

DEPUTY PRESIDENT ROBINSON: You might get a walkout if you quote all of it?

MR FITZGERALD: We might, but I was just saying well, that sort of option is available to the commission if the commission finds favour with my submission. But in terms of what options it leaves the commission then that is really in the union's hands to take.

MR JARMAN: Can I just clarify, I am not sure whether Mr FitzGerald is seriously suggesting at this stage of the hearings being abandoned or under this section of the act, or not. It would assist me if I could clarify that.

MR FITZGERALD: We are submitting - I do not expect that the case will be determined at this point, Mr Deputy President, because the principles of natural justice which the commission adheres to but we are submitting that if in fact the union - if the commission finds favour with our submission relating to a special case, then it has no option but to dismiss the matter. I hope that clarifies it.

Now, again Mr Deputy President, it is difficult to precisely come up with costings. The union have attempted to in the cost implications document but I would submit has been strongly rejected by Mr Jarman this morning, but I think the union's position was that the government have in fact had savings created by movement of the CIP area whereas in fact Mr Jarman showed the other, the reverse, but it is - there is potential, Mr Deputy President, that if the union claim as successful that it would have a potentially detrimental impact on disability service sector and without wishing to be an alarmist it could potentially cause a restructuring of services and - which in turn could be to the detriment of consumers.

Now, it is our submission that the union have, in this instance - and again I will respect the case which Ms Harvey has put, but have indeed poured a great weight of resources into this case and this case could, because of the absence of precedent, be a benchmark in other sectors, in health sectors possibly, but in any other private sector award. The HSUAs application in my submission, is a recipe for large wage increases, both in terms of the involvement of employees within existing - or movement of employees within existing broad-band levels and the extension to new levels.

DEPUTY PRESIDENT ROBINSON: When you say the potential effect if the claims of the union are granted, might be detrimental upon the services, what were you meaning there, that some services might be discontinued or downgraded or some close down even or will they operate with less staff or what?

MR FITZGERALD: My instructions confirm what I was about to say. Yes, certainly if - I mean, again it is - the big contingency here is funding and if the funding were not available then all those scenarios which you just mentioned certainly could be - could in fact be reality. Now, in our submission the HSUA have created an expectation amongst their membership that substantial increases will result, under the, in our submission, the myth that magically funding authorities will fund such increases.

Now, in the past there has been, and it is prior to yours and my involvement, Mr Deputy President, but the funding authorities have been reluctant to fund increases, and I just quote - and it took some considerable efforts and I think with the assistance of the union involved in lobbying for funding that there were some difficulties created or some difficulties for the parties in securing funding necessary for the most recent increases under the award which is the increase to the sleep-over allowance from 5 to \$20. Now, that indeed in my submission, is a minuscule amount compared to the potential increases which could result from the union's application.

DEPUTY PRESIDENT ROBINSON: Do you say that any costs associated with your own application could be absorbed without adverse effect?

MR FITZGERALD: I might just need to get some instruction on that, I think, sir. It is - yes, I think Mr Blackwood made a suggestion - a sensible suggestion. We would be submitting that it would in fact be a very small increase and could be absorbed but I think we need to be able to present to you the actual cost implication of our - but that is a very easy exercise, I would submit, Mr Deputy President, because all it would involve is an analysis of a service and using our translation schedule and looking at the cost impact associated with that. But certainly, in terms - in comparison with the union application that would be indeed minuscule.

DEPUTY PRESIDENT ROBINSON: Yes. I am just trying to get a handle on whether or not there is some capacity to pay, some adjustment, or whether things are so tight that there is just no possibility of absorption of any additional costs arising out of variations to the award.

MR FITZGERALD: Well, we are happy to undertake again that exercise and it may assist you.

DEPUTY PRESIDENT ROBINSON: Perhaps we could have a comparison of the cost implications of your own application and those of the union.

MR FITZGERALD: Yes. Well, I think that relates back to that earlier undertaking we would do in respect to the union application.

DEPUTY PRESIDENT ROBINSON: Yes.

MR FITZGERALD: Yes, certainly. Again, I just say the exercise is more difficult with the union application given the lack of specific translations. Yes, I am not meaning to be critical about that in terms of the union application either by harping on that. It is the way the union chose to proceed but we say in respect to the translation schedule, Mr Deputy President, that in fact there is no potential for disputes in respect to translation because it is very clear, categoric, whereas in the union case there is potential for disputed translation which may occur in respect to individuals.

So, Mr Deputy President, we submit that there is no other principle which the HSUA can base their claim and therefore the special case submission I have made should be considered by you, seriously, but that is if - particularly if you accept our argument that the structural efficiency exercise has been completed by the broadbanding and the MRA process.

DEPUTY PRESIDENT ROBINSON: Just so I can be clear in my own mind as to what you are putting to me there, would I be correct in assuming that what you are saying is that I should accept the TCCIs own application in relation to restructuring of classifications and leave it at that, and that the union case, as it goes to the introduction of two higher levels of the structure, should be made part of the special case recommendation to the president?

MR FITZGERALD: Well, that is - in terms of the first part I would agree entirely with you; that you should accept our application. In respect to the second, it is difficult for me to make any comment on that as to what you determine. It may be that that is an outcome.

DEPUTY PRESIDENT ROBINSON: Yes, well, I am just asking what you are really saying to me.

MR FITZGERALD: Well, that is what I am saying, yes. I mean, as I indicated, I think, our application clearly complies with the wage-fixing principles and is capable of being determined by you in our favour, but in respect to the union's application as to how you adjudge the levels 1 to 5 is your - is clearly up to you, but - - -

DEPUTY PRESIDENT ROBINSON: Remind me, which of the wage-fixing principles does your application fall under and you rely upon?

MR FITZGERALD: We would say quite clearly just under the general structural efficiency banner, because we are not seeking to move substantially any positions from the current award structure to a new award structure. We

are not seeking to extend the award, and it is at minimal cost. Now, that is yet to be proved by some cases we have studied for us.

DEPUTY PRESIDENT ROBINSON: So, to that extent you are putting to me that it is appropriate to use the structural efficiency in terms of your application, notwithstanding that there has been a work value carried out - - -

MR FITZGERALD: Yes, well - - -

DEPUTY PRESIDENT ROBINSON: - - - and a decision in 1985?

MR FITZGERALD: Again, you need to examine, Mr Deputy President, the extent of any increase which could potentially occur. We would submit that most will translate into the new structure virtually at no cost. Now, that will be shown, and therefore, given that, the submission we made in respect to the earlier decision will have no impact. But in contrast to the HSU position, which is quite clearly significant - has the potential for significant increases, then we would submit that the aspects which the union have used to attempt to justify their case have already been taken into account by Commissioner Gozzi.

Now, in summary - I should not be too much longer, Mr Deputy President, in respect to this part of my submission - the HSU have presented a de facto or pseudo work value case by throwing up, without drawing any comparisons to what previously existed, which is the basis of the work-value case, and the basis - I am sure I am preaching to someone who has been through a number of work value cases. One I think I might have been on with you is a nurses work value case, but the basis, of course, is to make - - -

DEPUTY PRESIDENT ROBINSON: I have never been involved with the nurses in a professional sense.

MR FITZGERALD: Oh, most definitely, not in a domestic sense, that, too, but in respect to the work value principle, and I am sure you would be well aware the basis of that is to make a comparison between the work as it is now in terms of skills, responsibilities and conditions under which the work is performed compared to what it was before - now, in respect to that, Mr Deputy President, the principles themselves do limit severely the extent of any change which could be proved by a work value, and that, of course, is specifically - the datum point is from the date of the second structural efficiency payment.

Now, it would be inconceivable that such changes have occurred since that date, particularly as many of the issues which were shown in the Gozzi - Commissioner Gozzi decision of 1986 also are evident as part of the HSUAs case. It is not something - in other words, they are not recent changes. They are changes which have been happening over a sustained period. So, the union have effectively thrown up these issues without looking directly at it by

way of comparison as to what it was previously. So, in that regard, Mr Deputy President, I would submit that the union, who again I submit carry the onus of proof, have clearly not discharged it.

Now, Mr Deputy President, if the commission does not accept fully our argument relating to the movement of existing classifications with the new structure as proposed by the HSUA - and I think that when we submit our examples of likely scenarios there, with respect you will have no option but to, I submit that it is beyond doubt that the only way the commission can proceed in respect of those two new classifications which I have previously taken you to is relating to the principles for extension to existing awards, where it does refer specifically to - and I do not want to be repetitive, but I have covered this to a certain extent - page 8, and I will just quote this again, because it is indeed an important quote.

DEPUTY PRESIDENT ROBINSON: Sorry, where are we?

MR FITZGERALD: Page 8 of TCCI.8.

DEPUTY PRESIDENT ROBINSON: Oh, right.

MR FITZGERALD: And it is first of all principles - well, we are talking more about the extension of the existing award to new work:

Or to award-free work.

Well, we say, or we submit, Mr Deputy President, that level 6 and 7 currently is award free. Now, I go on to quote:

The extension of the award can only be - such work will be assessed by reference to the value of work already covered by the award.

Now, within the HSUA application there was no reference whatsoever in terms of a comparison of skills and responsibilities to those previous - to the work already covered by the award. So, in that regard I submit that our position is undeniable in that the commission would have no option but to dismiss the application of the HSUA relating to level 6 and 7. Now the HSUA - as I indicated, the HSUA have not in any way attempted that exercise in respect of the way they have proceeded, nor would they, of course, because they have not chosen to proceed down that path. But their case is in their hands and if they restrict their choices in terms of the wage-fixing principles, then that may be to the ultimate detriment of their application.

Again, just let me nearly finish - not far away from finishing. It is undeniable in terms, in our submission, of our interpretation of the principles, but it is reinforced by - and it goes back to your question - you know the structural efficiency and work value principle is mutually exclusive. I must submit that the work value principle is there for a particular reason and has continued to

be there without much variation; the only variation I think I can discern is the - if I go to it it is on page 6 of TCCI.8. I think the only major deviation from previous work value principles is point (c), which restricts the datum point to the second structural efficiency increase adjustment allowance under the commission's October 89 decision, but other than that the principle has existed without change.

Now, as I indicated earlier, if structural efficiency was intended to be a general vehicle and there was not intended to be any reference to the work value principle, then the commission - this commission and its federal counterpart would have had the wisdom to delete the work value principle, but it does exist and it still exists today in terms of the national wage case, which I will not bother to produce, but it can be found in print L4700, which is - I was going to say the very trendy purple-coloured document which you might have. I did not want to be sexist, but it might reflect the make-up of the national wage bench. We have seen a change in presentation.

DEPUTY PRESIDENT ROBINSON: Well, I am aware of that decision and have a copy with its purple band across it, but I am not quite sure if it has got any relevance whatsoever.

MR FITZGERALD: Well, only to the extent - well, yes, I agree in that this commission has not yet adopted that decision. It has not considered the value in terms of these proceedings, I would submit, Mr Deputy President, in that the commission has chosen to retain the work value principle, which is at page 20 of that decision, and that principle is in identical form, apart from some minor changes to cater for the jurisdiction, the differing jurisdiction, to the principles which are outlined in the current - this commission's current set of principles as outlined in TCCI.8.

DEPUTY PRESIDENT ROBINSON: I must say I am hesitant to even open it, open that decision, given the fact that it has not been considered and given that that Australian Industrial Relations Commission operates under different legislation to Tasmania.

MR FITZGERALD: Well, I understand that view, Mr Deputy President, but this commission has generally, not always, followed - and nor is it bound to, let me say - followed particularly national wage case decisions of its federal counterpart. Now - - -

DEPUTY PRESIDENT ROBINSON: Yes, but I am in a situation I dare not open my mouth in relation to the merit of that decision when it has yet to be considered by, presumably, a full bench.

MR FITZGERALD: I would not want you to make any comment on it at this stage, but I just simply submit that it is persuasive that the review of the wage fixing principles within the federal arena has - within that review the bench has chosen to retain the work value principle without variation.

DEPUTY PRESIDENT ROBINSON: Has it?

MR FITZGERALD: It seems like we are nearly at the end of my submission

MS HARVEY: You are.

MR FITZGERALD: --- and I can undertake that I will be no longer than about two more minutes. So in summary, Mr Deputy President, we believe that given the industrial argument we have just put to the commission, and it is probably longer than I expected but it is long because it is an important argument, in any application before the commission, even though there have been - it is a much freer environment, we concede that, but there are still wage fixing principles which exist. We would submit that the union, as the principal applicant in terms of the union having the responsibility to carry the onus of proof, have not discharged that onus of proof; that the general banner of structural efficiency is very much a wide view or broad-brush approach which is not open to the union to use, and is very much against the whole notion of structural efficiency being introduced at minimal cost. So if it pleases, I would complete that part of my submission now and we will complete our submissions at the next hearing date. If it pleases.

DEPUTY PRESIDENT ROBINSON: Thanks, Mr FitzGerald. We will - I am sorry.

MS HARVEY: I was just going to inform the commission formally that Mr FitzGerald and I have had discussions about timing for this case and that our intention would be to run in the next hearing date with Mr FitzGerald, the final part of his submissions, and he indicated that it may be necessary to have facilities to run after the normal finishing time so that I can complete on the 28th. Hopefully we can get it all done within that time.

DEPUTY PRESIDENT ROBINSON: Well, that is a great incentive to run a bit later, and thanks for that advice and I shall make sure that the commission is prepared - prepares itself to accommodate that situation.

MS HARVEY: I trust you have got an overtime budget for your staff.

DEPUTY PRESIDENT ROBINSON: I think we will now adjourn.

THE MATTER WAS ADJOURNED
INDEFINITELY