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Dear Sir

Modern Award Review
Matter: AM2014/198
Alpine Resorts Award

We refer to the above matter and **enclose** herewith submission on behalf of members of the Falls Creek and Mount Hotham chambers of commerce regarding the Four Yearly Review of Modern Award – Alpine Resorts Award 2010.

Please do not hesitate to contact the writer should you need to do so.

Yours faithfully,
NEVIN LENNE GROSS

per:

Enc.

FAIR WORK COMMISSION

FOUR YEARLY REVIEW OF MODERN AWARDS
ALPINE RESORTS AWARD 2010

SUBMISSION ON BEHALF OF MEMBERS OF THE FALLS CREEK AND MOUNT HOTHAM CHAMBERS OF COMMERCE

1. This Submission is filed on behalf of various members of both the Falls Creek and Mount Hotham Chambers of Commerce (MHCC) including:-

   Falls Creek
   - Falls Creek Oversnow Pty Ltd
   - Falls Creek Hotel
   - Falls Creek Country Club
   - Koki Alpine Lodge
   - Mt Carli Pty Ltd
   - Astra Alpine Lodge

   Mount Hotham
   - DPSI General Pty Ltd
   - Snowman Property Management Pty Ltd
   - Jaisano Pty Ltd
   - C & J Timbs
   - Latent Investments
   - Habitat Apartments Australia Pty Ltd

   Each of those entities carry on business in Alpine Resorts in Victoria.

2. In 2014 DPSI General Pty Ltd and Falls Creek Oversnow Pty Ltd issued an Application to Vary the Alpine Resorts Award 2010 ("the Award") by seeking to amend the definition of "alpine resort" contained in Clauses 3.1 and 4.1 of the Award.

3. The Application was withdrawn in late 2014 on the basis that the Applicants for the Variation would join with other applicants to make a Submission to the Commission as part of a four yearly review of the Award. The substance of the draft amendments to

the award and in turn the Exposure/Alpine Resort Award 2014 ("the ED") is set out below.

4. The principal submission in relation the four yearly review is that the definition of "alpine resort" in Schedule H and clause 3.2 of the Exposure Draft – Alpine Resorts Award, 2014 should be amended to the following:

> "*Alpine Resorts means an alpine resort as defined by the Alpine Resorts (Management) Act, 1997 (Vic); and in the State of Victoria refers to each of the Hotham Alpine Resort (including Dinner Plain although it is not referred to in the Alpine Resorts Management Act), Falls Creek Alpine Resort, Mount Baw Baw Alpine Resort, Mount Donna Buang Alpine Resort, Lake Mountain Alpine Resort; and in the State of New South Wales the Thredbo Alpine Resort, Perisher Alpine Resort and Mount Selwyn Alpine Resort.*"

The other amendment is to clause 3.1 of the exposure draft so that the clause reads:

> *This industry award covers employers throughout Australia who operate a business or businesses principally located in an alpine resort including employers who operated ski lifts and their employees in the classifications within Schedule A – Classification Definitions to the exclusion of any other modern award.*

Background

5. Prior to 2014, a substantial number of employers operating businesses at Mount Hotham and Falls Creek in each season since 2010, paid employees who performed work in the work classifications in the relevant schedule pursuant to the Award. In 2013/14 a controversy arose as to the proper interpretation of Clause 4.1 of the Award, which sets out its coverage. Initially the employers were advised by the Fair Work Ombudsman that the Award applied to them, only for that advice to be reversed in 2013. It was reversed on the basis that although those employers carried on business in ski resorts, they did not operated ski lifts. Therefore, it was said that they did not meet the coverage requirement that an employer operate a business in an alpine

resort because the definition of "alpine resort" was limited to an establishment that include alpine lifting.

6. The parties responsible for this Submission, the Mount Hotham Chamber of Commerce ("MHCC") and the Falls Creek Chamber of Commerce ("FCCC") propose that it is both unfair and illogical that employees at Mount Hotham, Falls Creek, and Dinner Plain who perform work covered by the classification under the Award should be paid differently, dependent upon whether they are working for the Lift Company, or whether they are working for a non ski lifting employer in circumstances where the employees are performing the same work. It is also unfair that employers who employ employees to perform the same work as those employees engaged by ski lift companies are required to pay different rates of pay.

7. As the Award currently operates and if the terms of the exposure draft ("ED") were adopted, most of the persons employed in alpine resorts in Victoria who do work falling within the classification definition in the ED would not be covered by the ED. The contrary position applies in New South Wales where most of the functions carried out on in those Ski Resorts are performed by alpine lifting (ski lift) companies. This is an entirely anomalous situation in circumstances where the Award and the ED purport to cover establishments Australia wide.

8. The amendments that are proposed by MHCC and FCCC are that the definition of "alpine resort" should be amended so that the requirement that the establishment includes ski lifting operations is removed, and that Dinner Plain is covered within the Award. It is then proposed that by the amendments to Clause 3.1, the Award would cover businesses principally located within an "alpine resort" including employers who operate ski lifts, that is, a coverage would apply equally to employers whether they

were involved in ski lifting operations or not. As an example of the present anomalies the current restrictive definition of "alpine resort" means that a ski hire employee, working in a ski hire shop operated by a ski lift company, is on a completely different Award (and rate of pay) than a ski hire employee working in a ski hire shop operated by for a non-ski lift company. It is submitted that that is both illogical, unfair and counterproductive for all parties and conducive of confusion.

9. In Victoria, the phrase 'alpine resorts' includes, among other places, Dinner Plain, Falls Creek and Mount Hotham (the Resorts). The Falls Creek Alpine Resort Management Board, appointed pursuant to the Alpine Resorts (Management) Act 1997 (Vic), manages the Falls Creek Alpine Resort. The Mount Hotham Alpine Resort Management Board, also appointed pursuant to the Alpine Resorts (Management) Act 1997 (Vic), manages the Dinner Plains and Mount Hotham Alpine Resorts. Dinner Plain is not administered by the Mount Hotham Alpine Resort Management Board but instead is part of the Alpine Shire (see Clause 15).

10. Across the three main Alpine Resorts in Victoria, three companies, and only three companies, operate businesses that include alpine lifting, namely:

    (a) Falls Creek Ski Lifts Pty Ltd, being the sole operator of alpine lifts at Falls Creek; and

    (b) Mount Hotham Skiing Company Pty Ltd, being the sole operator of alpine lifts at Mount Hotham and Dinner Plain.

    (c) Buller Ski Lift Holdings Pty Ltd, being the sole operator of alpine lifts at Mount Buller.

11. A range of other businesses operate inside the Resorts that do not provide alpine lifting services but do provide services essential to the operation of the Resorts, including:

(a) the provision of accommodation and associated services;

(b) the provision of food and beverage services;

(c) the provision of ski-hire services; and

(d) the provision of ski and accessories retail.

12. The conduct of the businesses described above is intrinsically linked to the operation of the alpine lifting function in that most of the businesses are:

(a) operated wholly within the relevant alpine resort; and

(b) operated only when the alpine lifts are functioning, are about to function, or shortly after the functioning has ceased.

13. In addition, the Falls Creek Alpine Resort Management Board and the Mount Hotham Alpine Resort Management Board each provide services to the Alpine Resorts that do not include alpine lifting, including:

(a) sewerage treatment plants;

(b) carparking arrangements;

(c) municipal services; and

(d) ski patrol services.

14. The classification under the Award cover employees who work across a range of businesses engaged in Alpine Resorts. The definition of Alpine Resorts as it is presently framed limits the employees covered to those employed by ski lift companies only. The amendment to the DE seek to make it apply unambiguously to all employees of business principally operating within the Alpine Resort.

15. The ordinary meaning of "alpine resort" in Victoria would mean the area that is administered by the relevant Alpine Resort Management Board for Falls Creek and Mount Hotham. It would not be limited to just the ski lift companies. It is in fact the

Falls Creek Alpine Resort Management Board, that administers Falls Creek, and the Mount Hotham Alpine Resort Management Board which administers Mount Hotham. That administrative power is conferred by the Alpine Resorts Management Act 1997. It is submitted that, even though Dinner Plain is not part of the Mount Hotham Alpine Resort, that it should nevertheless be covered by the Award and the ED as the Dinner Plain resort is located a minimal distance from Mount Hotham, and is really integral to Mount Hotham. A number of business proprietors operate businesses at both Mount Hotham and Dinner Plain including Mount Hotham Skiing Company Pty Ltd, Hoys Ski Hire and DPSI General Pty Ltd.

16. Within the current Alpine Resorts Award, there are a large number of classifications of employees including car parking staff, water and sewerage staff, staff performing municipal functions, food and beverage staff, and ski patrol staff. At Mount Hotham, Falls Creek, and Dinner Plain, none of those functions are performed by the lift company save that the lift company may employ a small number of food and beverage staff in relation to their own staff accommodation. The ski patrol service, car parking service and municipal services, at both Falls Creek and Mount Hotham, are operated by the respective Resort Management Boards.

17. Virtually all food and beverage services within Falls Creek, Mount Hotham and Dinner Plain are operated by companies other than Falls Creek Ski Lifts Pty Ltd or Mount Hotham Skiing Company Pty Ltd. At Falls Creek and Mount Hotham, and Dinner Plain, accommodation and associated services are provided by related companies of Falls Creek Ski Lifts Pty Ltd and Mount Hotham Skiing Company Pty Ltd.

18. Clause 4.1 of the Award provides that the Award covers employers who "operate an alpine resort": Clause 3.1 of the Award defines 'alpine resort' to mean "an establishment whose business, among other things, includes alpine lifting". Alpine

lifting is not defined. Nonetheless, it is tolerably clear that the phrase 'alpine lifting' is a reference to the operation of ski lifts in alpine areas.

19. Clause 3.2 provides a bifurcated definition of alpine resort such that Award coverage is limited to employers throughout Australia who operate:

    (a) an establishment;

    (b) whose business, among other things, includes alpine lifting.

20. The construction and application of clause 3.1 is both ambiguous and uncertain.

21. First, the definition of "alpine resort" in clause 3 of the Award suggests that, to be covered by the Award, the business of that employer must include, among other things, alpine lifting. In effect, clauses 3.1 and 3.2 require that the businesses be alpine lifting.

22. It can be seen from the background set out above that the relevant establishments in Victoria, being the Falls Creek Alpine Resort, the Dinner Plains Alpine Resort and the Mount Hotham Alpine Resort, are operated by, respectively the Falls Creek Alpine Resort Management Board, Mount Hotham Alpine Resort Management Board and the Alpine Shire. None of these entities conducts a business that includes alpine lifting.

23. Second, the text of the DE is suggestive of coverage beyond the scope suggested by clause 3.1 in that the DE makes reference to classes of workers falling within the classifications set out in Schedule A of the DE but who are employed other than by an employer as defined by clause 3.1 of the DE. That such classes of worker exist was a fact known to the Australian Industrial Relations Commission at the time the Award was made and it can be inferred that, in the absence of an express statement to that

effect, the AIRC did not intend such workers to be excluded from the operation of the modern award and they should not be excluded from the reviewed Award.

24. Further, the businesses of the two companies identified above as providing alpine lifting services do not extend, in the named resorts, to operating a range of the services identified within the coverage provisions of the Award, including:

(a) the provision of food and beverage services (including the employment of cooks and chefs);

(b) the supply of accommodation; and

(c) the provision of ancillary support functions including sewerage treatment, car-parking.

25. Third, a literal reading of clause 3.1 of the DE would have the effect that employees working at one or more of the Resorts, performing the same duties, exercising the same skill and subject to the same unique conditions inherent in seasonal work as each other would have a different awards cover and apply to them (and thereby have different conditions of work) solely by reason of their being employed by different employers. By way of example, the Award would apply to a hospitality worker engaged by one of the two named lift operators identified above. By contrast, the Hospitality Award 2010 would apply to and cover a hospitality worker employed (Resort worker in the classification definition) to work in the resort by a different corporate entity.

26. The inherent unlikelihood that the Fair Work Commission or its predecessor intended this disparity as between workers distinguishable only by the corporate identify of their employer evidences ambiguity and uncertainty in clause 4.1 of the Award and 3.1 of

the DE and that ambiguity should be reviewed and remedied as part of the review process.

Circumstances of the making of the 2010 Award

27. In making the 2010 Award, the Full Bench should be taken to have intended for the award to have applied to businesses operating within alpine resorts generally, rather than only in respect of those businesses which have as a component of their operations, a ski lift or lifts. This submission is put on a number of grounds including:

    (a) the departure from the ordinary and natural meaning of the phrase "Alpine Resort" affected by the definition that it be "an establishment whose business, among other things, includes alpine lifting";

    (b) the conflation of the concepts of "Ski Resorts" and the "Snowsport Industry" in the communications to the Commission as part of the making of the Award and the term "Alpine Resort" as used in the Award (see in this regard the letter from Harmers Workplace Lawyers to the Commission dated 10 October 2008 appended to the submissions filed by the Australian Ski Areas Association dated 6 March 2009 in the award modernisation proceedings – **Copy Attached**);

    (c) the absence of a clear explanation to the Full Bench that there were many employers operating businesses within Alpine Resorts employing persons undertaking work of a type covered by the classifications in the Award, who would not be covered by the Award, if it were confined to employers who operated a ski lift or lifts as part of their operations (see in this regard the transcript of 30 June 2009 in the award modernisation proceeding —at PN 3686 — 3694 **Copy attached**);

28. MHCC and FCCC also rely on the Award Modernisation Statement by the Full Court Bench on 22 May 2009 [2009] AIRCFB 450 at [219] - [222] where the Full Bench said:

[219]The draft Alpine Resorts Award 2010 covers the seasonal snowsports industry in particular, though it will also have application to alpine resorts that operate over the summer season. Employees of alpine resorts are employed in a wide range of occupational groupings and experience considerable fluctuating demand for their skills and services with peaks during weekends and public holidays. Accordingly, the industry is marked by a high level of casual and seasonal employment and flexible hours of work. There are, however, a range of differences between the conditions of employment in the New South Wales alpine resorts as compared to those in Victoria. It has been necessary to take into account the various pre-reform awards and NAPSAs applicable to the industry.

[220] New South Wales alpine resorts have a casual loading of 15%, as opposed to 25% in Victoria. While we intend to maintain the federal standard of 25%, this increase in costs will need to be considered in the context of the impact of the modern award on costs overall. This is best done when the transitional provisions are being dealt with.

[221] It has been necessary to establish a number of accommodations between the conditions in the two states in relation to such matters as the days in the week on which ordinary hours may be worked (irrespective of the season), overtime rates, maximum daily hours, meal breaks, apprenticeship rates, some allowances (including relocation reimbursement) dual role employment, minimum hours for ski instructors, and the definition of seasonal employment.

[222] We decided not to include in the draft provisions for annualisation of salaries or cashing out of annual leave. Such arrangements are not common in the awards applicable to the alpine resort and snow sports industry. We have also decided not to make any special provision in relation to alpine resorts management boards. We have provisionally decided to include employees who perform hospitality and childcare duties. Nonetheless we would be assisted by further submissions on that matter."

29. These paragraphs indicate that it was the intention of the Full Bench that the Award would cover the seasonal snow sport industry generally, and not be confined to those employers who had, as part of their enterprise, the operation of a ski lift or lifts. No reference is made, nor is there an acknowledgement, that it was intended that the scope of the Award would be limited, so as not to cover the majority of employees employed in ski resorts in Victoria.

Dated the 28th day of JANUARY 2015.

Ian Gross

Nevin Lenne Gross for the members of the Falls Creek Chamber of Commerce and the members of the Mount Hotham Chamber of Commerce

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- Legal Risk Management

SUBMISSIONS BY HARMERS WORKPLACE LAWYERS

ON BEHALF OF THE

AUSTRALIAN SKI AREAS ASSOCIATION

IN RELATION TO THE

ALPINE RESORTS (GENERAL) AWARD 2010

6 MARCH 2009

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1 Introduction

1.1 We act for the Australian Ski Areas Association ("**ASAA**"), and refer to our letters to the Australian Industrial Relations Commission ("**Commission**") dated 10 October 2008, a copy of which we enclose with this submission:

(a) the first which seeks that a "stand-alone" Modern Award be made for the Australian snowsports industry ("**Snowsports Industry**"); and

(b) the second which sought that the Modern Award for the Snowsports Industry be included in Stage 3 of the Award Modernisation Process.

1.2 The ASAA is grateful to the Commission for including consideration of the Modern Award for the Snowsports Industry in Stage 3, as requested in that second letter, by including the Federal *Alpine Resorts (Australian Workers Union) Award 2001* in the list of awards for Stage 3 under the "Tourism Industry".

1.3 In relation to the ASAA request for a "stand-alone" Modern Award to apply to the Snowsports Industry, we enclose with these submissions a draft *Alpine Resorts (General) Modern Award* ("**Draft Award**"). These submissions relate to that Draft Award.

2 Overview of the Australian Ski Areas Association and Nature of the Snowsports Industry

2.1 The members of the ASAA are the companies that operate all of the ski resorts in Australia ("**Alpine Resorts**").

2.2 As noted in the first of our letters dated 10 October 2008, the Snowsports Industry is unique in its nature.

2.3 The employees of the Alpine Resorts fall within a large ra groups, and perform work that is generally highly seasonal in na specialist skills, and is undertaken in potentially extreme clima the Snowsport Industry, those occupations include:

(i) Skitube drivers;

(ii) Ski instructors;

(iii) Ski patrollers;

(iv) Ski lift operators;

(v) Snow groomers;

(vi) Snow makers;

(vii) Snow courtesy staff;

(viii) Ticket sellers;

(ix) Electrical and trades staff;

(x) Retail and sales staff;

(xi) Hospitality staff;

(xii) Childcare staff; and

(xiii) Administration staff.

2.4 The Snowsports Industry is highly seasonal, resulting in high numbers of employees during the Ski Season when alpine lifting is being provided by the Alpine Resorts (generally between early June and early October) ("**Ski Season**") and significantly reduced staff outside the Ski Season.

2.5 The level of tourism during the Ski Season is dependent on the quantum of snow falls during the season and the level of discretionary spending on tourism in the economy, which then influences the amount of work available for employees of the Alpine Resorts, resulting in the need for flexibility in the employment arrangements for the Alpine Resorts.

3 Current Industrial Regulation of Alpine Resorts

3.1 Alpine Resorts currently operate in three states in Australia: Victoria, New South Wales and Tasmania.

3.2 The industrial regulation of the Alpine Resorts differs between those States.

Industrial Regulation in Victoria

3.3 The key pre-reform Federal Award applying to the Alpine Resorts in Victoria is the *Alpine Resorts (Australian Workers Union) Award 2001* ("**Victorian (AWU) Award**").

3.4 There is also the Federal *Victorian Alpine Resorts Award 1999*, which applies to employees of an Alpine Resort Management Board established under the *Alpine Resorts (Management) Act 1997*, and not to employees of the companies that operate the Alpine Resorts. As such, that Award is more akin to a public service award.

3.5 The following classification groups are covered by the Victorian (AWU) Award (with specific roles under each group being identified in the Award):

(a) Lift Operations;

(b) Skier Services;

(c) Ski Hire;

(d) Tickets/Administration;

(e) Workshop;

(f) Retail Shops;

(g) Race Department;

(h) Snow Groomers; and

(i) Snow Makers.

3.6 We understand that the unique conditions, and flexibilities, in the Victorian (AWU) Award were introduced by consent with the Australian Workers Union.

3.7 The Federal *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998* ("**Federal Hospitality Award**") sets the minimum terms and conditions of employees of the Alpine Resorts in hospitality roles.

3.8 The Federal *Children's Services (Victoria) Award 2005* ("**Victorian Childcare Award**") sets the minimum terms and conditions of employees of the Alpine Resorts in child-care roles.

3.9 The vast majority of employees engaged by the Victorian Alpine Resorts during the Ski Season are engaged in roles that fall within the Victorian (AWU) Award.

3.10 In stating the above, we note that some of the Alpine Resorts in Victoria currently have in place Federal certified agreements applying to their employees, which override the above Awards.

Industrial Regulation in New South Wales

3.11 Prior to the commencement of Work Choices on 27 March 2006, the key awards applying to the Alpine Resorts in NSW were:

(a) *Ski Industry (State) Award* ("**Ski Industry Award**");

(b) *Ski Instructors (State) Award* ("**Ski Instructors Award**");

(c) *Perisher Blue Pty Limited (Ski Tube) State Award* ("**Skitube Award**");

(d) *Electrician & c. (State) Award* ("**Electricians Award**");

(e) *Metal, Engineering and Associated Industries (State) Award* ("**NSW Metals Award**");

(f) Federal *Metal Industries Award*;

(g) *Theatrical Employees Recreation and Leisure Industry (State) Award* ("**Leisure Award**");

(h) *Miscellaneous Workers – Kindergartens and Child Care Centres (State) Award* ("**NSW Childcare Award**"); and

(i) the Federal Hospitality Award.

3.12 As a result of legislation passed by the NSW government just prior to the introduction of Work Choices, the Ski Industry Award, Ski Instructors Award and Skitube Award were deemed to be State enterprise agreements. As a result, after Work Choices, those three awards became known as "preserved collective state agreements" or "**PCSAs**". Hence, we refer to them below as the Ski Industry PCSA; Ski Instructors PCSA and Skitube PCSA.

3.13 As a result of Work Choices, the Electricians Award, NSW Metals Award, Leisure Award and NSW Childcare Award, became known as "notional agreements preserving state awards" or "**NAPSAs**".

3.14 The following classification groups are covered by the Ski Industry PCSA:

(a) Lift Attendant;

(b) Lift Operator;

(c) Ticket Seller;

(d) Snow Groomer Operator;

(e) Snow Maker;

(f) Parking Attendant;

(g) Ski Patrol;

(h) Courtesy Staff;

(i) Driver;

(j) Trail Crew;

(k) Ski Outlet Staff; and

(l) a general classification of "Resort Worker".

3.15 The Ski Instructors PCSA is a specific instrument applying only to snowsports instructors.

3.16 The Skitube PCSA is also a specific instrument applying only to employees of Perisher Blue Pty Limited (being one of the Alpine Resorts) in the following classifications, due to the Skitube Railway System ("**Skitube**") operated by Perisher Blue Pty Limited:

(a) Trainee driver;

(b) First level train driver;

(c) Second level train driver;

(d) Leading hand track inspector;

(e) Resort worker – being an employee who performs various maintenance and general duties.

3.17 The vast majority of employees engaged by the NSW Alpine Resorts during the Ski Season are engaged in roles that fall within the Ski Industry PCSA and Ski Instructors PCSA.

3.18 The unique conditions, and flexibilities, in the Ski Industry PCSA and Ski Instructors PCSA were introduced by consent with the Australian Workers Union.

Industrial Regulation in Tasmania

3.19 There is no Award in Tasmania that applies specifically to the Snowsports Industry.

3.20 We do not currently have instructions from any Tasmanian Alpine Resort on the industrial regulation of their employees in the Snowsports Industry in Tasmania.

3.21 However, we understand that there are two Alpine Resorts in Tasmania which operate only for a very limited period during the year.

4 Submissions regarding Stand Alone Modern Award and Exemptions

4.1 In light of the matters outlined in section 2 above, when considered in the context of the number of different industrial instruments applying to the Alpine Resorts as outlined in section 3 above, the ASAA considers it appropriate for a stand-alone Modern Award to be made for the Snowsports Industry. See definition in para 1.1.

4.2 The requirement for flexibility in the operation of minimum terms and conditions to Alpine Resorts is highlighted in section 6 of these submissions, in which section comments are made on particular aspects of the Draft Award and the reasons for the flexibility sought in that Award.

5 Consultation with the Australian Workers Union (AWU)

5.1 The ASAA has not had an opportunity, to date, to consult with the AWU in relation to the Draft Award, although a copy of the Draft Award as well as these submissions, will be provided to the AWU.

5.2 It is the ASAA's intention to invite the AWU to have discussions with it regarding the Draft Award, prior to the public consultation on 18 March 2009.

5.3 As such, the ASAA and AWU may have further submissions to put forward to the Commission as at that date, in light of any such discussions that may take place.

6 Overview comments on the Draft Award

6.1 To assist the Commission in reviewing the Draft Award, we are instructed to provide the following comments in relation to certain clauses and parts of the Draft Award as identified below:

Clause 4: Coverage

6.2 It is proposed that the Draft Award cover "Alpine Resorts" and their employees within the classifications in Schedule A to the Award, to the exclusion of any other modern award.

6.3 As noted above, due to the unique nature of the Snowsports Industry, and the flexibility required due to the seasonal, and weather-dependent, nature of that Industry, the ASAA submits that it is appropriate that the Draft Award apply as a stand-alone modern award to Alpine Resorts.

Clause 7: Award Flexibility

6.4 The ASAA seeks two variations to the "standard" award flexibility clause that the Commission has generally been adopting in the Modern Awards.

6.5 The first is the addition, in clause 7.1, of the ability of an employer and employee to reach agreement on how and when annual leave is taken, as well as in relation to public holidays.

6.6 The second is, in clause 7.8(a), that the flexibility agreement be able to be terminated on one (rather than four) week's notice.

6.7 The reason for these two variations is due to the seasonal nature of the Snowsports Industry. Many of the roles in the Draft Award only exist when there is sufficient snow for the Alpine Resorts to offer alpine lifting, which is generally between early June and early October. Given the roles only exist for a short period, having employees take annual leave during that period can adversely impact on the operational requirements of the Alpine Resorts. Further, as many of the roles are only required for the duration of the season when alpine lifting is being offered, requiring notice of four weeks for termination is disproportionate when compared to the potential duration of the employment relationship.

Clause 8: Consultation regarding major workplace change

6.8 Given the seasonal nature of operating an Alpine Resort, there is also a significant variation in the number of employees employed during the season when the Alpine Resorts are providing alpine lifting as compared to when alpine lifting is not being provided.

6.9 As a result of this significant variation in employee numbers, the ASAA considers it appropriate to specifically include in the Draft Award, at clause 8.1(b), the following statement:

> [A]n event or change which is a normal incidence of the seasonal nature of operating an alpine resort will not be considered a "significant effect".

Clauses 10: Employment Categories

6.10 The ASAA proposes that there be four employment categories: permanent employees (clause 11), seasonal employees (clause 12), casual employees (clause 13) and Snowsports Instructors (clause 14).

6.11 Snowsports Instructors are, in essence, a particular category of "casual employee", and so receive a casual loading as part of their hourly rate of pay.

6.12 The reason they are separately identified in the Draft Award is because of their qualifications and experience levels, and the fact that there are to be five categories of Snowsports Instructor levels as outlined in clause 21.1 of the Draft Award.

6.13 We also note that Snowsports Instructors are a separate category under the Victorian (AWU) Award, and in respect to Snowsports Instructors in NSW, are subject to a specific industrial instrument, being the Ski Instructors PCSA.

6.14 Further, as seasonal employees and Snowsports Instructors are only employed for a limited period of time, due to the seasonal nature of the Snowsports Industry, their hourly rates include a loading in respect to annual leave.

Clause 17: Termination of Employment

6.15 The ASAA considers it appropriate to include a "Termination of Employment" clause in the Draft Award, as different notice periods apply for the different employment classifications in the Award, being permanent employees, seasonal employees, casual employees and Snowsports Instructors.

6.16 Clause 17.7 is titled "Rolling Notice". Due to the fact that the conclusion of the Ski Season depends on the weather conditions, the circumstance can arise where a seasonal employee may be provided with notice of termination and then there are additional snowfalls providing the opportunity for further work. Due to this situation, the ASAA seeks a clause that permits an Alpine Resort to offer the employee further work, beyond the date on which the notice period would have expired, after which time the employment relationship can terminate on one hour's notice or payment in lieu. A "Rolling Notice" clause is also contained in the Ski Industry PCSA, and clause 17.7 of the Draft Award is consistent with that clause.

Clause 18: Redundancy

6.17 The ASAA considers it appropriate to include a "Redundancy" clause in the Draft Award, so as to make it clear for employees that the entitlement for a severance payment:

(a) only arises for permanent employees; and

(b) does not arise if a position ceases to exist due to the seasonal nature of operating an Alpine Resort.

Clause 21: Minimum Wages

6.18 The methodology used by the ASAA to determine the wage rates and classifications, was to look at the current minimum Award/PCSA/NAPSA wage rates for relevant classifications applicable to each Alpine Resort. As there are differences between the minimum rates in each of those instruments, the roles where then banded together based on these wages rates and an assessment made as to the relative work value of

each role. This ensured that roles have been retained at least at the lowest level being implemented in an Alpine Resort under their relevant Award/PCSA/NAPSA.

6.19 Once the groupings were set, a graduating system of wages was applied to ensure that increased skills or experience were being appropriately recognised. This was compared to previous wage rates to ensure parity for each group. Finally the proposed rates and scales were reviewed by each resort to ensure that overall costs were maintained (excluding overaward payments).

Clause 22: Allowances

6.20 We are instructed that the allowances included in the Draft Award are the key allowances actually implemented and utilised by one or more Alpine Resort.

Clause 24: Mixed Functions and Dual-Role Employment

6.21 This clause has been inserted also due to the unique nature of operating an Alpine Resort.

Clause 24.3: Dual-Role Employment

6.22 As a number of the positions in the Draft Award are only available during that part of the year when alpine lifting is being provided, both the ASAA and certain employees, wish to have the flexibility to have "dual-role employment". Under such an arrangement, by way of example, an employee may be engaged as a qualified Ski Patroller (Resort Worker Level 6) during that period of the year when alpine lifting is being provided, and a Qualified Fitness Instructor with lifeguard qualifications (Resort Worker Level 4) outside of that period.

6.23 Clause 24.3 is designed to facilitate an Alpine Resort and an employee entering into an employment arrangement of that nature.

Clause 24.4: Multi-hiring Arrangement

6.24 A number of employees are engaged by the Alpine Resorts only during that period when alpine lifting is being provided. Again, as the employment may be seasonal, a number of employees wish to have the option of having two roles during that period. For example, an employee may wish to have a primary role of Ticket sales (under Resort Worker Level 2), which duties are performed during the day, and then a supplementary role of undertaking bar duties (also under Resort Worker Level 2) during the evenings.

This is a common way of staff.

6.25 Clause 24.4 is designed to facilitate an Alpine Resort and an employee entering into an employment arrangement of that nature.

Clause 28: Hours of Work

6.26 The Award provides for ordinary hours of work for permanent employees and seasonal employees to be on an "any five in seven basis".

6.27 Currently under the Victorian (AWU) Award, Ski Industry PCSA and Ski Instructors PCSA, ordinary hours may be undertaken on any day in the week. Therefore, clause 28 is consistent with those Awards and PCSAs.

Clause 33: Annual Leave

6.28 The ASAA considers it appropriate to include an "Annual Leave" clause in the Draft Award, so as to make it clear for employees that the entitlement to annual leave only arises for permanent employees, and not casual employees, seasonal employees or Snowsports Instructors.

Clause 34: Personal/Carer's Leave and Compassionate Leave

6.29 The ASAA considers it appropriate to include a "Personal/Carer's Leave and Compassionate Leave" clause in the Draft Award, so as to make it clear how those entitlements operate for permanent employees, seasonal employees, casual employees and Snowsports Instructors.

Schedule D: Transitional Provisions – Casual Loadings

6.30 The current casual loading percentages applying under the industrial instruments between the Alpine Resorts in New South Wales and those in Victoria differ. As a result, the ASAA proposes a transitional provision to apply in respect to the casual loading percentage.

6.31 While the casual loading percentage under the Victorian (AWU) Award is 25%, under the Ski Industry PCSA it is 15%. As a result, the ASAA proposes the transitional arrangement set out in Schedule D to the Draft Award such that the casual loading for Casual Employees of Alpine Resorts in NSW transitions, on a graduated basis, from 15% to 25% between 2010 and 2014.

HARMERS WORKPLACE LAWYERS
6 March 2009

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10 October 2008

Australian Industrial Relations Commission
Level 8, Terrace Towers
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East Sydney NSW 2011

By email: amod@airc.gov.au

Dear Commissioner(s)

MODERN AWARD FOR SNOWSPORT INDUSTRY

We act for the Australian Ski Areas Association ("**ASAA**"). The members of the ASAA are the companies that operate all of the ski resorts in Australia ("**Ski Resorts**").

1 Consultation in relation to Award Modernisation

We write to the Commission as part of the consultation being undertaken for the award modernisation process. In particular, we are instructed to write to the Commission to express the views of the ASAA in relation to the scope of the modern awards that may apply to the Australian snowsport industry ("**Snowsport Industry**").

2 Nature of the Snowsport Industry

The Snowsport Industry is unique in its nature. Some of the key reasons it is unique include the following:

(a) The employees of the Ski Resorts fall within a large range of occupational groups, and perform work that is generally highly seasonal in nature, requires mostly specialist skills, and is undertaken in potentially extreme climatic conditions within the Snowsport Industry, those occupations including:

(i) Skitube drivers;

(ii) Ski instructors;

(iii) Ski patrollers;

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(iv) Ski lift operators;

(v) Snow groomers;

(vi) Snow makers;

(vii) Snow courtesy staff;

(viii) Ticket sellers;

(ix) Electrical and trades;

(x) Retail and sales;

(xi) Hospitality;

(xii) Childcare; and

(xiii) Administration.

(b) The Snowsport Industry is highly seasonal, resulting in high numbers of employees during the ski season (between June and October) and significantly reduced staff during the "off-season" period.

(c) The level of tourism during the ski season is dependent on the quantum of snow falls during the season, which then influences the amount of work available for employees of the Ski Resorts, resulting in the need for flexibility in the employment arrangements for the Ski Resorts.

3 Modern Award for Snowsport Industry

The ASAA's intention is to press for a single modern Snowsport Industry Award ("**Proposed Award**"), to apply to employees of the Ski Resorts in the Snowsport Industry.

The ASAA intends to liaise with the Australian Workers Union ("**AWU**") (and other unions as necessary) in relation to that Award. The AWU is the union with the predominant coverage of employees of the Ski Resorts in the Snowsport Industry. In a letter to the ASAA, dated 12 May 2008, the AWU indicated that it has also proposed that a single Snowsport Industry Award be made as part of the award modernisation process.

Given the unique nature of the Snowsport Industry, the ASAA's intention is to seek that the Proposed Award be the only award applying to employees of Ski Resorts in the Snowsport Industry.

We also note that we have been instructed to write separately to the Commission to seek that the Snowsport Industry which, at present, would fall within Stage 4 of the award modernisation process (under "Industries not otherwise assigned"), be dealt with at an earlier stage of the process, given the seasonal nature of the Industry and the necessity for clarity during the 2009 season of potential award conditions for the return 2010 season.

4 Modern Awards for Priority Industries

There is the potential for a number of the Modern Awards for the Priority Industries to impact on the Snowsport Industry, given the current coverage of those Awards. These include the *Hospitality Industry (General) Award 2010*, *Manufacturing and Associated Industries and Occupations Award 2010*, *Clerks – Private Sector Award 2010*, *Retail Industry Award 2010*, *Security Services Industry Award 2010* and *Rail Industry Award 2010*.

Given the ASAA seeks to have a Proposed Ski Award that is, in effect, a "stand-alone" instrument, its intention is to press for a carve-out from other Awards, including the Modern Awards for the Priority Industries referred to above, that may otherwise have applied to employees of the Snowsport Industry.

In putting this forward to the Commission, we understand that the Commission is not seeking to finally determine the scope of the Modern Awards at this stage of the award modernisation process.

Please do not hesitate to contact the undersigned in order to further discuss any aspect of this matter.

Yours faithfully
HARMERS WORKPLACE LAWYERS
Per:

Michael Harmer / Bronwyn Maynard / Leanne Davies

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- Industrial Relations
- Employment
- Occupational Health & Safety
- Human Rights & Equal Opportunity
- Legal Risk Management

10 October 2008

Australian Industrial Relations Commission
Level 8, Terrace Towers
80 William Street
East Sydney NSW 2011

By email: amod@airc.gov.au

Dear Commissioner(s)

MODERN AWARD FOR SNOWSPORT INDUSTRY – SUBMISSION FOR INCLUSION IN THIRD ROUND OF AWARD MODERNISATION PROCESS

We confirm that we act for the Australian Ski Areas Association ("**ASAA**"). The members of the ASAA are the companies that operate all of the ski resorts in Australia ("**Ski Resorts**").

In a letter to the Commission dated 10 October 2008, we sought to put the Commission on notice that the ASAA intends to press for a single modern Snowsport Industry Award ("**Proposed Award**"), to apply to employees of the Ski Resorts in the Snowsport Industry. A copy of that letter is enclosed.

Based on the timetable released by the Commission on 3 September 2008, our view is that the Proposed Award is currently likely to be dealt with in Round Four of the Award Modernisation Process, by virtue of the Snowsport Industry falling within the scope of "*Industries not otherwise assigned*".

We write to the Commission on this occasion in order to press for the Proposed Award to be included as part of Round Three of the Award Modernisation Process.

Detailed submissions in support of the ASAA's position on the need for prioritisation of the Proposed Award are set out below.

1 Submissions in support of inclusion of the Proposed Award in the Third Round of the Award Modernisation Process

If the Proposed Award were to proceed in Round Four then, based on the *Stage 4 Timetable* contained in the Statement made by the Commission on 3 September 2008 [2008] AIRC 708, the Snowsport Industry would likely not have the benefit of reviewing any exposure draft for the Proposed Award until 25 September 2009, and the Proposed Award would not be made until 4 December 2009.

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For the reasons set out below, the Stage 4 Timetable will pose difficulties for the recruitment of employees by the Snowsports Industry for the 2010 season, given the late release of the awards under that stage.

1.1 Duration of the Australian Ski Season

The official Australian Ski Season runs from the beginning of the long weekend in June (which this year fell on 7 June 2008) to the end of the long weekend in October (which this year fell on 6 October 2008).

During 2009, the official Australian Ski Season will run from the period 6 June 2009 to 5 October 2009, inclusive.

1.2 Seasonal recruitment within the Snowsports Industry

Many of the employees – and in particular, the Ski Instructors – who are required to be engaged by the Ski Resorts each season possess skill-sets and qualifications unique to the industry. In addition, a high proportion of these employees reside overseas outside of the Australian Ski Season.

It is critical to the success of each Ski Resort that it is able to attract sufficient numbers of appropriate personnel each season, to fulfil its business needs.

Furthermore, the level of certainty the Ski Resorts have as to the likelihood of former employees returning to it impacts on the recruitment, induction and training efforts required to be undertaken in preparation for the forthcoming season.

The combined effect of:

- a limited talent pool from within which to attract suitably qualified employees (and in particular, Ski Instructors); and
- the desirability of Ski Resorts being able to maximise the likelihood of employees with specific experience in their business operations returning to work for the Ski Resort the following season

makes it important for the Ski Resorts, around the time of the conclusion of the ski season each year, to know with certainty the minimum terms and conditions of employment that will apply for the following season so as to increase the likelihood of those seasonal employees, who have experience in their operations, returning for the next season.

1.3 Importance of achieving certainty during the 2009 Ski Season as to terms and conditions of employment for the 2010 Ski Season

From a practical perspective, this has led to each of the Ski Resorts, during each current Ski Season, putting proposals forward to a number of employees as to potential employment arrangements for the following Ski Season. In order to do this for the 2010 Ski Season, the Ski Resorts will require certainty as to the minimum terms and conditions of employment for seasonal employees by no later than October 2009.

As the date for making Round Four Modern Awards is not until 4 December 2009, certainty as to the minimum terms and conditions of employment for seasonal employees in the Ski

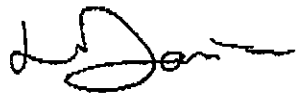
Industry within the required timeframe will not be obtained unless the Proposed Award is included in Round Three.

Consistent with this, it is the ASAA's strong preference for the Proposed Award to be made by 4 September 2009 (being the date by which Round Three Modern Awards must be made) and not as part of the later Round Four.

***

Please do not hesitate to contact the undersigned should you have any questions in relation to the above or require any additional information.

Yours faithfully
HARMERS WORKPLACE LAWYERS
Per:



Michael Harmer / Bronwyn Maynard / Leanne Davies

Encl.

Parties' Draft Award—Australian Ski Areas Association – 6 March 2009

Alpine Resorts (General) Award 2010

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Part 1—Application and Operation

1. Title

This award is the *Alpine Resorts (General) Award 2010.*

2. Commencement date

This award commences on 1 January 2010.

3. Definitions and interpretation

3.1 In this award, unless the contrary intention appears:

Act means the *Workplace Relations Act 1996* (Cth)

alpine resort means an establishment whose business, among other things, includes alpine lifting

any five in seven means any five ordinary working days worked between Monday and Sunday

applicable hourly rate means the relevant rate for the classification the employee is working under as set out in clause 21

Commission means the Australian Industrial Relations Commission or its successor

double time means double the applicable hourly rate

employee has the meaning in the Act

employer has the meaning in the Act

enterprise award has the meaning in the Act

junior employee means an employee who is less than 19 years old

NES means National Employment Standards

rostered day off ("RDO") means any continuous 24 hour period between the completion of the last ordinary shift and the commencement of the next ordinary shift on which an employee is rostered for duty

seasonal employee means an employee engaged to perform work for the duration of a specified season

shift worker means an employee who:

(i) is employed by an employer which has shifts continuously rostered 24 hours a day for seven days a week; and

(ii) is regularly rostered to work those shifts; and

(iii) regularly works on Sundays and public holidays

skitube tunnels are defined as the underground area between Portal 1 and Portal 2 (Bilston Tunnel) as well as between Portal 3 and Portal 4 (Blue Cow Tunnel)

Snowsports Instructor is an employee whose primary role is the teaching of skiing or boarding including race and specialist program coaches

spread of hours means the period of time elapsing from the time an employee commences duty to the time the employee ceases duty within any period of 24 hours

standard rate means the minimum hourly rate for a Resort Worker Level 2 (Seasonal) in clause 21

Time and one half means one and a half times the applicable hourly rate

3.2 Where this award refers to a condition of employment provided for in the NES, the NES definition applies.

4. Coverage

4.1 This industry award covers employers throughout Australia who operate an alpine resort and their employees in the classifications within Schedule A to the exclusion of any other modern awards.

4.2 The award does not cover an employee excluded from award coverage by the Act.

4.3 The award does not cover an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award.

5. Access to the award and the National Employment Standards

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a notice board which is conveniently located at or near the workplace or through electronic means, which ever makes them more accessible.

6. The National Employment Standards and this award

The NES and this award combine to contain the minimum conditions of employment for employees covered by this award.

7. Award flexibility

7.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) hours of work;

(c) overtime rates;

(d) penalty rates;

(e) allowances;

(f) leave loading;

(g) how and when annual leave is taken; and

(h) public holidays.

7.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress.

7.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause 7.1; and

(b) not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.

7.4 For the purposes of clause 7.3(b) the agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:

(a) the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Act, as those instruments applied as at the date the agreement commences to operate; and

(b) the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.

7.5 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement does not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

7.6 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

7.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure that the employee understands the proposal.

7.8 The agreement may be terminated:

(a) by the employer or the individual employee giving one week's notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

7.9 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

Part 2—Consultation and Dispute Resolution

8. Consultation regarding major workplace change

8.1 Employer to notify

(a) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representative or representatives, if any.

(b) **Significant effects** include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that:

- where this award makes provision for alteration of any of the matters referred to herein an alteration is deemed not to have significant effect; and
- an event or change which is a normal incidence of the seasonal nature of operating an alpine resort will not be considered a "significant effect".

8.2 Employer to discuss change

(a) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(b) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1.

(c) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the interests of the employer.

9. Dispute resolution

9.1 In the event of a dispute in relation to a matter arising under this award, or the NES, in the first instance the parties will attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavor to resolve the dispute in a timely manner by discussions between the employee or employee's concerned and more senior levels of management as appropriate, or in accordance with the dispute resolution procedure operating at the employer (provided that any such procedure should not be taken to be incorporated into this award).

9.2 If a dispute in relation to a matter arising under this award or the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken, a party to the dispute may refer the dispute to the Commission.

9.3 The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration.

9.4 Where the matter in dispute remains unresolved the Commission may exercise any method of dispute resolution permitted by the Act which it considers appropriate to ensure the settlement of the dispute.

9.5 An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.

9.6 While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the Act. Subject to applicable occupational health and safety legislation, as well as other safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform other available work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

Part 3—Types of Employment and Termination of Employment

10. Employment categories

10.1 Employees under this award will be employed in one of the following categories:

(a) permanent employees;

(b) seasonal employees;

(c) casual employees, or

(d) Snowsports Instructors.

10.2 At the time of engagement an employer will inform each employee of the terms of their engagement and in particular whether they are to be a permanent, seasonal, casual, or Snowsports Instructor employee.

11. Permanent employment

11.1 A permanent employee may be engaged on either a full-time or part-time basis in any classification in this award. This may be on an ongoing or fixed term basis.

11.2 A full-time permanent employee is a permanent employee who is engaged to work 38 ordinary hours (or an average of 38 ordinary hours over a period of up to 12 months) per week.

11.3 A part-time permanent employee is a permanent employee who is engaged to work less than 38 ordinary hours (or an average of less than 38 ordinary hours over a period of up to 12 months) per week.

12. Seasonal employment

12.1 An employer may employ seasonal employees in any classification in this award.

12.2 A seasonal employee may be engaged on either a full-time or part-time basis.

12.3 A full-time seasonal employee is a seasonal employee who is engaged to work 38 ordinary hours (or an average of 38 ordinary hours over the anticipated length of their employment) per week.

12.4 A part-time seasonal employee is a seasonal employee who is engaged to work less than 38 ordinary hours (or an average of less than 38 ordinary hours over the anticipated length of their employment) per week.

12.5 The hourly rate of seasonal employees will include a $1/12^{th}$ loading in lieu of annual leave.

13. Casual employment

13.1 A casual employee is an employee engaged as such in any classification in this award and must be paid a casual loading as provided in this award. This loading is paid as compensation for annual leave, paid personal/carer's leave, paid compassionate leave, notice of termination, redundancy benefits and the other entitlements from which they are excluded by the terms of this award and the NES.

14. Snowsports Instructor employment

14.1 A Snowsports Instructor means an employee who is employed as a Snowsports Instructor (as defined at Clause 3.1) on an hourly basis, and so who is a specific category of casual employee under this award. The hourly rate includes a casual loading paid as compensation for annual leave, paid personal/carer's leave, paid compassionate leave, work undertaken on public holidays, notice of termination, redundancy benefits and the other

entitlements from which they are excluded by the terms of this award and NES.

15. Apprentices

15.1 Apprentices will be engaged in accordance with relevant apprenticeship legislation and be paid in accordance with clause 21.2.

15.2 An apprentice under the age of 18 years must not, without their consent, be required to work overtime or shift work.

15.3 An apprentice will be engaged for a minimum of 4 hours per shift.

16. Junior employees

16.1 Junior employees will be paid in accordance with clause 21.3.

16.2 Junior employees, on reaching the age of 18 years, may be employed in the bar or other places where liquor is sold. Junior employees working in roles that undertake liquor service must be paid at the adult rate of pay in clause 21 for the work being performed.

16.3 An employer may at any time demand the production of a birth certificate or other satisfactory proof for the purpose of ascertaining the correct age of an employee. If a birth certificate is required, the cost of it must be borne by the employer.

16.4 No employee under the age of 18 years will be required to work more than 10 hours in a shift.

17. Termination of employment

17.1 Notice of termination is provided for in the NES.

17.2 Termination of employment by the employer for permanent employees will be as per the NES as set out below:

Employee's period of continuous service with the employer at the end of the day the notice is given

Period	
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

The period of notice will be increased by one week if the employee is over 45 years old and has completed at least two years of continuous service with the employer at the end of the day the notice is given.

17.3 Seasonal employees are required to be given one week's notice of termination of employment.

17.4 Casual employees and Snowsports Instructors are required to be given one hour's notice of termination of employment.

17.5 An employer may elect, at its discretion, to make a payment to an employee in lieu of some or all of an employee's notice period, of at least the amount

the employer would have been liable to pay the employee for the hours he or she would have worked had the employment continued until the end of the notice period.

17.6 Notwithstanding the provisions of clauses 17.1 to 17.4 an employer shall have the right to dismiss any employee summarily and without notice if an employee is (in the employer's reasonable opinion) guilty of misconduct or dishonesty (which may include, without limitation, fraud, theft, sexual or other harassment or discrimination, misappropriation of company funds or resources or serious breaches of company policy) or gross negligence or if the employee acts in a way which, in the reasonable opinion of the employer, may injure or be likely to injure the business, affairs or reputation of the company or cause serious risk to the safety of any person or the environment.

17.7 Rolling Notice

In some cases a seasonal employee may be provided with notice as set out in clause 17.2 and then, because of an extension to operations (due to favorable business and/or weather conditions) the opportunity arises for the employee to be provided with further work. In such cases where notice has already been given and the employee works beyond the date on which the notice period would have expired, a further one hour's notice shall be given by either side, or one hour's pay in lieu of such notice of termination.

17.8 Notice of termination by an employee

The notice of termination required to be given by an employee is the same as that required of an employer, except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the requisite notice the employer may withhold from any monies due to the employee on termination, under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause, less any period of notice actually given by the employee.

17.9 Job search entitlement

Where an employer has given notice of termination to a permanent employee, that permanent employee must be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off is to be taken at times that are convenient to the employee after consultation with the employer.

18. Redundancy

18.1 This clause only applies to permanent employees. If the employment of permanent employees is terminated due to genuine redundancy such an employee will be entitled, in respect of continuous service, to a payment calculated in accordance with the following table:

Employee's period of continuous service with the employer on termination	**Redundancy pay period:**
At least 1 year but less than 2 years	4 weeks

At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

Without limiting what will be a "genuine redundancy", it is not a genuine redundancy if a position ceases to exist due to the seasonal nature of the operations of an alpine resort.

18.2 Redundancy pay – Exclusions

Clause 18.1 does not apply:

(a) to those employees who are excluded from the entitlement to a redundancy payment in the NES; or

(b) if the employer is a small business employer as defined in the NES.

18.3 Transfer to lower paid duties

Where an employee is transferred to lower paid duties by reason of redundancy, the same period of notice must be given as the employee would have been entitled to if the employment had been terminated, and the employer may, at the employer's option, make payment instead of an amount equal to the difference between the former ordinary rate of pay and the new ordinary time rate for the number of weeks of notice still owing.

18.4 Employee leaving during notice period

An employee who has been given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee will be entitled to receive the benefits and payments they would have received under this clause had they remained in employment until the expiry of the notice that they have been given, but will not be entitled to payment instead of notice.

18.5 Job search entitlement

(a) An employee given notice of termination in circumstances of redundancy will be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee will, at the request of the employer, be required to produce proof of attendance at an interview or they will not receive

payment for the time absent. For this purpose a statutory declaration will be sufficient.

(c) This entitlement applies instead of clause 17.9.

Part 4— Classifications and Minimum Wage Rates

19. Work Organisation

Employees must undertake duties as directed within the limits of their competence and undertake duties across the different streams contained in the classification definitions in Schedule A.

20. Classifications

The definitions of the classification levels in clause 21, Minimum hourly wages, are contained in Schedule A.

21. Minimum hourly wages

21.1 General

(a) An adult employee within a level specified in the following table (other than an apprentice or an employee in respect of whom a certificate under s.123 of the Act is in force) will be paid not less than the rate per hour assigned to the classification, as defined in Schedule A but subject, for casual employees, to Schedule D, for the classification in which such employee is working. An employee's rate of pay is inclusive of the award rate set out in this clause:

Level Classification Minimum hourly wage

Alpine Resort Worker Classifications

Category	Full-time	Seasonal*	Casual**
Training	$ 14.3500	$ 15.5458	$ 17.9375
Resort Worker Level 1	$ 14.5000	$ 15.7083	$ 18.1250
Resort Worker Level 2	$ 15.0000	$ 16.2500	$ 18.7500
Resort Worker Level 3	$ 16.0000	$ 17.3333	$ 20.0000
Resort Worker Level 4	$ 16.5000	$ 17.8750	$ 20.6250
Resort Worker Level 5	$ 17.5000	$ 18.9583	$ 21.8750
Resort Worker Level 6	$ 18.0000	$ 19.5000	$ 22.5000
Resort Worker Level 7	$ 19.0000	$ 20.5833	$ 23.7500

Snowsports Instructor Classifications

Category	Snowsports Instructor***
Instructor - Category A	$ 29.0000
Instructor - Category B	$ 26.0000
Instructor - Category C	$ 23.0000
Instructor - Category D	$ 20.0000
Instructor - Category E	$ 19.0000

(b) Notes:

* Rate of pay for seasonal employees includes a 1/12th loading in lieu of annual leave.

** Rate of pay for casual employees includes a 25% casual loading, and is subject to Schedule D.

*** Rate of pay for Snowsports Instructors includes a 25% casual loading.

(c) Transitional provisions dealing with casual loadings for casual employees are contained in **Schedule D**.

21.2 Apprentice wages

(a) All percentages prescribed in this clause will be calculated to the nearest 10 cents. Any broken part of 10 cents in the result being less than five cents will be disregarded—five cents and over will go to the higher 10 cents.

(b) A person who has completed a full apprenticeship must not be paid less than their applicable hourly rate.

(c) An apprentice will be paid a percentage of their applicable hourly rate, as follows:

- First Year: 55%;
- Second Year: 65%;
- Third Year: 80%; and
- Fourth Year: 95%.

21.3 Juniors

Junior employees

The minimum rates of wages for junior employees are the under mentioned percentages of the rates prescribed for the appropriate adult classification for the work performed for the area in which such junior is working:

Age	%
17 years and under	70%
18 years	80%

22. Allowances

22.1 Meal allowance

An employee required to work overtime for more than two hours per shift without being notified on the previous day or earlier that they will be so required to work must either be supplied with a meal by the employer or paid an allowance equal to 40% of the standard hourly rate per instance.

22.2 Sewerage Treatment Plant Allowance

Employees working at designated sewerage treatment plants shall be paid an additional amount of 45% of their applicable hourly rate, for each shift they are engaged in work at a designated sewerage treatment plant.

22.3 Duty Controllers Allowance

An employee who is an accredited rail safety worker and required to act as a Duty Controller on a railway and who has been deemed competent in this capacity will be paid an additional allowance of 12% of their applicable hourly rate, for each hour they work in this capacity.

22.4 Track Inspector Allowance

An employee who is an accredited rail safety worker and who is responsible for the inspection and maintenance of track, tunnels and general rail infrastructure to ensure the safe running of the railway ("**Track Inspector**"), and who works within the Skitube Tunnels (but not including the Perisher Skitube Terminal, Blue Cow Terminal, Bullocks Terminal and platform areas) shall be paid an allowance of 3.5% of their applicable hourly rate, for each hour they work in this location.

22.5 Boot Allowance

Where the employee is directed to wear specific outdoor footwear as part of their employment and this footwear is not supplied by the employer the employee will be paid an allowance of 1% of the standard hourly rate for each hour worked. This does not include items such as black shoes for service staff.

22.6 Equipment Allowance

Where an employee is required to provide ski / board equipment as part of their employment, and this equipment is not supplied by the employer, the

employee will be paid an allowance of 2% of the standard hourly rate for each hour worked. An employee entitled to the Equipment Allowance will be entitled to this instead of the Boot Allowance.

23. Supported wage system

See Schedule B.

24. Mixed functions and dual-role employment

24.1 It is recognised that employees in the Snowsports Industry generally have a limited period of employment, due to the seasonality of the businesses that they are employed by, and therefore in the main have a limited period in which to maximize their earnings. To facilitate this process, employees may work a variety of roles with one employer to increase their earning potential.

24.2 To this end employees shall be paid as a minimum the appropriate rate (including any terms and conditions on a pro-rata basis) for each role undertaken by them as defined by clause 21 and as set out by Schedule A.

24.3 Dual-role employment

(a) Due to the unique nature of most positions under this award, in that they are generally only available during that part of the year when alpine lifting is being provided, employees may be offered dual-role employment (where operational requirements allow) in which the employee may have two distinct roles.

(b) In these circumstances any offer of employment will set out the terms and conditions for each role and these will be mutually agreed between the two parties prior to the commencement of this type of employment.

24.4 Multi-hiring arrangement

(a) As an alternative, or in addition to, dual-role employment, an employee may by agreement be engaged on a multi-hiring arrangement.

(b) If an employer and an employee enter into a multi-hiring arrangement, the parties must agree on the primary role of the employee.

(c) The employer may then offer the employee, and the employee may undertake, a non-primary role (or roles) in any level or classification within Schedule A that he or she is qualified for, provided that:

- any non-primary role is to be undertaken, and paid for, on a casual basis; and
- any hours worked by an employee in a non-primary role do not count toward ordinary hours or overtime in the employee's primary role.

25. Payment of wages

An employer may pay an employee his/her wages either weekly, fortnightly, or monthly by payment into the employee's bank account by electronic funds transfer, without cost to the employee.

26. Annualised salary arrangements

26.1 This clause applies to permanent employees and seasonal employees.

26.2 An employer and an employee may agree to enter into an annualised salary arrangement instead of all or any of the following provisions of this award:

(a) Clause 21 – Minimum hourly wages;

(b) Clause 22 – Allowances;

(c) Clause 31 – Penalty rates;

(d) Clause 32 – Overtime.

26.3 If the employee is engaged on a dual-role employment arrangement pursuant to clause 24.3, the annual salary is to be pro-rated across each role according to the number of ordinary hours the employee is engaged to perform in each role over the year.

26.4 The employer and the individual employee must genuinely make the agreement without coercion or duress.

26.5 The annual salary must be no less than the amount the employee would have been entitled to receive under the rates and allowances prescribed by this award, in light of the employee's anticipated hours and working arrangements. The annual salary is paid in full satisfaction of any obligation to otherwise make payments to the employee under this award and may be relied upon to set off any such obligation, whether of a different character or not.

26.6 Any written agreement under this clause must specify the annual salary that is payable, what provisions of this award will not apply as a result of the annualised salary arrangement and any hours, overtime or penalty assumptions and calculations commuted into the annualised arrangement.

26.7 The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

26.8 The agreement may be terminated:

(a) for permanent employees, by the employer or the employee giving six months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period;

(b) for seasonal employees, by the employer or the employee giving two weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(c) at any time, by written agreement between the employer and the individual employee.

27. Superannuation

27.1 Superannuation legislation

(a) Superannuation legislation, including the *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund. If an employee does not choose a superannuation fund, the superannuation fund nominated in the award covering the employee applies.

(b) The rights and obligations in these clauses supplement those in superannuation legislation.

27.2 Employer contributions

An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as this will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

27.3 Voluntary employee contributions

(a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause 27.2.

(b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month following the giving of two weeks' written notice to their employer.

(c) The employer must pay the amount authorised under paragraph clauses 27.3(a) or 27.3(b) at the same time as the employer makes the superannuation contributions provided for in clause 27.2.

27.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 27.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 27.2 and pay the amount authorised under clauses 27.3(a) and 27.3(b) to at least one of the following superannuation funds:

(a) The Hospitality Industry Portable Liquor Union Superannuation Trust Deed (HOST-PLUS);

(b) Australian Super; or

(c) any other superannuation fund which complies with the *Superannuation Industry (Supervision) Act 1993* as amended from time to time to which an employer was contributing, in compliance with the *Alpine Resorts (The Australian Workers' Union) Award 2001*, before 12 September 2008.

27.5 Absence from work

Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 27.2 and pay the amount authorised under clauses 27.3(a) and 27.3(b) while the employee is on any paid leave.

Part 5—Hours of Work and Related Matters

28. Hours of work

28.1 Ordinary hours of work

(a) Ordinary hours of work for permanent employees and seasonal employees will be as set out at clauses 11 and 12 above, and due to operational requirements of the business will be on an any five in seven basis.

(b) Hours of work for employees engaged on either a casual or Snowsport Instructor basis will be determined by business demand.

29. Rostering

29.1 If the hours and/or days of work for any permanent, seasonal or casual employees, or Snowsport Instructors, are variable, the employer must prepare rosters showing the name of each employee and their days of work and starting and finishing times. An employer may also (but is not required to) prepare a roster for any other employees.

29.2 The roster will be posted on a notice board which is conveniently located at or near the workplace or through electronic means, which ever makes it more accessible.

29.3 The roster will be alterable:

(a) at any time by mutual consent; and

(b) by the employer on the day prior to when the rostered shift was originally scheduled to be worked, or where notice is unable to be given of the roster change on the previous day, with as much notice as is reasonably practicable in the circumstances.

30. Breaks

30.1 If an employee, including a casual employee, is required to work for five or more hours in a day they must be given an unpaid meal break of no less than 30 minutes. The break must be given no earlier than one hour after starting work and no later than six hours after starting work.

30.2 Where operational requirements do not allow time for an unpaid meal break in accordance with clause 30.1, the employee will be given a paid meal break of 20 minutes.

30.3 If the unpaid meal break is rostered to be taken after five hours of starting work, the employee must be given an additional 20-minute paid meal break. The employer must allow the employee to take this additional meal break no earlier than two hours after starting work and no later than five hours after starting work.

30.4 If an employee is not given a meal break in accordance with clause 30.1 or 30.2 the employer must pay the employee an extra hourly or part thereof payment at the rate of 50% of the applicable hourly rate from the end of six hours until either the meal break is given or the shift ends.

30.5 An employee is entitled to receive an additional 30 minute unpaid meal break for each additional 5 hours worked by them in a day. The taking of any additional meal breaks is to be as per clauses 30.3 and 30.4 above.

30.6 Employees who are engaged on an annualised salary arrangement pursuant to clause 26, above are entitled to unpaid meal breaks in accordance with clauses 30.1 and 30.5, but will not be entitled to any additional paid breaks or penalty rates under clauses 30.3 and 30.4.

31. Penalty rates

31.1 Application of clause

This clause 31 does not apply to employees who are engaged on an annualised salary arrangement pursuant to clause 26.

31.2 Payment for work performed on public holidays

(a) This clause 31.2 does not apply to employees engaged as Snowsports Instructors.

(b) All time worked by a permanent employee or seasonal employee on a public holiday must be paid for at the rate of double time and one half for the hours worked.

(c) All time worked by a casual employee on a public holiday must be paid for at the rate of double time and one fifth for the hours worked.

(d) As an alternative to clause 31.2(b), such employees who worked on a prescribed holiday may, by agreement within a two week period after working on the public holiday, perform an equivalent number of hours work as they worked on the public holiday at ordinary rates plus an additional 50% for those hours, provided that equivalent paid time is added to the employee's annual leave or equivalent hours in lieu of such public holiday will be allowed to the employee.

31.3 Casual Loading

(a) As per the hourly wage rates in clause 21.1 all casual employees and Snowsport Instructors will receive a 25% loading included into their hour rate, unless their loading percentage is less than 25% as per

Schedule D, in which case their applicable hourly rate in clause 21 will be reduced proportionately to accord with the applicable loading percentage in Schedule D.

32. Overtime

32.1 Application of clause

This clause 32 does not apply to:

(a) Casual employees;

(b) Snowsports Instructors;

(c) employees engaged on an annualised salary arrangement pursuant to clause 26; or

(d) employees paid a casual rate under clause 24.

32.2 Entitlement to overtime rates

Subject to clause 32.1(c) and (d) above, a permanent employee or seasonal employee is paid at overtime rates for:

(a) any hours in excess of the ordinary hours per week that the employee is engaged to work; or

(b) where the employee's hours of work are averaged over a period of time in accordance with clauses 11 or 12, hours in excess of their ordinary hours of work per week, assessed as an average over that period of time.

32.3 Overtime rates

(a) **Employees whose hours of work are not averaged**

The following overtime rates are payable to a permanent employee or seasonal employee:

- first two hours at ordinary time; and
- all time worked in excess of the first two hours each week shall be paid for at the rate of time and one half for the next two hours and then double time for all work thereafter.

(b) **Employees working on an averaged hours arrangement**

Any hours banked by an employee under an averaged hours arrangement will be banked at the rate that would have been payable for the time worked, had the employee not been on an averaging arrangement.

32.4 Reasonable Overtime

(a) Subject to clause 32.4(b), 16.4 and the NES, an employer may require an employee to work reasonable overtime in accordance with the provisions of this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to

(i) any risk to employee health and safety;

(ii) the employees personal circumstances, including any family responsibilities;

(iii) the requirements of the employer;

(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse such work; and

(v) any other related matter.

Part 6—Leave and Public Holidays

33. Annual leave

33.1 Annual leave is provided for in the NES.

33.2 Application

(a) This clause applies to all permanent employees.

(b) Casual employees, seasonal employees and Snowsports Instructors are compensated for annual leave in their hourly rate of pay, and are not entitled to accrue annual leave under this clause 33.

33.3 Annual leave entitlement

Employees to whom this clause applies will be entitled to annual leave in accordance with the NES. Without derogating from this requirement, employees' entitlements to annual leave may be summarised as follows:

(a) an employee is entitled to four weeks of paid annual leave (pro rata for part-time employees), which accrues based on ordinary hours worked by the employee for the employer during each four week period of continuous service (capped at 38 hours per week) and is credited to the employee at no greater than monthly intervals. Annual leave accrues on a pro-rata basis.

(b) annual leave is cumulative.

(c) an employee may be directed to take one quarter of his or her accumulated annual leave if the employee has accrued more than 30 days' leave at the time at which the direction is given.

(d) shift workers (as defined) may be entitled to up to an additional one week's annual leave each year, depending on the proportion of time spent working as a shift worker and the particular shift patterns within the business.

(e) an employee's annual leave is generally to be taken at a time that is convenient for both the employer and the employee. Employees are encouraged to take their annual leave at times of low demand on the business. Annual leave for longer than two days will generally not be

approved by the employer when alpine lifting is being provided by the employer for snowsports activities, due to operational requirements. The employer will not unreasonably refuse to authorise an employee to take annual leave that is credited to the employee.

(f) an employee must take an amount of annual leave during a particular period if:

- the employee is directed to do so by the employee's employer because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and
- at least that amount of annual leave is credited to the employee.

33.4 Cashing out annual leave

(a) Permanent employees are entitled to forego up to two weeks of accrued annual leave credited to them by giving the employer a written election of the decision to do so. Employees may request to cash out up to a maximum of two weeks of their accrued annual leave once in any 12 month period.

(b) The employer may authorise, or decline to authorise, any request made by an employee to cash out annual leave, at its discretion.

(c) If an employee elects to forego annual leave, he or she must be paid the full amount that would have been payable to the employee had the employee taken the leave he or she elected to forego. The employer will pay this amount to the employee in the next pay period following the date it authorises the cashing out of annual leave by the employee.

(d) Any leave cashed out will result in the necessary adjustment being made to the employee's annual leave accrual so that the employee has no further entitlement to take, or receive pay in lieu of, the period of leave foregone.

(e) Employers are prohibited from exerting undue influence or undue pressure on an employee to cash out his or her annual leave.

33.5 Paid leave in advance of accrued entitlement

An employer may allow an employee to take annual leave either wholly or partly in advance before the leave has accrued. Where paid leave has been granted to an employee in excess of the employee's accrued entitlement, and the employee subsequently leaves or is discharged from the service of the employer before completing the required amount of service to account for the leave provided in advance, the employer is entitled to deduct the amount of leave in advance still owing from any remuneration payable to the employee upon termination of employment.

33.6 Requirement to take leave notwithstanding terms of the NES

An employer may require an employee to take annual leave by giving at least four weeks' notice in the following circumstances:

(a) as part of a close down of its operations; or

(b) where more than 30 days' leave is accrued.

34. Personal/carer's leave and compassionate leave

34.1 Personal/carer's leave and compassionate leave are provided for in the NES.

34.2 Application

(a) This clause applies to all permanent employees and seasonal employees.

(b) Clauses 34.3 and 34.5(b) do not apply to employees engaged on a casual basis or as Snowsports Instructors. Casual employees and Snowsports Instructors are compensated for paid personal/carer's leave and compassionate leave in their hourly rate of pay.

34.3 Paid personal/carer's leave entitlement

Employees will be entitled to personal/carer's leave in accordance with the NES. Without derogating from this requirement, the entitlements of employees to personal/carer's leave are summarised below:

(a) permanent employees and seasonal employees are entitled to 10 days of paid personal/carer's leave per year (pro-rated for part-time employees and seasonal employees) provided the employee complies with the notice and evidence requirements required by the employer.

(b) personal/carer's leave may be taken as sick leave or carer's leave (provided that only 10 days paid carer's leave days may be taken in a 12 month period, pro-rated for part-time employees).

(c) paid personal leave is cumulative, but not from season to season (in the case of seasonal employees).

34.4 Unpaid personal & carer's leave entitlement

(i) A permanent or seasonal employee who has exhausted his or her paid personal/carer's leave entitlement under clause 34.3; or

(ii) A casual employee or Snowsport Instructor who is not entitled to paid personal/carer's leave;

may, provided he or she complies with the notice and evidence requirements of the employer, take unpaid carer's leave of up to two days where a member of the employee's household or immediate family requires care or support due to an illness, injury or unexpected emergency. Additional absence is by agreement.

34.5 Compassionate Leave

(a) Employees will be entitled to compassionate leave in accordance with the NES. Without derogating from this requirement, employees will be entitled to up to two days of compassionate leave for each occasion on which a member of the employee's immediate family or household:

- contracts or develops a personal illness that poses a serious threat to his or her life; or
- sustains a personal injury that poses a serious threat to his or her life; or
- dies.

(b) Compassionate leave taken by permanent and seasonal employees will be paid leave.

(c) Compassionate leave taken by casual employees and Snowsports Instructors will be unpaid leave.

35. Community service leave

Community service leave is provided for in the NES. Consistent with the NES entitlement, only permanent and seasonal employees are entitled to be paid their base rate of pay for their ordinary hours of work in respect of any period of community service leave required to be taken to complete jury service.

36. Parental leave

Parental leave is provided for in the NES.

37. Public holidays

37.1 Public holidays are provided for in the NES.

37.2 Substitution of public holidays by agreement

By agreement between the employer and the majority of employees in the relevant enterprise or section of the enterprise, an alternative day may be taken as the public holiday in substitution of any of the days prescribed in s.54 of the NES.

37.3 Additional arrangements for permanent and seasonal employees

A permanent or seasonal employee whose rostered day off falls on a public holiday must, subject to clause 31.2, either:

(a) be paid an extra day's pay; or

(b) be provided with an alternative day off within 28 days; or

(c) receive an additional day's annual leave.

37.4 A permanent or seasonal employee who works on a public holiday which is subject to substitution as provided for by the NES will be entitled to the benefit of the substitute day.

PART 7 – Industry specific provisions

38. Stand down arrangements

38.1 This clause applies to permanent employees and seasonal employees.

38.2 The employer shall have the right to withhold or deduct payment for any part of a day or shift during which an employee cannot usefully be employed

because of any industrial action, breakdown of machinery, weather or bushfire conditions or any other stoppage of work for any reason which the employer cannot reasonably be held responsible.

Schedule A— Classification Definitions

Training Level is for when staff are undergoing training prior to being deemed competent to undertake their substantive role at the appropriate Resort Worker Level, excluding those who are being trained in Plant Operators role. It is also the rate to be paid to staff while attending orientation or induction programs.

The maximum period of time on which an employee may be engaged at the Training Level is seven weeks.

Resort Worker Level 1 means an employee who is engaged in a role that requires no previous experience, on the job training and work under supervision such as the following roles:

- Carparking duties
- Outdoor and Indoor Assistant roles including Race Event Workers, Snowsports Assistants, Painters and Lift Attendants whose roles are primarily focused on specific Labouring tasks
- General unskilled labour tasks
- Bar Assistant who is employed primarily in non-service duties
- Food Service Assistant - duties including removing food plates, setting and/or wiping down tables, cleaning and tidying of associated areas
- Kitchenhand duties
- Housekeeping duties assisting under supervision in the servicing of resort property and cleaning thereof
- Laundry duties assisting in laundry service

Resort Worker Level 2 means an employee who is engaged in a role that requires some previous relevant experience or qualifications, detailed on the job training for the specific employers requirements and work under supervision. The following roles are examples:

- An employee who is engaged in general clerical or office duties.
- Guest Service roles including Ticket and Pass sales, Hire sales and service, Retail Sales, Concourse Attendants and Tour Guides.
- Trainee Plant Operator roles (including Trainee Train Drivers) who are undergoing training and assessment and are yet to be deemed competent.
- A person involved in the coordination and instruction of other staff involved in Carparking operations.
- Unqualified Child Care Workers
- Municipal Services (garbage collection etc)
- Pool attendants with lifeguard qualifications
- Ticket Checkers, Uniform Room Attendants and Mountain Awareness staff
- Snowsports administrative staff who are responsible for the booking of lessons
- Bar duties including service, cellar and bottle sales.
- Food Service duties including service, cashier and waiting duties.
- Housekeeping involved in the servicing and cleaning of resort property.
- A Cook being an unqualified person involved in the preparation butchering or cooking of food.

- An employee who is engaged in reception / reservations duties including night auditing, telephonist, receptionist, cashier, information services, portering or reservations.
- Laundry duties involved in laundry production duties such as machine operation

Resort Worker Level 3 means an employee who is engaged in role that requires significant previous experience in the field in which they are to be employed or will be involved in roles that require specialist training by the employer. The following roles are examples:

- A Lift Operator who is responsible for the safe operation of aerial and surface lifting, the loading and unloading of guests, maintaining the lift station and reporting of mechanical faults to appropriate trades and supervisory staff.
- An employee involved in Mountain operation roles such as Assistant Ski Patrol and Trail Crew
- Trades Assistants in Electrical, Mechanical, Fitting & Machinery and Building disciplines including (but not limited to) Electrical Assistants, Track Maintenance Assistants, Fitters and Machinists, Carpentry Assistants and Leading Hand Labourers.
- Beauty Therapist and Spa Attendant.
- Stores Person or Cellar person with forklift qualifications and who is engaged as such.
- Food Service & Bar staff who supervise staff of a lower grade and who work without supervision.
- A Kitchen attendant who has the responsibility for the supervision, training and coordination of kitchen attendants of a lower grade.
- An employee in a Housekeeping, Porter or Laundry role who has the appropriate level of training and who is employed to supervise employees of a lower grade.
- An employee who is engaged in night auditing, Hotel reception or reservations who has more than three years experience in a similar role in a Hotel or Travel Reservations business.

Resort Worker Level 4 means an employee who is engaged in a role that requires specialist skills built on previous experience and qualifications or provide direction for staff at a lower level. The following roles are examples:

- An employee who is engaged in the supervision of other staff involved in reception / reservations duties including night auditing, telephonist, receptionist, cashier, information services or reservations.
- An employee who is engaged in the supervision of Guest Service roles including Ticket and Pass sales, Hire sales and service, Retail Sales, Concourse Attendants Information and Tour Guides.
- An employee engaged in Cashroom, Treasury or other similar back office cash reconciliation roles.
- Experienced Painters.
- Qualified Fitness Instructor with lifeguard qualifications.

- Bar and Food Service staff who supervise staff of a lower grade in running a particular section, restaurant or bar.
- A Qualified Chef, who has completed an apprenticeship in this discipline.
- An employee who is engaged as an Inventory Controller or Uniform Room Coordinators.

Resort Worker Level 5 means an employee who has the appropriate level of training and who is employed to supervise and/or train employees of a lower grade. The following roles are an example of such positions:

- An employee who is engaged in the supervision of Lift Operators or Treasury / Cashroom staff.
- A Hospitality supervisor in any area of hospitality including but not limited to food & beverage, housekeeping, front office and reservations, laundry, stores, duty supervisors and the like.

Resort Worker Level 6 means an employee who is engaged in a role that requires the completion of a recognized qualification in the field in which they are employed and have been deemed competent to fulfill the following roles:

- A Plant Operator who has been deemed competent in the operation of plant and equipment including (but not limited to) Transport vehicles, Groomers, Excavators, Cranes, Trains, Snowmaking or Sewerage Plant equipment.
- Railway Track Inspectors.
- A Child Care Worker who has completed as a minimum an AQF Certificate 3 or 4 in Children's Services (or equivalent).
- A qualified Ski Patroller
- Trade qualified staff who have completed an apprenticeship in an Electrical, Fitting, Mechanical, Painting, Spray Painting, Carpentry or Building discipline and are undertaking work in their relevant discipline.
- An employee who is employed to Supervise staff undertaking Trail Crew or Snowsports Reservations duties.
- Qualified Beauty Therapist
- Media Staff such as Reporters, Editors and Camera Operators.
- A Qualified Chef who supervises or trains other kitchen staff, undertakes ordering and stock control and is solely responsible for other cooks and other kitchen employees in a single kitchen establishment.

Resort Worker Level 7 means an employee who is engaged in any of the following roles:

- A Child Care Worker who is engaged as a supervisor and who has completed as a minimum an AQF Diploma in Children's Services.
- An employee who is engaged in the supervision of other staff involved in Plant Operation.

Instructors Category A means an employee who is engaged as a Snowsports Instructor (as defined) is a fully certified Instructor, and has obtained their APSI Level 3 Qualification or international equivalent (as can be seen in Table 5.1 of Schedule C) and has a minimum of 10 full-time seasons of practical experience. Full-time season for the purposes of this category of employment will be a minimum of 12 successive weeks at a recognized Snowsports School.

Instructors Category B means an employee who is engaged as a Snowsports Instructor (as defined) and has an intermediate level of certification, being their APSI Level 2 Qualification or international equivalent (as can be seen in Table 4.1 of Schedule C) and has full-time practical teaching experience.

Instructors Category C means an employee who is engaged as a Snowsports Instructor (as defined) and has a fundamental level of certification, being the APSI Level 1 Qualification or international equivalent (as can be seen in Table 3.1 of Schedule C) and has full-time practical teaching experience.

Instructors Category D means an employee who is engaged as a Snowsports Instructor (as defined) and has some teaching experience with an entry level qualification (as per Table 2.1 in Schedule C)

Instructors Category E means an employee who is engaged as a Snowsports Instructor (as defined) and has either no experience or a low level qualification (as per Table 1.1 in Schedule C).

Schedule B—Supported wage system

1. This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this agreement/award. In the context of this clause, the following definitions will apply:

1.1 Supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in Supported Wage System: Guidelines and Assessment Process.

1.2 Accredited assessor means a person accredited by the management unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system.

1.3 Disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme.

1.4 Assessment instrument means the form provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system.

2. Eligibility criteria

2.1 Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this agreement/award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension.

2.2 This clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this agreement/award relating to the rehabilitation of employees who are injured in the course of their employment.

2.3 This clause does not apply to employers in respect of their facility, programme, undertaking, service or the like which receives funding under the *Disability Services Act 1986* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s.10 or under s.12A of the Disability Services Act, or if a part only has received recognition, that part.

3. Supported wage rates

3.1 Employees to whom this clause applies will be paid the applicable percentage of the minimum rate of pay prescribed by this award/agreement for the class of work which the person is performing according to the following schedule:

Assessed capacity(clause 4)	Prescribed award rate
%	%
10*	10
20	20
30	30
40	40
50	50
60	60
70	70
80	80
90	90

3.2 Provided that the minimum amount payable must be not less than $69 per week.

3.3 * Where a person's assessed capacity is 10%, they must receive a high degree of assistance and support.

4. Assessment of capacity

For the purpose of establishing the percentage of the award rate to be paid to an employee under this award/agreement, the productive capacity of the employee will be assessed in accordance with the supported wage system and documented in an assessment instrument by either:

4.1 The employer and a union party to the award/agreement, in consultation with the employee or, if desired by any of these;

4.2 The employer and an accredited assessor from a panel agreed by the parties to the award and the employee.

5. Lodgement of assessment instrument

5.1 All assessment instruments under the conditions of this clause, including the appropriate percentage of the award wage to be paid to the employee, must be lodged by the employer with the Registrar of the Australian Industrial Relations Commission.

5.2 All assessment instruments must be agreed and signed by the parties to the assessment, provided that where a union which is party to the award/agreement, is not a party to the assessment, it will be referred by the Registrar to the union by certified mail and will take effect unless an objection is notified to the Registrar within 10 working days.

6. Review of assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review must be in accordance with the procedures for assessing capacity under the supported wage system.

7. Other terms and conditions of employment

Where an assessment has been made, the applicable percentage will apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other workers covered by this award/agreement paid on a pro rata basis.

8. Workplace adjustment

An employer wishing to employ a person under the provisions of this clause must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

9. Trial period

9.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

9.2 During that trial period the assessment of capacity will be undertaken and the proposed wage rate for a continuing employment relationship will be determined.

9.3 The minimum amount payable to the employee during the trial period must be no less than $69 per week.

9.4 Work trials should include induction or training as appropriate to the job being trialled.

9.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under clause 4 hereof.

Schedule C—Equivalency of Snowsports Qualifications

Table 1.1

Country	Association	Certification Level
Australia	APSI (Ski & SB)	Instructor Training Course/ Recruitment Cl
Austria	ÖSSV (Ski & SB)	Anwärter
Canada	CSIA (Ski)	CSIA Level 1
Canada	CASI (SB)	CASI Level 1
Canada	CSCF (Coaching)	Entry Level (1)
New Zealand	NZSIA (Ski & SB)	C.S.I
Poland	SITN-PZN	Childrens Level
Switzerland	SSSA	Kinderlehrer
United Kingdom	BASI (Ski)	Alpine Level 1
United Kingdom	BASI (SB)	SB Level 1
USA	PSIA (Ski)	PSIA Level 1
USA	AASI (SB)	AASI Level 1

Table 2.1

Country	Association	Certification Level
Australia	APSI (Ski & SB)	Childrens Certificate
Canada	CSCF (Coaching)	Level 1 Advanced Certification

Table 3.1

Country	Association	Certification Level
Australia	APSI (Ski & SB)	APSI Level 1
Austria	ÖSSV (Ski & SB)	Anwärter
Canada	CSIA (Ski)	CSIA Level 2
Canada	CASI (SB)	CASI Level 2
Canada	CSCF (Coaching)	Development Level (2)
Czech Repulic	APUL	APUL C
Japan	SIA	IT I (Bronze Medal)
Netherlands	NVVS	A-Diploma
New Zealand	NZSIA (Ski & SB)	Stage One
Poland	SITN-PZN	Level Basic
Slovakia	SAPUL	C Qualification
Slovenia	SIAS	Level 1
Switzerland	SSSA	Stufe 1
United Kingdom	BASI (Ski)	Alpine L2

United Kingdom	BASI (SB)	SB L2
USA	AASI (SB)	AASI Level 2
USA	PSIA (Ski)	PSIA Level 2

Table 4.1

Country	Association	Certification Level
Australia	APSI (Ski & SB)	APSI Level 2
Austria	ÖSSV (Ski & SB)	Landesschilehrer
Canada	CSIA (Ski)	CSIA Level 3
Canada	CASI (SB)	CASI Level 3
Canada	CSCF (Coaching)	Performance Level (3)
Czech Repulic	APUL	APUL B
Japan	SIA	IT II (SiLevel er Medal)
Netherlands	NVVS	B-Diploma
Poland	SITN-PZN	Assistant PZN
Slovakia	SAPUL	B Qualification
Slovenia	SIAS	Level 2
Switzerland	SSSA	Stufe 2
United Kingdom	BASI (Ski)	Ski Teacher
United Kingdom	BASI (SB)	SB Teacher
USA	PSIA (Ski)	PSIA Level 3
USA	AASI (SB)	AASI Level 3
USA	USSA (Coaching)	Level 200 State Coach

Table 5.1

Country	Association	Certification Level
Australia	APSI (Ski & SB)	APSI Level 3
Austria	ÖSSV (Ski & SB)	Staatlich geprüfter Schilehrer
Canada	CSIA (Ski)	CSIA Level 4
Canada	CASI (SB)	CASI Level 4
Canada	CSCF (Coaching)	Program Director (4)
Czech Repulic	APUL	APUL A
Italy	AMSI	Maestro di Sci (Gold Level)
Japan	SIA	IT III (Gold Medal)
Netherlands	NVVS	C-Diploma
New Zealand	NZSIA (Ski & SB)	Stage Two
Poland	SITN-PZN	PZN-ISIA
Slovakia	SAPUL	A Qualification
Slovenia	SIAS	Level 3
Sweden	ESS	Examinerad Svensk Skidlarare (Level 3)
Switzerland	SSSA	Stufe 3

United Kingdom	BASI (Ski)	Diploma
USA	PSIA (Ski)	PSIA Level 3
USA	AASI (SB)	AASI Trainer

Schedule D – Transitional Provisions – Casual Loadings

The following transitional arrangements apply in respect to the casual loading for casual employees of employers who operate alpine resorts in New South Wales:

- for 2010, the casual loading is 15%;
- for 2011, the casual loading is 17.5%;
- for 2012, the casual loading is 20%;
- for 2013, the casual loading is 22.5%; and
- for 2014, the casual loading is 25%.

The casual hourly rate set out in clause 21 is therefore to be reduced proportionately on the basis of the above casual loading percentage being applicable, rather than 25%.

"K"

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TRANSCRIPT OF PROCEEDINGS

Workplace Relations Act 1996 20479-1

JUSTICE GIUDICE, PRESIDENT
VICE PRESIDENT LAWLER
VICE PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT WATSON
SENIOR DEPUTY PRESIDENT HARRISON
SENIOR DEPUTY PRESIDENT ACTON
COMMISSIONER SMITH

AM2008/25, 26, 27, 28, 29, 30,31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 and 63

s.576E - Award modernisation

Sydney

10.17AM, TUESDAY, 30 JUNE 2009

Continued from 29/06/2009

THE FOLLOWING PROCEEDINGS WERE CONDUCTED VIA VIDEO CONFERENCE AND RECORDED IN SYDNEY

Hearing continuing

PN3408
JUSTICE GIUDICE: The first industry that we will deal with is maritime and we will take appearances in relation to that industry.

PN3409
MR W MCNALLY: I appear on behalf of the Maritime Union Australia and the Australian Institute of Marine and Power Engineers. With me MR N KEATS.

PN3410
MR G HATCHER: I seek leave to appear with my learned friend MR SIQH for CSL Australia Pty Ltd.

PN3411
MR K BROTHERSON: I seek leave to appear for the National Bulk Commodities Group Incorporated.

PN3412
MR C PLATT: I appear on behalf of the Australian Mines and Metals Association and the Australian Ship Owners' Association.

PN3413
MR R WARREN: I appear by leave for the Australian Federation of Employers and Industries.

PN3414
JUSTICE GIUDICE: Thank you. Any other appearances?

PN3415
MS Z ANGUS: I appear on behalf of the Australian Workers' Union.

PN3416
JUSTICE GIUDICE: Thank you. Where leave is sought, it's granted. Now, we have a number of awards in this area. Has there been any discussion between the parties as to how to deal with these? Normally I think we would take them award by award.

PN3417
MR K HARVEY: Your Honour, Keith Harvey in Melbourne. We can see, but we can't hear anything in Melbourne. We're not sure what's happening.

PN3418
MR L MALONEY: Your Honour, from Brisbane, I have the same problem. We can see, but can't hear.

PN3419
JUSTICE GIUDICE: Can you hear now?

PN3420
MR HARVEY: We can in Melbourne, yes, your Honour.

PN3421
JUSTICE GIUDICE: Can you hear us, Mr Maloney?

PN3422
MR MALONEY: I can now, your Honour. Thank you.

PN3423
JUSTICE GIUDICE: Very well. Who are you appearing for, Mr Maloney?

PN3424
MR L MALONEY: I appear on behalf of the Whitsunday Charter Boat Industry Association and the Association of Marine Park Tourism Operators for Livingstones Australia in matter AM2008/59. That's the tourism matter.

PN3425
JUSTICE GIUDICE: We haven't got to that yet. We're dealing with maritime at the moment, but we should get to tourism some time today.

PN3426
MR MALONEY: Thank you. Yes.

PN3427
JUSTICE GIUDICE: Mr Harvey, can you hear us?

PN3428
MR HARVEY: Sorry, your Honour, I can hear you, but I forgot to take mute off at this end. Your Honour, I appear on behalf of the Australian Services Union with regard to the maritime industry matter. The ASU filed a late submission in this matter yesterday which has been listed on the Commission's website which when it comes to my turn I will explain to the Commission the reason for it. If the Commission pleases.

PN3429
JUSTICE GIUDICE: Yes, and Ms Oppy, are you appearing in this matter?

PN3430
MS OPPY: No, your Honour, funnily enough not this matter, but I will be in the last one.

PN3431
JUSTICE GIUDICE: Very well.

PN3432
MR WOODS: I appear on behalf of Ports Australia in respect of this area, in respect to dredging only.

PN3433
JUSTICE GIUDICE: I am sorry, Mr Woods was it?

PN3434
MR WOODS: Yes.

PN3435
JUSTICE GIUDICE: Thank you. Are there any other appearances? Very well, as I was saying, it's a question of how we deal with this. Has there been any discussion about the order or the manner in which we should deal with these exposure drafts? Mr Hatcher?

PN3436
MR HATCHER: Yes, if it please the Commission, the Commission will have received some correspondence from our client. We would wish to move for an adjournment in relation to the Maritime Industry Seagoing Award 2008/41 and it

would seem convenient if that could be dealt with first subject to any other parties' views.

PN3437
JUSTICE GIUDICE: Yes. Well, do the other parties have notice of this?

PN3438
MR PLATT: .....

PN3439
MR WOODS: AMMA and ASA would support the proposition for an adjournment, your Honour.

PN3440
JUSTICE GIUDICE: Yes. Well, we will hear you on it, Mr Hatcher.

PN3441
MR HATCHER: May it please the Commission, the Commission will have received the correspondence that our clients received from the Minister's office. The correspondence indicates an intention or foreshadows an intention by the Minister to extend the operation of the Fair Work Act.

PN3442
JUSTICE GIUDICE: Mr Hatcher, I am not quite sure what you meant when you said the Commission would have received it.

PN3443
MR HATCHER: The letter that our client received from the Minister was attached to the correspondence.

PN3444
JUSTICE GIUDICE: Yes, that's right. We received it from you?

PN3445
MR HATCHER: That's so, yes. I'm sorry, your Honour.

PN3446
JUSTICE GIUDICE: It's all right. I'm just making sure there wasn't some other communication that you were referring to.

PN3447
MR HATCHER: No. It may be appropriate if I formally tender - - -

PN3448
JUSTICE GIUDICE: We haven't been marking these documents. There are too many of them, but we will ensure that these documents go onto the website and are part of the proceedings.

PN3449
MR HATCHER: Thank you, your Honour.

PN3450
JUSTICE GIUDICE: In fact, already on the website, I suspect.

PN3451
MR HATCHER: If I can briefly summarise and hopefully not do an injustice to the Minister's correspondence, the Minister indicates an intention to extend the

operation of Fair Work Australia, presumably some time after that legislation comes in to force, to cover permit and licensed vessels wherever and however they may be operated within the economic zone of Australia.

PN3452

The award modernisation proposal seems to have gone forward upon an assumption that the Act presently extends that far. Presumably the Minister has a different view and sees the necessity to extend the operation or perhaps there are other classes of vessels that it's thought the Act presently doesn't extend to and it's sought to extend to.

PN3453

More importantly perhaps for present purposes the Minister foreshadows an intention and I say foreshadows an intention because we had rather thought the way it was foreshadowed that it may have actually come to fruition by today to amend the award modernisation Request of the Commission in relation to the Maritime Industry Seagoing Award so that it might distinguish the situation of permit vessels, that is appropriate conditions for permit vessels might be separately determined.

PN3454

At least that's as we understand the Minister's intention both from the correspondence and from discussions that have been had with our client. Now, the Commission will have seen from our submission in relation to the exposure draft that whilst there are a number of general submissions, there are a number of very specific submissions directed to the conditions that apply on permit vessels, drawing particularly upon decisions of the Commission, that is the Australian Industrial Relations Commission, dealing with the conditions that might prospectively apply on those vessels.

PN3455

Given that the Minister has foreshadowed an intention to amend the Request to deal particularly with conditions on those vessels and given the historical situation of the operation of the Maritime Industry Seagoing Award, the fact that the award has as we apprehend it no direct application to any employers at the moment, in our respectful submission it would be the appropriate step to see exactly what the Minister envisages the Commission will be asked to do in terms of reviewing conditions to apply to permit vessels, how that Request might impact upon the present Request in relation to the maritime industry more generally and allow the parties to consider the way in which the two proceedings might go forward.

PN3456

We had been told and I should say that the Minister intended appearing today to inform the Commission of the amended award modernisation Request. I don't know whether there's been some miscommunication, some misunderstanding or some delay in the appearance, but that was certainly the information we were provided with. That is in short the basis for the application for adjournment. I've taken the opportunity of raising the matter with my learned friend, Mr Keats, and whilst I don't think the application for adjournment is supported and I wouldn't suggest that Mr Keats would go close to that, I don't know that he wishes to be heard in opposition.

PN3457
That's my understanding of the position, but I will allow him to speak for himself, obviously. If the adjournment is opposed, then I would seek to rather embellish the submissions, but that's the substance of the application for adjournment and to the extent that there's no direct opposition, in our respectful submission there's sufficient material for the Commission to accede to it.

PN3458
JUSTICE GIUDICE: Any other views about this application?

PN3459
MR WOODS: Your Honour, my client would support the submissions made by Mr Hatcher on behalf of his client.

PN3460
MR PLATT: We support the application.

PN3461
JUSTICE GIUDICE: Yes. No other views? Mr McNally?

PN3462
MR MCNALLY: The Maritime Union and the Institute regard it as a matter for the Commission. We are concerned that the direction may take some weeks.

PN3463
JUSTICE GIUDICE: Mr Hatcher, I suppose the question that poses itself is why could not the award be progressed, leaving the question of conditions on licensed and permit ships to be dealt with in due course?

PN3464
MR HATCHER: Well, your Honour, if the award had direct application to a known body of vessels, that would clearly be an attractive course, but at this stage the very basis of licences and permits are under review as we understand it. That may or may not be clarified in the way the Minister approaches this. That's in the province of another Minister. The award presently as Commissioner Raffaelli found in earlier proceedings has no direct application to any employers by reason of agreements being in place and so forth.

PN3465
JUSTICE GIUDICE: That is so in many areas.

PN3466
MR HATCHER: Well, our submission would be that this is a rather unusual circumstances in this industry.

PN3467
JUSTICE GIUDICE: Well, it's the maritime industry. Yes, well, we will have to consider it, Mr Hatcher. What we might do, Mr Hatcher, is just reserve our ruling on that, but we will deal with the other awards first and presumably the people who are here for the Seagoing Award will be happy to stay a little bit longer until they get the answer. We want to confer about the matter, but we don't think it's worth adjourning at this stage, but we will deal with it during the morning.

PN3468
MR HATCHER: May it please. If we could then withdraw perhaps while the Commission deals with those other matters?

PN3469
JUSTICE GIUDICE: You don't have any interest in the other matters?

PN3470
MR HATCHER: No.

PN3471
MR BROTHERSON: Nor do I, your Honour.

PN3472
JUSTICE GIUDICE: I think the easiest course might be if we adjourn straight away and we will give you a response.

<SHORT ADJOURNMENT [10.31AM]

<RESUMED [10.35AM]

PN3473
JUSTICE GIUDICE: Mr Hatcher, we have decided to grant the adjournment. We're obviously concerned about the overall timetable and the potential jeopardy to the completion of the modernisation of this area but it seems that there's not much that we can do at this stage until the Request is amended, as it has been indicated it will be.

PN3474
MR HATCHER: Yes.

PN3475
JUSTICE GIUDICE: So what we intend to do is to issue some directions once the Amended Request and those directions will deal with the manner in which the modernisation of this area can be dealt with, consistent with the timetable we have already announced.

PN3476
MR HATCHER: I think we will be on notice, your Honour, that our client ought to have its skates on, your Honours.

PN3477
JUSTICE GIUDICE: Yes. Well, as I say, we'd like to maintain the timetable.

PN3478
MR HATCHER: Yes.

PN3479
JUSTICE GIUDICE: Very well. We shall move to the Dredging Industry Award. Who would like to commence?

PN3480
MR W MCNALLY: I will volunteer, your Honour.

PN3481
JUSTICE GIUDICE: Yes, Mr McNally.

PN3482
MR MCNALLY: What the unions did, that's the Maritime Union and the institute did, in each of the awards with which they're concerned today was to file a submission and then to file a further submission in reply to those submissions

that have been filed by other parties. We rely upon those submissions and have little to say to add to that. In the dredging industry at 123 of the statement of the Commission dealing with the dredging industry on 22 May, at paragraph 23 the Commission raised concern as to the inclusion of the average weekly wage. We've addressed that in our submission.

PN3483

At paragraph 124 the Commission raised concern as to the meaning of remote and less remote. We've addressed that in our written submission and we've raised a difficulty that we found in all the Maritime Awards and indeed the Port Services Award where we have endeavoured to define the classifications by reference to qualifications that were necessary to perform certain functions. We came to a dead end on that in a number of respects, not the least of which was firstly that people were performing functions below their qualifications under the award. We had to recognise that and some of the qualification descriptors didn't adequately address the concerns.

PN3484

So what we have done in all the awards including the Dredging Award is to abandon that attempt, delete schedule A and proceed with the descriptions of the classifications as they are contained in mostly clause 13. There's other less significant matters raised in the written submissions we've put in and we rely upon those, if the Commission pleases.

PN3485

JUSTICE GIUDICE: Thanks, Mr McNally. Yes, Ms Angus.

PN3486

MS Z ANGUS: Yours Honours and Commissioner, there's two primary awards that form the basis of the modern Dredging Award, the AWU Dredging and the Maritime Dredging Awards. Aside from the classification structure in both of those awards they are almost word for word identical so in this industry the award modernisation process has been largely uncontroversial. The Commission's exposure draft reflects the position advanced by both the AWU and the MUA in the filed draft and we are for that reason content with the draft in all respects bar one.

PN3487

The parties didn't seek to insert a part timer's clause for provision for part time employment in the award on the basis largely that it's not current practice in the industry and a part time employment clause has been inserted by the Commission but it is not the standard part time employment clause. In our submission if the Commission is inclined to insert the provision for part time employment in the award and we'd certainly live with that, then it should be the terms and conditions appropriate for part timers in this industry should be consistent with the majority provisions, the majority terms and conditions for part timers in the modern awards that the Full Bench issue.

PN3488

So in our submission the only concern we have with the Dredging Award is that the provisions covering part time should reflect the standard terms and conditions for part time as across the awards. If it pleases the Commission.

PN3489
JUSTICE GIUDICE: Thank you, Ms Angus.

PN3490
MR A WOODS: Yes, your Honour, just in relation to the coverage, Mr McNally on behalf of his clients raised in the submission that it's directed more in terms of the Port Authorities Award a proposition that the employers and employees covered by that award should not be included in the exclusion in 4.2 of the Dredging Industry Award. We maintain the exclusion should stand. The practical position in respect of dredging in the port authority industry is that there are at the moment two ports that undertake that. One of those is the Port of Brisbane to which Mr McNally refers in his submission.

PN3491
The Port of Brisbane is a NAPSA enterprise award so it would fall within that exclusion in any event and the other dredge is operated by the Port of Newcastle which is covered by the New South Wales Ports Corporation Award and has general application and there's no particular provisions in that award that single out dredge operating staff for many other staff and they are dealt with as port officers. So when approaching the principle in terms of drafting the Port Authorities Award we maintain that approach should be consistently followed and would maintain the exclusion that's contained in the Dredging Industry Award.

PN3492
JUSTICE GIUDICE: Thank you. Any other submissions in relation to dredging? Very well. We shall now deal with the maritime offshore oil and gas draft. Yes, Ms Angus, thank you, are there any submissions in relation to that draft? Mr McNally?

PN3493
MR MCNALLY: The Maritime Union and the Australian Institute of Marine Power Engineers filed written submissions on 12 June dealing with the Maritime Offshore Industry Oil and Gas Award. The principal feature of that written submission was that we abandon our search to define classifications by reference to qualifications and the reasons for that are set out in the submissions and there are more minor matters raised in the written submissions and we rely upon those submissions, if the Commission pleases.

PN3494
JUSTICE GIUDICE: Thanks, Mr McNally. Yes.

PN3495
MR C PLATT: If your Honour pleases, in relation to the submission by the CEPU concerning award coverage we would say that it's not necessary to exert a change to the scope clause as a result of clause 4.3 which obviously deals with the interaction of awards. The Full Bench made some comments in relation to embedded employers I think in its decision on 22 May and the CEPU's position has been replicated in a number of awards including the modern Mining Industry Award and in respect of submissions in relation to the Hydrocarbons Award we would say that it's quite clear that where the employer is engaged in the industry, in this case of that covered by the Maritime Offshore Oil and Gas Award, then persons who perform electrical duties that are covered in the classification structure would quite clearly be working under this award.

PN3496

Obviously someone who is coming on in a true contractor arrangement for a short duration and are not working in this industry would be covered by the Electrical Contracting Award or its modern equivalent. So we would say that as a consequence there's no need to insert the provisions to which the CEPU propose and a similar response in relation to the Australian Industry Group proposal in respect of its award. If the Commission pleases.

PN3497

JUSTICE GIUDICE: Thank you. Are there any other submissions?

PN3498

MR K HARVEY: I have a final submission about maritime if everybody else has completed theirs on those particular awards.

PN3499

JUSTICE GIUDICE: Yes, Mr Harvey.

PN3500

MR HARVEY: Yes, thank you, your Honour. Your Honour, with regard to the maritime industry as such the ASU did not make a written submission with regard to any of the proposed published maritime exposure draft awards and we have no submissions to make about those. They don't propose to cover any employees who are members or eligible to be members of the Australian Services Union. However, your Honours and Commissioner, the ASU did file a late submission yesterday which is on the Commission's website in the context of this industry regarding the position of shipping clerks, that is, employees currently covered under the Clerical Industry Shipping Officers Award 2003.

PN3501

Your Honours and Commissioner Smith may be aware that this matter was alluded to on a number of times in this process of award modernisation in stage 3 in the public consultations and in the written submissions. The ASU, your Honours and Commissioner, could have filed the submission also under the ports and harbours industry sector and in fact the union's exposure draft submissions re ports and harbours filed on 12 June do refer to this issue. But having examined the list of respondents to the Clerical Industry Shipping Officers Award 2003 I think it may also be appropriate to refer to this matter here and that's the reason why we have filed this late submission.

PN3502

As I said, your Honours and Commissioner, this issue is a question or the issue of the appropriate modern award coverage of clerks currently employed under that Clerical Officers Award, there are so far as we're aware by participating and reading all the submissions, there are no proposals to include those employees under any award in the maritime or ports and harbours or any related industry award. It therefore appears to the ASU that it is likely that those employees will eventually be covered by the modern Clerks Award made in the priority stage.

PN3503

If this is the case, your Honours and Commissioner, the ASU submits that the modern Clerks Award will need to be varied to provide certain terms and conditions of employment particular to shipping officers and currently provided for under the Shipping Officers Award and those terms and conditions are detailed

in the schedule attached to the ASU's further submission filed yesterday and they are provisions taken directly without any editorialising from the Clerical Industry Shipping Officers Award 2003. Your Honours and Commissioner, you may recall that an analogous position arose last week in these public consultations in the context of the oil and gas industry regarding oil and gas - sorry, oil industry clerks and on the following day with regard to the travel industry. In the first of those proceedings the ASU submitted that if all clerks were not to be included in the Oil Industry Award as we are actually submitting, then there were two alternative possibilities to that, firstly that a modern Oil Clerks Award could be made or alternatively if these clerks were eventually to be covered by the Clerks Private Sector Award that amendments would need to be made to that award to maintain the existing safety net for those employees.

PN3504

And a similar situation arose the following day with regard to the travel industry, particularly the travel agents industry and on that occasion the ASU had proposed a modern Travel Agencies Award be made, but there was no exposure draft issued on that and the Full Bench indicated that it was unlikely to make such an award and suggested that employees in that industry be covered by another award, either the Clerks Modern Award or the Retail Industry Award.

PN3505

Your Honour, the president, may recall that I asked for some guidance as to how these matters would be dealt with if the Clerks Modern Award were to eventually apply to employees in the travel industry and we were advised verbally that we needed to deal with these matters as we went through and not at a later date, so that's the reason for the late submission with regard to the maritime industry and particularly the shipping clerks, your Honours and Commissioner, and as I said we've prepared a schedule attached to yesterday's submission which we submit should be added to the Clerks Private Sector Award to maintain the terms and conditions of employment for shipping officers.

PN3506

I should advise, I think, your Honours and Commissioner, that the ASU has also prepared similar schedules with regard to employees currently covered under the Clerks Breweries Award with regard to the liquor manufacturing industry which is scheduled for hearing tomorrow and the private transport industry other sectors scheduled for Thursday. That, of course, is in addition to oil clerks and travel industry clerks that I've just mentioned.

PN3507

Now, your Honours and Commissioner, we submit that this course of action has become necessary as a result of the original decision of the Full Bench that appropriate coverage of clerical and administrative employees would need to be considered on an industry by industry basis and therefore we have not been in a position to determine or to know until each industry sector is covered where the coverage of clerical and administrative employees will end up at the end of the award modernisation process.

PN3508

I should say just for the sake of completeness that we would also submit, your Honours and Commissioner, that this is not a matter which deals with transitional

issues and shouldn't be confused with that. As we understand it, transitional issues relate to in particular state and territory differentials arising from NAPSAs and that's the way in which transitional provisions in for example the Modern Clerks Award are dealt with, but these matters are not transitional in that sense because the awards that we're talking about are pre-reform federal awards of this Commission which operate on a national basis and therefore are not covered by those sort of transitional arrangements.

PN3509

So that's the reason for the late additional submission, your Honour, and for the further additional submissions that I've foreshadowed, but contemplating this further, your Honours and Commissioner, particularly in the light of the Full Bench statement last Friday regarding applications to amend modern awards that have already been determined by the Commission, it appears to us, your Honours and Commissioner Smith, that an alternative approach to the course of action that we've adopted in this stage three proceedings is that it may be considered.

PN3510

I think it's correct that what we're suggesting are amendments to the Clerks Private Sector Award and the Commission may find it preferable to deal with all such proposals to vary via an application to vary that award by the ASU to achieve the final determination of coverage, both coverage of that award and the terms and conditions to apply in particular sectors at a particular time, but in order to ensure that the Commission is aware and the other parties are aware of what we propose in this area, we determined that it was incumbent on us to file these additional submissions and indicate what we considered, what we saw as the issue that has arisen, particularly in stage three as the final outcome of award coverage for clerical employees in certain industries and industry sectors is determined. Those are our submissions in this matter, your Honour, but I am obviously happy to answer any questions that the Bench may have. If the Commission pleases.

PN3511

JUSTICE GIUDICE: Did the ASU participate in the consultations before the drafting?

PN3512

MR HARVEY: Yes, your Honour, we did and some of these matters were canvassed, your Honour, and that's reflected and, in fact, we quoted from the transcript of those hearings in our submission that we filed with regard to the exposure draft with regard to port and harbour services and we flagged at that stage that the terms and conditions relating to shipping officers under that Clerical Industry Shipping Officers Award would need to be determined as part of this process and that's in our submissions which I was going to refer to later today, your Honour.

PN3513

JUSTICE GIUDICE: Well, the difficulty that presents itself is that the ASU has now put forward a proposal in relation to coverage of clerks in the industry late in the consultation process which might be said other parties haven't had an adequate opportunity to consider.

PN3514

MR HARVEY: Yes, your Honour, and we do appreciate that that's a criticism of what has occurred, but we would also submit, your Honour, I mean, we're happy to take our share of the responsibility for that, but we also say that it's a natural outcome of the process that has been taken with regard to the coverage of clerical and administrative employees generally. For example, your Honour, if I go back to the oil industry and I don't want to re-argue that matter, but we still don't know until the final award is made with regard to the oil industry as to whether clerical employees are to be covered by the industry award or not and we won't know that until the Commission publishes its final decision on the form of the Oil Refineries and Manufacturing Award, so we are a little betwixt and between, your Honour, and that's why we have also submitted an alternative proposition so that everybody can be on notice if necessary for us to file a submission, an application to vary the Clerks Modern Award to if you like mop up or pick up those areas of coverage which we find in retrospect are now being covered by the Clerks Modern Award which we certainly didn't know in the priority stage.

PN3515

JUSTICE GIUDICE: Yes. Well, is it your position or the union's position, Mr Harvey, that it places a high priority on having an occupational clerical award, but where there are industry provisions for clerks that are more beneficial, you wish to retain those?

PN3516

MR HARVEY: Yes, your Honour, particularly where they're found in existing pre-reform awards and we say that's appropriate for two reasons, your Honour, and one of the reasons - - -

PN3517

JUSTICE GIUDICE: I am not asking you whether it's appropriate or not. I am just asking if that's your position.

PN3518

MR HARVEY: Yes, your Honour.

PN3519

JUSTICE GIUDICE: All right. It may be as you say that there will have to be some later step in the process to deal with clerical coverage in some of these areas, but in any event, thank you for your submission and we will consider it.

PN3520

MR HARVEY: Thank you, your Honour.

PN3521

JUSTICE GIUDICE: Yes.

PN3522

MR PLATT: I notice that Mr Nucifora appeared for the ASU at the consultation hearings and the bulk of that discussion was to the effect that there wasn't any clerical classifications in the relevant awards and that there was an interest in relation to the dredging award. The submission in relation to the shipping industry as we've found out has only been made yesterday, so we've only been able to search it this morning, but I note that most of the shipping industry

representatives, apart from AMMA and ASA, aren't present to hear the submissions.

PN3523
JUSTICE GIUDICE: Yes.

PN3524
MR PLATT: We having had a brief look at the appendix of the submission, there's some areas there where there would be some challenge and certainly a need for some discussion and I would suggest that in the interests of procedural fairness, the balance in the industry ought to be able to be given time to consider this proposal.

PN3525
JUSTICE GIUDICE: Yes. Any other submissions? Very well, does that conclude the matters in relation to offshore oil and gas? Very well, I think we should then, if there are no other matters for maritime, I think we should move to tourism and I will take appearances in the tourism industry matter.

PN3526
MR W MCNALLY: I appear for the Australian Institute of Marine and Power Engineers with MR KEATS.

PN3527
MR J RYAN: I appear for the Shop, Distributive and Allied Employees Association.

PN3528
MR M HARMER: I appear on behalf of the Ski Areas Association.

PN3529
JUSTICE GIUDICE: Ski Areas Association?

PN3530
MR HARMER: Yes.

PN3531
MR W ASH: I appear on behalf of the LHMU.

PN3532
MR R WARREN: I seek leave to appear for the Australian Federation of Employers and Industries.

PN3533
JUSTICE GIUDICE: Thank you. Any other appearances?

PN3534
MS Z ANGUS: I appear on behalf of the Australian Workers' Union.

PN3535
MR K HARVEY: I appear on behalf of the Australian Services Union.

PN3536
MR L MALONEY: I appear on behalf of the Whitsunday Charter Boat Industry Association and the Association of Marine Park Tourism Operators in relation to 2008/59.

PN3537
JUSTICE GIUDICE: Thank you. We will deal with the Marine Tourism and Charter Vessels Award first. Yes, Mr McNally.

PN3538
MR MCNALLY: This industry is involved in the port services collection of awards in this way. What the maritime and the institute have proposed is that there be a Maritime Industry General Award which will cover vessels and we'll have more to say about this when we get to it, vessels that aren't covered by other awards and we've proposed that the Maritime Industry Tourist Award not be made and that it be contained, that the terms and conditions of employment in respect of tourism be dealt with by the Maritime Industry General Award. We did file a substantial submission on 18 June in which we responded to the submissions that were made by the various representatives of the industry that proposed the making of a separate award.

PN3539
JUSTICE GIUDICE: Mr McNally, would it be appropriate if we also took appearances in relation to the port and harbour services area, given the cross-over here? There may be parties who want to comment on the submissions.

PN3540
MR MCNALLY: Either that or defer this to - because this will take longer than the other awards, I know Mr Morris has something to say. We could probably dispose of everything in the matter for 20 minutes, just leaving this matter, if the Commission pleases.

PN3541
JUSTICE GIUDICE: Yes.

PN3542
MR MCNALLY: We haven't dealt with the Towage Award, the Stevedoring Award, the Port Authorities Award. They should be substantially short.

PN3543
JUSTICE GIUDICE: Yes. I think you can continue with your submissions, but before you do I will just take appearances in the other matter so that anybody who wants to comment on them now or later can do so, so I will take the appearances in the port and harbour services.

PN3544
MR A MORRIS: I appear on behalf of the Maritime Towage Employer Group and the Coal Terminals Group.

PN3545
MS J GRAY: I appear on behalf of the CFMEU Mining and Energy Division.

PN3546
MR R WARREN: Your Honour, I also will be appearing in that matter and make submissions in connection with the Ports, Harbours and Enclosed Water Vessels Exposure Draft Award.

PN3547
MR A HERBERT: I seek leave to appear on behalf of Gladstone Port Corporation in relation to the Port Authorities Award.

PN3548
MR A WOODS: I seek leave to appear on behalf of Ports Australia with MR ANDERSON in respect to the Ports Authorities Award.

PN3549
MS Z ANGUS: I appear on behalf of the AWU in the Coal Terminals Award.

PN3550
MR K HARVEY: I appear on behalf of the ASU with regard to ports and harbours.

PN3551
MS C OPPY: I seek leave to appear on behalf of Westscheme Pty Ltd.

PN3552
JUSTICE GIUDICE: Thank you. Mr Maloney, do you have any separate interest in this area?

PN3553
MR MALONEY: No, your Honour, we don't. Thank you.

PN3554
JUSTICE GIUDICE: All right, Mr McNally, if you could resume. Thank you.

PN3555
MR MCNALLY: In the Ports, Harbours and Enclosed Water Vessels Award we had proposed an industry as meaning employees engaged in or in connection with vessels and we widely define vessels. We finished up with an exposure draft which defined the industry as vessels operating within ports, harbours and other bodies of waters within the Australian coastline.

PN3556
It was the intention of the unions to have an award made that applied to all other maritime activities other than those covered by the specific awards, the Seagoing Award, the Offshore Oil and Gas Award and the Dredging Award and the Towage Award. In our submission filed in this matter on 22 June, that's filed in respect to the Ports, Harbours and Enclosed Waters Award, we address that difficulty and the award that we proposed or the coverage of the award that we propose is to operate in respect of all types of vessels used for navigation on waters that isn't covered by those other awards which we specifically refer to.

PN3557
We have suggested that the name of the award be changed to the Maritime Industry General Award 2010 because the name of the award that we previously suggested was confusing and it certainly confused the Commission in that they made an award that only was in enclosed internal waters. What the intention is and what the need is, is to have an award that covers coastal waters including the territorial sea 12 miles out and possibly beyond.

PN3558
The reasoning for that is set out in our written submission. It was then proposed that a Tourist Industry Award be made, a Maritime Industry Tourist Industry Award be made. We oppose the making of that award in the submissions which we filed on 17 June 2009. There is a later submission filed by those representing

the Whitsunday charter boat industry area. We have nothing to say in respect to that because is re-canvasses the matters covered in our filed submission.

PN3559
In short, what we propose is that if some recognition must be given to a shifting of ordinary hours and related penalty rates, then that should happen, but that should happen within the ambit of the coverage of the Maritime Industry General Award rather than making a separate award. The function as we understand the Commission is to reduce the number of award, not to increase them.

PN3560
JUSTICE GIUDICE: Overall I think we will achieve that objective, Mr McNally.

PN3561
MR MCNALLY: We've done pretty well.

PN3562
JUSTICE GIUDICE: Can I just ask, Mr McNally, I don't want to interrupt you, but those two Queensland NAPSAs, the Whitsunday charter boat one and the North Queensland Boating Operators Award, the MUA was involved in the making of those awards, I think.

PN3563
MR MCNALLY: I am sorry?

PN3564
JUSTICE GIUDICE: The MUA was involved in the making of those awards or not?

PN3565
MR MCNALLY: To a great extent, the AWU's role when it was made was a greater role than the MUA.

PN3566
JUSTICE GIUDICE: I see.

PN3567
MR MCNALLY: Our concern is that the award or the NAPSA covers a very small area.

PN3568
JUSTICE GIUDICE: Yes.

PN3569
MR MCNALLY: Principally between Mackay and Bowen. You can't quite see one from the other, but it's a very small area. It is an area where the vessels that are used in respect of length, in respect of power don't necessarily differ from those vessels that are involved in the Maritime Industry General Award. The master of those vessels possesses the same qualifications and skills. The only exception to that might be that the master of a vessel may perform other functions such as drawing the attention of tourists to items of interest and items of historical importance and those sort of matters. We don't see the necessity for a general award. We may recognise that there may be some requirement to extend the ordinary hours of work with resulting penalties. Our submissions deal with that

alternative, but we don't see the necessity to have a separate award. If a separate award is to be made, it should be modelled on the Maritime Industry General Award with different provisions in relation to ordinary hours of work and the associated penalty rates that are attached to those ordinary hours of work. If the Commission pleases.

PN3570
JUSTICE GIUDICE: Thanks, Mr McNally. Yes, we're still dealing with the Marine Tourism and Charter Vessels Draft.

PN3571
MR MCNALLY: Might I add the ..... which is the word that those that were responsible for the making of the exposure draft isn't defined anywhere which is another added difficulty.

PN3572
JUSTICE GIUDICE: Yes. Thank you. Are there any other submissions in relation to the Marine Tourism and Charter Vessels Award?

PN3573
MR MALONEY: Yes, your Honour, in Brisbane.

PN3574
JUSTICE GIUDICE: Yes, Mr Maloney.

PN3575
MR MALONEY: Your Honour, I think ours are the only other submissions in relation to this award. The MUA submissions simply say that there shouldn't be a Marine Tourism and Charter Vessels Award. Obviously our strong submission is that there should be, not only because it's not limited to the region between Mackay and Bowen, it also covers the whole of the coastline and it's designed to cover all of those tourism operators around the Australian coastline.

PN3576
We've already said in our earlier submissions that 85 per cent of the charter vessels in Australia are located within Queensland, New South Wales and WA and we find a total of 65 per cent in Queensland and New South Wales. It's not just limited to Far North Queensland, although that is where a significant number of operators are located and the rationale behind a separate award is that the industry itself which did include the MUA in its state union guises as the Merchant Service Guild and the Seamen's Union of Australia was directly involved in the making of the North Queensland Boating Operators Award as I was on behalf of the employers and it was definitely involved directly in the making of the consent Whitsunday Award and I stress that was by consent.

PN3577
Yes, the AWU was one of the major parties, but the MUA was also a party to that and to that consent arrangement and they can't deny that and now they say, well, that consent arrangement, we don't like that, it should be somewhere else. The exposure draft that's been made is quite limited in its coverage to marine tourism and those charter vessels. We confirm that it's designed to exclude the operation of coastal trading or freighter operations, common carriers, water taxis, regular passenger transport ferry services, some of which are government subsidised in various areas and those types of operations are not designed to be covered under

the marine tourism charter vessels and we say, look, they're quite appropriate to be covered under the proposed Maritime Industry Award 2010 as Mr McNally says, as the MUA argues for, but the provisions that have been designed for the Marine Tourism and Charter Vessels Award cater for those requirements where as we've already said in our submissions they're subject to the vagaries of weather, seasonal fluctuations, tourism fluctuations, et cetera.

PN3578

We have we believe addressed the areas of coverage in our submissions of 16 June and 26 June. The issue of classifications has already been covered in those submissions, as have the pay rates where we've tried to maintain the relatively unique arrangement that applied in the Whitsunday NAPSA for daily rates as well as providing for hourly rates, weekly and casual provisions. We've addressed the hours of work provision which was left in the exposure draft to be developed at clause 20.4 in our submissions of 16 June.

PN3579

We've also proposed that the allowances in the exposure draft at clause 14.5 should be adjusted as per our submissions of 16 June. The submission of the members of our associations if the Commission pleases is simply to say that the proposed conditions in either the ports et cetera award or the maritime award are simply not appropriate for these operators. They don't reflect the existing rates and conditions and they would impose very significant changes and very significant increases on those operations.

PN3580

The rates of pay, finally, if the Commission pleases, we've proposed are certainly in excess of any of the rates that have been proposed by the MUA and we say it's appropriate that they should be included in the proposed award and we set out those wage rates in our submission of 15 June with a comparison chart attached to them. Those are the submissions, if the Commission pleases.

PN3581

JUSTICE GIUDICE: Yes, thank you, Mr Maloney. Mr Warren.

PN3582

MR WARREN: Thank you, your Honour. Your Honour, can we say from the outset that we are fundamentally opposed to the submission made by my learned friend Mr McNally that there should be a Marine Industry General Award which would subsume the current exposure draft issued by the Commission covering marine tourism and charter vessels.

PN3583

Clearly in our submission the Commission has heard and considered this argument. There is a clear need for recognition of the particular and distinct nature of the tourism and charter vessels. We say the scope and coverage of the exposure draft is appropriate and should be maintained and the Commission should reject the submission put by my learned friend Mr McNally on behalf of his client union.

PN3584

With respect to the position of the Whitsunday Charter Board Industry Association we note the submissions filed and also the submissions made today

with respect to rates. The AFEI has a fundamental problem with the rates as expressed in the Whitsunday Charter Boat Industry Association submissions of 16 June in the hourly rates as expressed in clause 3.5. We note the Commission in its statement of 22 May in paragraphs 216 through 218 raised issues with this concept of a pay per day and the difficulty in obtaining an hourly rate and that appears to be the difficulty expressed further by the Whitsunday Charter Boat Association in the hourly rate in 3.5.

PN3585

We note that criticism is directed towards the AFEI position and the distinction drawn between daily and casual employees in the charter boat industry's submission at paragraph 6.1 and the indication there that there is no support from that association for AFEI's position on 26.2. I will return to that briefly in a moment. Can we indicate that the problem seems to have arisen if one looks to 3.5 of the Whitsunday Charter Boat Industry Association by drawing from the Queensland NAPSA which only described daily rates whether the person, and indeed the same daily rate, whether the person worked five hours or 10 hours they still received the same rate, yet they have established an hourly rate.

PN3586

If one looks to 3.5, by first nominating the daily rate, multiplying that by five to get a weekly rate and then dividing that weekly rate by 7.6 or by a 38 hour week to obtain an hourly rate. Now, the problem with that is the daily rate when established was not established on the basis of 7.6 hour and so it throws out a rate particularly at the master level significantly in excess of those that AFEI say are appropriate when one looks at the AFEI submission and in paragraph 14 of the AFEI submission if one goes there, this is the submission of 12 June that was filed, if one looks to clause 14 the hourly rates there were achieved by dividing the weekly rate prescribed in the New South Wales NAPSA by 38.

PN3587

There is currently in the New South Wales NAPSA a 40 hour provision but concession was given to the 38 hour week and those rates as can directly translate with the exception of crew level 3 and crew level 1, were directly translated there from the New South Wales NAPSA by a divisor of 38 and that gives an appropriate, we say, hourly rate which spreads from the master classification down to the crew level 1 classification. If the method of, we say, artificially creating an hourly rate is adopted as is pursued by the Whitsunday Charter Boat Association, the hourly rate particularly at the top end of the master's rate is skewed and significantly greater rate than is appropriate and that has been arrived at, as I've said, by starting with a daily rate and there is no hourly rate or weekly in the Queensland NAPSA.

PN3588

So starting with a daily rate, putting a notional 7.6 on that and you end up with an hourly rate. There clearly has been in the daily rates expressed in the Queensland NAPSA a recognition of the fluctuations in the amount of hours that a person works and that's not for us to comment on or to submit or have information of. But there must be some averaging system, but in any event, it is fundamentally wrong to start with a daily rate, multiply that daily rate by five to get a weekly rate and then divide the whole lot by 38 to get an hourly rate when your daily rate is

not calculated apparently in the award either on a 40 hour week or a 38 hour week, hence the skewing.

PN3589

We note of course that the CVA in its submission, the Commercial Vessel Association of New South Wales, in its submission of 24 June it appears seems to come to that same conclusion in paragraphs 2 and 4 and particularly in 4 when the CVA indicates that the Queensland NAPSA, and I quote:

PN3590

In the absence of any definition for worked hours and no defined maximum hours the daily rate under the Queensland NAPSA cannot form a basis from which to derive an hourly rate as there is no mechanism to achieve.

PN3591

Those are the words of the CVA and we would support such a position. We note in the most recent submission of the MUA on this particular exposure draft in paragraph numbered 11 that the MUA appears to be pursuing a classification structure which rewards an employee for the type of qualification they have as opposed to paying the employee for the type of qualification they need to work the particular vessel. It appears as though from paragraphs 11 and following that that is the aim of that submission.

PN3592

We note in the Commercial Vessel Association submission of 17 June in paragraph numbered 3 that this issue is addressed and we note that therein the CVA says and I quote in the first paragraph of paragraph numbered 3:

PN3593

The necessary qualification required by the crew is determined by the governing state authority and is stipulated within the individual vessel survey permit.

PN3594

Indeed this appears to be recognised by the MUA in paragraph 12 of their most recent submission and I quote:

PN3595

In addition, these authorities set minimum manning requirements for commercial vessels. For some vessels there is a requirement that the manning include a person with an engineering certificate competency.

PN3596

Et cetera. And it is clear that the manning of the vessel, the qualification required to man that vessel and to navigate that vessel comes from the survey to the vessel and indeed if one returns to the Commercial Vessel Association's submission of 17 June, on the last page of that under heading Classification Structure and Definition, it is apparent that when one looks towards the bottom, master 5, navigate vessel requiring a master 5 certificate, master 5, navigate a vessel requiring master 4 certificate, et cetera.

PN3597

So in other words, that is an appropriate classification or descriptor of the duties required to man that vessel and that is the appropriate way in our submission that

the matter should be addressed and the employee should be paid, even if the person has a master 1, if the vessel only requires a master 4 they shouldn't be paid as a master 1 and so much is clear. One only has to say that to see the good common sense in my respectful submission of that position. Whilst on the CVA submission of 17 June we note paragraph 6 of that submission and it deals with the capacity of an employee to obtain recognition by on the job training and we say that is an appropriate way of addressing that issue and the qualification training not be mandatory but be able to be obtained by on the job training.

PN3598

Finally, your Honours and Mr Commissioner, might I just refer to the exposure draft and indeed the paragraph that issue was taken by our Queensland friend with respect to 26.2. It appears, with respect, when one looks at the wording in 26.2 there it refers to a daily basis yet it is clear from clause 10 that the only types of employment are full time, part time and casual and that's an appropriate break and there shouldn't be a recognition necessarily of daily basis in 26.2. We say in terms of clause 10 it would be more appropriate to say employees other than employees engaged on a casual basis required to work on Christmas Day be paid treble time and then in 26.3, instead of weekly employees to be consistent with clause 10 it should say full time and part time employees required to work on public holidays other than Christmas Day should be paid double time.

PN3599

It just links 26.2 and 3 to clause 10 and there is then internal consistency within the expressions of the award. Unless there is any further questions from the Bench those are our submissions.

PN3600

JUSTICE GIUDICE: Mr Warren, do you make any submission about the remuneration of employees engaged on an overnight charter?

PN3601

MR WARREN: No, your Honour.

PN3602

JUSTICE GIUDICE: You don't have any helpful suggestions on how the parties might deal with that? I understand your position.

PN3603

MR WARREN: I don't have a brief to that extent, your Honour, with respect.

PN3604

JUSTICE GIUDICE: No.

PN3605

MR WARREN: Thank you. Does your Honour wish me to make any comment with respect to ports, harbours and closed water vessels or will I wait - - -

PN3606

JUSTICE GIUDICE: No, I think we will take that in sequence.

PN3607

MR WARREN: Thank you, your Honour.

PN3608

JUSTICE GIUDICE: Thank you. Is there any other submissions in relation to this draft? Mr McNally.

PN3609

MR MCNALLY: Yes, your Honour. Contrary to Mr Warren's understanding of our submissions we ..... Australian Federation of Employers. We don't suggest that the classifications be described by reference to qualifications. We recognise that a person with a higher qualification may be employed in a lower capacity. If the Commission pleases.

PN3610

JUSTICE GIUDICE: Yes, thank you. All right. We might deal now with the Alpine Resorts Draft Award. Are there any submissions in relation to that? Mr Harmer?

PN3611

MR M.HARMER: Yes, your Honour, if the Commission pleases. The Australian Ski Areas Association amends the exposure draft award which we basically note extends fairly unique coverage of this industry across a number of classifications but that exposure draft faces challenges under the later set of submissions from a number of unions including the LHMU, ASU, SDA, AMWU and CEPU. Now, most of the submissions in question were filed in writing and in accordance with the timetable by 12 June 2009, however there were further submissions from the AWU on 18 June and only yesterday you received some further written submissions from the LHMU.

PN3612

Now, in respect of all the unions submissions it was tempting on our part given the extensive range of issues raised going to coverage and terms and conditions under the exposure draft to put on a written response but consistent with the directions of the Commission we stayed our hand. We're in a position today where we will attempt to address orally all of the unions submissions although I must say in relation to the LHMU's submission lodged yesterday I do not have instructions and it does go not only to some issues of coverage in terms and conditions but specifically to considerable tables of rates, so we would seek the leave of the Commission to address that somehow although we're entirely in the Commission's hands in that regard.

PN3613

JUSTICE GIUDICE: Yes.

PN3614

MR HARMER: If the Commission pleases, I would like to make some submissions going to issues of general principle relating to coverage of this particular exposure draft award or at least the principles that should be applied in resolving what are not insignificant contests over the coverage of the award. The first point we make is that the exposure draft consistent with section 576A of the Act properly reduces regulatory burden on the employers in this unique industry, promotes flexible work practices whilst maintaining a fair minimum safety net for relevant employees. It also fits in with paragraph 9 of the Consolidated Request in that it seeks to minimise the number of awards impacting on employees in this industry which but for this specific industry award could number up to 15.

PN3615

Now, the unions, five in particular, have now challenged that outcome under the exposure draft, challenged to our mind the achievement of those specific objects of the Act and the Consolidated Request. The next point we make on coverage is that in our respectful submission in this industry coverage has to be determined by reference to the industry of the employer in the case of all classifications which are integral to the industry and it's our respectful submission that all classifications referred to within the current exposure draft fit that description. Now, in support of that submission we just very briefly summarise for the members of the Commission the unique aspects of work in this particular industry and I will be brief I guarantee.

PN3616

But by way of summary, the work is highly seasonal. It basically involves the quantum of work being highly dependent on day to day weather conditions. That in turn demands a higher level of flexibility across all areas of work and that really to transfer employees in all and any classifications from one part of a resort to another to meet exigencies of weather on any particular day, the work of course is performed in extreme weather conditions and that impacts on some specific protective clothing and ski equipment requirements that are addressed within this award. There's an industry specific career path training and set of conditions and importantly, many of the employees given the flexibility requirements do and indeed actively seek to perform a number of roles, multiple roles within a particular season so that they can maintain work levels for themselves in all forms of weather.

PN3617

Specifically in the area of penalties the busiest times for this particular industry are on weekends and public holidays. Large percentages of the workforce come to the area to have the benefit of skiing and of course the slopes are least accessible on weekends when custom is busiest for the resorts and the employees seek and enjoy having week days off so that they can ski when the slopes are less crowded by normal customers and accordingly flexible arrangements such as in 5 and 7 and a lack of what would be called traditional penalties have been characteristic of this industry throughout its entire history.

PN3618

There are also many benefits for employees working in the industry including free lift passes which range in value from between 1100 to $1300 for approximately a three months season, subsidised accommodation, subsidised ski equipment, subsidised meals and a whole range of benefits involved for employees who are supported to come to the remote ski areas to work in this industry. Now, what we have now faced through the five unions concerned is an attempt to carve out from those specific arrangements that have been included in the exposure draft for a number of stated classifications are certain categories of work and in our respectful submission the modern awards in question do not in any way, shape or form cater appropriately for the unique conditions that we have set out.

PN3619

And specifically in terms of the Commission, the approach the Commission has been adopting to issues of coverage, as I say, industry of employer would be appropriate and having particular regard to the work performed and the

environment in which it is performed, adopting some of the wordage inserted in coverage clauses by the Commission in its modern awards we respectful submit there's no question that the only award that can cater for the flexibility, transferability of work and unique conditions is the exposure draft award before the Commission.

PN3620

We further submit that the Commission in its 19 December 2008 award modernisation decision at paragraph 23 indicated that awards with occupational coverage would not cover employees covered by an industry award which contained relevant classifications and again it's our respectful submission that here we have an industry award that covers the relevant classifications, has done so historically in either Victoria or New South Wales, which is where the vast preponderance of the industry sits and accordingly on the basis of that approach it would be appropriate to leave the coverage of this particular industry or exposure draft in the award intact.

PN3621

The next point we seek to make on coverage goes to the weight to be given to certain historical aspects of coverage. The first relates to Victorian award coverage which has been permanent historically in the context of Victorian common rule awards and in accordance with the Victorian common rule principles adopted by a Full Bench of this Commission and absent substantial challenge and yet that coverage has extended classifications such as workshop and a number of areas of work which are under challenge by the unions raising issue with the exposure draft.

PN3622

Secondly, in terms of the history in New South Wales, in our earlier written submissions we pointed to the decision of Watson J that founded the award in New South Wales that covers the industry that covers the industry, main Ski Industry State Award which is now technically a PCSA which I will come to. That particular decision by Watson J was described as establishing an equitable base for the relevant employees in the context of structural efficiency principle under the previous principles of wage fixation and involved challenge by a large number of unions to the attempt to create an island in effect for the award covering a number of classifications including many of those now challenged in this exercise.

PN3623

Now, all of the unions that raised their heads to make challenge in that particular matter that led to Watson Js decision either reached arrangements with the AWU resulting in their awards being the subject of specific exemption from the scope of the - sorry, there being specific exemption from those unions awards such that they did not impact on the unique coverage, island coverage if you like of the Ski Industry Award, or in the case, for example, that the SDA had that exemption within the Shop Employees State Award mandated by a later decision of the Commission.

PN3624

So what we have in a number of unions now raising objection to coverage is a challenge to matters which have been historically determined both in Victoria and

New South Wales properly in a common rule context in each state and really we have an attempt to overturn history and in some cases specific agreements reached between unions and employers on what would be historical coverage determined long ago in the case of both New South Wales and Victoria. The next point I just briefly make is that there is reference made in some of the unions' submissions to the fact that the Ski Industry Awards in New South Wales are PCSAs.

PN3625

In our respectful submission that arises from a specific exigency of the New South Wales legislation introduced by the New South Wales Government in order to attempt to protect certain consent award arrangements on the onset of WorkChoices and does not in our respectful submission change the fact that for many years up until the WorkChoices legislation they operated as awards properly and would have been NAPSAs normally other than for that specific New South Wales legislation and we respectfully submit that that doesn't reduce the weight that should be allocated to either the Ski Industry State Award or the Ski Instructors State Award for the purposes of coverage or otherwise before this Commission.

PN3626

The next point we make is that all classifications in the exposure draft have historically been subject to coverage by either the New South Wales or the Victorian awards. We don't press that to the point whereby both states always covered all classifications, although we note that in New South Wales apart from their being specific reference to employees such as in the retail area, there was a not elsewhere included provision called resort worker, which as I will come to, was utilised to deal with employees performing municipal style duties with the resorts, hospitality workers, childcare workers, and indeed as a result the Childcare Award in New South Wales was the subject of specific exemption, as was the Shop Employees State Award as I will come back to.

PN3627

So there is precedent for the coverage of the entire exposure draft determined in the common rule context that I have referred to. The next point I wish to make by way of introduction on the coverage issue is that the Commission's decision on 19 December 2008 at paragraph 24 indicated that maintenance classifications would not be included in industry awards unless there was existing arrangements that made it desirable to do so. Now, significantly in this exposure draft we have maintenance classifications included and in our respectful submission that principle if you like stated on 19 December 2008 is met here in that there is a unique history of coverage in Victoria of maintenance classifications and a unique set of circumstances in terms of the conditions I've referred to that extend also to maintenance workers who equally may want to ski during the off days, during the middle of the week or take up multiple roles when maintenance work is low or do any number of the flexible things that are permitted historically in this industry and indeed under the exposure draft.

PN3628

So those introductory comments we respectfully submit address in general the concept of the attack that we now see from some five unions on coverage of the scope of this exposure draft and I would now seek to move briefly, if the Commission will permit me, to address in turn each of the unions challenging

either coverage or by reference to their own modern award conditions in this exposure draft and I will - - -

PN3629
JUSTICE GIUDICE: Mr Harmer, these aren't really new issues, are they? I mean your submissions of 12 June, was it, do deal with these questions of coverage and I appreciate some refinement of the arguments might have been developed by the unions in their submissions.

PN3630
MR HARMER: Yes, your Honour.

PN3631
JUSTICE GIUDICE: But I would ask you to bear in mind that the question of coverage has hardly arisen in the last little while so you might bear that in mind in considering how much detail you deal with in your presentation today.

PN3632
MR HARMER: Yes, your Honour. Thank you for that guidance. I won't then respond in detail to the submissions all of which were of course lodged on 12 June we haven't formally replied to.

PN3633
JUSTICE GIUDICE: No.

PN3634
MR HARMER: But to the extent that we are overlapping with issues previously addressed I will try and curtail my comments.

PN3635
JUSTICE GIUDICE: Thank you.

PN3636
MR HARMER: Perhaps briefly then I will refer to first of all the two submissions lodged by the LHMU. They address specifically hospitality and childcare employees. Again the general submissions I have made going to the unique nature of this industry apply to those particular employees and I note in relation to childcare the specific exemption provided to the Miscellaneous Workers Kindergartens and Childcare Centres State Award New South Wales when the issue of coverage first came up for the industry and also the fact that hospitality workers have been traditionally covered under the resort worker classification New South Wales and also within Victoria.

PN3637
There is thereafter within the LHMU's submission a number of observations about specific conditions which again I acknowledge we have probably addressed in our own submissions concerning those conditions sufficiently to respond to, although I note specifically that there's emphasis on hourly rates and I just note the unique history of the developments of those rates which do differ because of the many other benefits involved in the industry from rates in the mainstream Hospitality or Childcare Awards. We also rely on our written submissions in terms of specific examples we've provided of both childcare workers requiring flexibility in that they do look after children within a ski school context and have a

career path in that area, as do hospitality workers who can rotate between work on the slopes and indoors within hospitality arrangements.

PN3638

The ASU's specific further submissions which were filed yesterday, or at least we received a copy of them yesterday, again I'll just make a few brief observations because, as I say, I don't have any detailed instructions on the material but the LHMU tries to place weight on the PCSA status of the awards which I've addressed in New South Wales. Secondly, there's some observations on coverage which we've already adequately addressed, and there's reference to the inappropriateness of the not elsewhere included style classification which, of course, we have in this matter dismantled and which now appears in the exposure draft in a series of specific classifications going to hospitality, childcare and municipal services. Other than that the LHMU submissions of yesterday contain a detailed number of comparisons of rates and conditions which, as I say, I have not received instructions on and I'm not properly in a position to respond to and merely reserve our position on that. That deals with the LHMU.

PN3639

The ASU raises similar issues and our response again is similar. The only specific aspect of the ASU submission which goes beyond the hospitality and childcare workers goes to both clerical and municipal employees. Both those categories have been historically covered by the awards I've referred to, particularly in New South Wales where, if I can just explain very briefly in terms of municipal services, obviously the exposure draft only covers employers in this unique industry. It doesn't cover local government work but within the lease allocated to each resort within the National Park, they are very much isolated and self-contained operations and accommodate a large number of people and sublet to a large number of operations for accommodation and entertainment and other purposes. All municipal services have to be on a self-contained basis provided by each of the resorts and it's for that historical reason that the industry awards have catered for municipal services, if you like, water supply and other things being supplied by these resorts and that's been dealt with under the resort work category, for example in New South Wales.

PN3640

In terms of the SDA's submissions, it's submissions go more to issues of comparative rates with the modern awards. I've referred to the express exemption from the Shop Employees State Award in terms of the coverage issue and won't repeat the unique nature of the industry that warrants different rates.

PN3641

Finally, both the AMWU and the CEPU make submissions attempting to extricate from the exposure draft maintenance staff. As I've already mentioned there is historical coverage of workshop employees in Victoria. There is also the fact that the unique conditions I referred to do impact on and are relevant to both mechanical and electrical maintenance employees and in our respectful submission, without labouring the point, we believe that the complete scope of classifications included in the exposure draft should remain intact as all those classifications are integral to this unique industry.

PN3642

If the Commission please, the AWU, which notably is the principal union in this industry, does not object to any aspect of the coverage of the exposure draft, other than suggesting some other categories of employers might be included, which we've already addressed in writing and I won't further address on that. I may, if the Commission will permit me, just briefly reply to some fresh issues raised with the exposure draft content by the AWU and I acknowledge that these are fairly trivial in nature but they're matters we haven't previously had an opportunity to reply to.

PN3643

Firstly, in paragraph 2 of the AWU's submission of 12 June there's an issue raised in relation to the necessity for a definition of outdoor employee. That is necessary because it links into certain equipment and boot provisions in the wider award. At paragraphs 4 to 7 there are submissions made in respect of seasonal employees and the need for termination notice and severance provisions. We have already addressed that issue so I won't dwell on it, in our prior written submissions, and we rely on those but certainly any reversion to that form of lack of recognition that our employees are engaged for a unique and separate period of seasonal work with no guaranteed return next season, would impose huge costs on this industry and is inappropriate.

PN3644

Paragraphs 8 to 9 of the AWU's submission of 12 June there's reference to the need for minimum guaranteed hours for snow sports instructors. That's inappropriate, given the high level of casualisation across snow sports instructors and I note to the extent that New South Wales has had some guaranteed hours, it's been based upon the high level of certain ski instructors and has been variable rather than fixed so we consider that an inappropriate suggested change to the exposure draft.

PN3645

At paragraph 10 of their submissions of 12 June there's reference to monthly superannuation contributions. The resorts consider it appropriate that that should be quarterly in accordance with taxation requirements.

PN3646

There's then the further submissions on 18 June 2009 where there's at attempt at paragraph 6 to question the calculation of the seasonal rates that are set out in the exposure draft. We'd just like to correct those calculations put forward by the AWU and confirm that the loading is 1/12th and we press the calculations in the exposure draft.

PN3647

At paragraph 7 there's a request from the AWU in relation to the requirements by employers for employees to obtain certain equipment. We would like to concede that point and indicate that if an employer requires an employee to purchase clothing, the employer will reimburse the employee so we are pleased for that change to occur to the exposure draft.

PN3648

At paragraphs 8 and 9 there's an issue raised about airfare reimbursement which has been a limited benefit in New South Wales but not applied at all historically in

Victoria and it's aim in New South Wales was to attract back to the resorts the skills and abilities of people who serve in the northern hemisphere outside our season and there's an attraction or retention point that has been specific to the consent awards in that state. We oppose its extension across the entire industry so applies it only to limited more senior levels of snow sports instructors in New South Wales. We oppose that pressed for change by the AWU.

PN3649

We otherwise press for the benefits that we've alluded to within our own written submissions and, if the Commission pleases, unless there's any questions that's all I sought to raise in response to the various union written submissions but I do repeat again that we haven't had an opportunity to take proper instructions on the LHMU submissions, particularly on rates received only yesterday. If it pleases the Commission.

PN3650

JUSTICE GIUDICE: Yes, well, I think if you could make any written response you wish to as promptly as possible, that would be appreciated.

PN3651

MR HARMER: May it please the Commission. We'll attempt to do that within seven days if that's permissible.

PN3652

JUSTICE GIUDICE: Thank you. Yes, who's next?

PN3653

MR RYAN: If the Commission pleases, on behalf SDA, I'd make some responses to some of the submissions that have been filed in this matter. The LHMU submission appears to have hospitality workers and childcare workers removed from the award. The SDA didn't go down the same approach in terms of our written submission, however, the SDA would be quite comfortable in accepting the removal of the service workers from the award. Our prime submission was based upon the premise that retail workers, hair and beauty workers or fast food workers who are employed under the terms of the exposure draft award should have not less than the same relative classification structure as defined industry awards. That was the details of our written submission as filed.

PN3654

The key issue clearly in terms of whether or not the service workers are in this award or out is really determined by the issue of the coverage clause of the Alpine Resorts Award and the very coverage clause of the Alpine Resorts Award means that the other industry awards will necessarily apply in the snow sports industry or in the ski fields and that's simply because the coverage clause of the Alpine Resorts Award is so specific, it actually should probably be renamed the Alpine Lifting Award because the whole definition of the industry is dependent upon an establishment that includes alpine lifting which simply means that any establishment in the ski fields or in the snow sports industry that does not provide alpine lifting is simply not covered by the Alpine Resorts Award.

PN3655

In that sense it's not an award covering the resorts, it's an award covering only those establishments that include alpine lifting. Very clearly, in our submission,

not all employers who are employers within the ski fields area are going to be employers who include alpine lifting. That very fact means that the other industry awards will apply and it is inequitable, in our submission, for employees only under this award to be put in a lesser position than employees who would also work in the ski fields who would be employed under the prime industry awards that would cover their respective classifications.

PN3656

We note that the submissions of the Australian Ski Areas Association as filed on 12 June had attached to it amendments that they sought to the award and one of the amendments that they seek is to delete clause 4.4 from the award. It's a standard clause in most of the modern awards which relates to the operation of other awards which may be appropriate. The general submission of the Australian Ski Areas Association is that there is no other award that is appropriate, therefore clause 4.4 is simply not required. In our very strong submission it is required because even with those establishments that provide alpine lifting, it is apparent from the classification structure in the Alpine Resorts Award that not every possible job classification which could be used in an alpine resort or by an employer who first the definition of an alpine resort, is necessarily included in the exposure draft. On the basis that not every possible job classification is included in the award, then there must be the capacity for other awards to apply if there are awards that would be more specific to a part job title. On that basis we'd certainly oppose the removal of clause 4.4 from the exposure draft award.

PN3657

The key issue that we raise concerns the issues of conditions of employment for retail workers, hair and beauty workers and fast food industry workers. We note even today in the oral submissions made by the ASAA that one of the justifications for the lack of loadings and the low rates in the award is that there are clearly other benefits that employees can get by working for an establishment that provides alpine lifting and one of those benefits is things such as they might get free lift tickets. Well, it doesn't matter what may or may not occur, they're not conditions that are in the award itself. Any of the fringe benefits that may be applied simply don't form part of the valid safety net because they're not award terms and conditions of employment and on that basis, anything that may be an extra or a freebie is simply not relevant for the determination of what constitutes the fair and effective safety net which does mean, in our very strong submission, that you need to discount any of the fringe benefits that may apply and only then concentrate of what are the essential safety net conditions determined by the exposure draft of the Alpine Resorts Award vis-à-vis the awards issued by the Commission certainly in stage 1 which is the area of interest for the SDA, the General Retail Industry Award, the Hair and Beauty Industry Award and the Fast Food Industry Award.

PN3658

The other particular issue we'd raise in relation to the proposed amended draft as provided by the Australian Ski Areas Association is that clause 25.1 of their draft seeks to remove the public holiday loading for casuals, keeps it for permanent employees but removes it for casuals. We would strongly oppose that. The public holiday loading recognises the value of the holiday for all employees and to suggest that casual employees do not warrant any extra remuneration for public

holiday work certainly goes against the approach of the Commission in relation to all of the other modern awards that have been issued so far.

PN3659

Clause 26.2 of the Australian Ski Areas Association amended draft seeks reductions in the overtime rate. The first reduction they seek is that for the first two hours of overtime the rate should be reduced from time and a half to single time. The effect of that is that's a default creation of a 40 hour week because the moment there is no overtime penalty being paid for the first two hours, and if they're treated as simply additional ordinary hours, it is by stealth the introduction of a 40 hour week. The second reduction that they seek is to reduce the overtime rate for the second two hours from double time to time and a half. In other words, what they're really saying is overtime will only occur after 40 hours have effectively been worked. The SDA would strongly oppose the suggested amendments to clause 26.2.

PN3660

The Australian Ski Areas Association also seeks to introduce a new clause at clause 13.4 which is a rolling notice provision which relates to seasonal workers who have already been given notice of termination and then, because of good weather in the Australian Ski Areas Association's concept of good weather which is freezing cold and the stuff I'd like to be sitting around a fire at home rather than being out in the weather, but what they refer to as good weather which may extend the ski season, they then want to reduce the period of notice , if there's an extension of work, down to one hour. The SDA would oppose the concept of clause 13.4. If notice has been given in accordance with the notice requirements of the Act or the award, it is quite simple, we would suggest, for additional forms of employment to continue after the termination of the seasonal employment. Casual employment comes to mind, in which case they don't need the rolling notice provision because as casuals there would be termination on the basis of an hour, or alternatively, the employers could withdraw the notice and then reissue the notice subject to what they understand to be the extent of the good weather that would extend the season. In any event, the SDA strongly opposes the concept behind clause 13.4 and its proposed inclusion in the award.

PN3661

JUSTICE GIUDICE: You don't think there should be any concession for the weather.

PN3662

MR RYAN: No, simply because the industry operates - generally has a set start date and it starts, even if there is no snow - I mean, I'm not a fan of skiing but I understand some people will go up to the ski resorts even if there's no snow and some people go to ski resorts even when there is snow but never ski because they're into a social life drinking, wining and dining and other activities that don't involve skiing. I think it's necessarily weather dependent.

PN3663

JUSTICE GIUDICE: I think we may be straying from the issue.

PN3664

MR RYAN: They're the submissions of the SDA.

PN3665
JUSTICE GIUDICE: Thanks, Mr Ryan. Mr Ash.

PN3666
MR ASH: Mr Harmer mentioned that we filed written submissions yesterday so in the course of those I'll be very brief. The submissions of the LHMU are that the current award landscape does not provide for the inclusion of hospitality and childcare workers in an industry award that covers ski related employment. As the AWU note in their submission they cannot comment on the appropriateness of terms and conditions for employees other than those regulated by the list of ski related awards. The LHMU submits that if an award is to be made to cover ski related work it should be made on the basis of current award regulation in the industry.

PN3667
It also appears that some of the awards that Mr Harmer or the ASAA have sought to source conditions from are PCSAs for the purpose of the award modernisation process, as mentioned by Mr Harmer. Childcare and hospitality workers are currently covered by the relevant industry awards, as is shown in part 1 of our submission filed yesterday and previously. These workers are often required to maintain industry relevant qualifications and training relating to outside regulation. This is related to the industry they work in, not their occasional employment for parts of the year in alpine resorts.

PN3668
As the tables appended to our submission yesterday demonstrate, the exposure draft removes almost all the award safety net conditions that currently apply to workers in LHMU classifications at alpine resorts, notably, the trade rate is also below the minimum rate for tradespeople and the ASAA proposal does not appropriately recognise the numerous work value cases that have set the appropriate rates for childcare workers in particular, but also hospitality workers.

PN3669
We would also agree with the submission of Mr Ryan in relation to the comments on fringe benefits. We would see that as unrelated to the award safety net and an attraction and retention issue for the individual employer in ski resorts. If the Commission pleases.

PN3670
JUSTICE GIUDICE: Mr Ash, the issue of the existing award coverage in relation to hospitality workers, I think the argument against you is that the classification of resort worker under the Ski Industry State Award would cover those classifications.

MR ASH: If I understand correctly, at present those workers are being picked up, and we would argue that it's a misapplication of the catch-all provision, picked up by the catch-all provision in that award and that the appropriate award that should be applying is the applicable NAPSA.

PN3671
JUSTICE GIUDICE: Presumably there is some way of knowing whether in fact hospitality employees are covered by the resort workers classification at present and paid under it. That's what's suggested.

PN3672
MR ASH: I'll have to take that question on notice, your Honour.

PN3673
JUSTICE GIUDICE: Thank you. Ms Angus.

PN3674
MS ANGUS: Thank you, your Honour. Your Honour, the AWU position in relation to coverage has been slightly mischaracterized by the representative of ASAA. It's not so much that we agree with the published outline in the exposure draft, rather that we can only make - our submissions only extend to the application of the modern award as it covers those classifications that appear in the three Ski Industry Awards.

PN3675
Your Honours and Commissioner, the Ski Industry Award there's been some discussion about does include a reference to a classification called resort worker which I'm advised only applies to the equivalent of a general hand provision. From my understanding of the industry, the three Ski Industry Awards to which we've referred to in our submissions, cover essentially outdoor employees and that hospitality, childcare and retail workers have not fallen within the scope of those three awards. We'd certainly support the submissions of my colleagues from the two previous speaking unions that any Alpine Resorts Award should not operate as a ghetto award for childcare, hospitality and retail workers and so we'd support the general approach that if those classifications are to be included, then the terms and conditions attached to those classifications should be consistent with other relevant modern awards.

PN3676
In respect to the content of the exposure draft, in large part we are content with the content as it applies to outdoor employees, subject to the comments that we've included in our written submissions. There are a number of areas that we continue to press where the exposure draft departs from what we say is the appropriate safety net for the award classifications that we represent. They are our submissions.

PN3677
JUSTICE GIUDICE: Thank you. Any other submissions?

PN3678
MR HARVEY: Your Honour, in Melbourne, ASU.

PN3679
JUSTICE GIUDICE: Yes, Mr Harvey.

PN3680
MR HARVEY: Thank you, your Honour, the ASU has submitted written submissions in this matter and I'm hearing myself as I say this, your Honour, there's a bit of feedback, but the ASU has filed written submissions dated 12 June. I think Mr Harmer at one stage referred to some ASU submissions filed yesterday but I think it's clear that they were LHMU submissions, not ASU submissions. We only filed one set of submissions with regard to the exposure draft award.

PN3681

Those submissions, which I won't go over, did address just two issues; firstly, the coverage or the appearance that the award was going to cover local government employees and in our written submissions we did indicate the source of our concern about that which was largely two things, your Honours and Commissioner Smith, and that was actually with respect to my colleague from the AWU that in the AWU's original submissions back on 26 March they referred to the Victorian Alpine Resorts Award as one of the underpinning awards which should be considered as part of this and went on to say and I quote:

PN3682

The award regulates public sector and local government employees undertaking work such as rubbish collection, park attendants, ski patrollers at alpine resorts, civil maintenance work.

PN3683

Therefore, we are also concerned to see in the exposure draft reference to a classification dealing with municipal services and some misapprehension perhaps continuing that this work did apply to local government employees or work performed by local government employees. I think in that respect, your Honours and Commissioner, Mr Harmer's submissions have probably clarified that position today as to the source of that particular classification and I think in doing so he referred to the fact that certain leases that applied in what are, as I understand, national parks required the resorts to undertake some work which might be considered to be of sort of a municipal nature. In that respect, if that matter is reasonably clear, then this doesn't apply to local government employees and that local government work is not affected by this proposed award, then I don't need to take that matter any further.

PN3684

The second matter that the ASU's submissions did deal with was simply the rate of pay with regard to clerical employees either - if you compared them with hospitality workers under the Hospitality Award or clerks under the Modern Clerks Award, that the rates of pay were too low if that comparison was made and we stand by those submissions. I don't think Mr Harmer addressed the level of pay for clerical classifications, either as clerical hospitality workers or clerical workers generally so we would maintain our submissions with regard to that particular matter.

PN3685

Other than that, your Honour, we agree with the submissions made by my colleagues from the LHMU. We have specifically previously supported their submissions. I'm not sure whether I've seen their submissions dated yesterday. I have two copies in my file, two submissions from the LHMU but both of them appear to be undated and because I don't have access to the Commission's website here, I can't check but generally speaking, we certainly support the LHMU's submissions and also those of the SDA that have been made today. If the Commission pleases.

PN3686

JUSTICE GIUDICE: Mr Harmer, I wonder if you have any submission to make about the issue raised as to the coverage of the award, in particular the definition of alpine resort.

PN3687

MR HARMER: The definition is satisfactory to the Australian Ski Areas Association, your Honour. The resort operators measure their productivity and market share by reference to ski lift hours or trips and all of the alpine resorts operate ski lifts and it would appear to be a significant distinguishing feature compared to other employers in the region of which there obviously are some. The unique circumstances we face and I apologise if this is not directly in response to your question, your Honour, but in response to comments made by some of the unions, we cannot emphasise too much how much the exigencies of the weather can devastate our business and how much poor weather in terms of lack of snow and the reporting of it can reduce demand for our product to such a significant extent as to render the resorts non-viable in some seasons.

PN3688

JUSTICE GIUDICE: Yes, Mr Harmer, I was particularly interested in the definition and the submission that was made about the requirement that the resort include alpine lifting. The suggestion seemed to have been made that there would be other resorts that don't include alpine lifting which would be covered by other awards and that was the issue that I was interested in your submission on.

PN3689

MR HARMER: In our respectful submission, your Honour, there would be no alpine resorts involved in the ski industry as we understand it that does not involve ski lifts, so I am unable to assist with the nature of any resort operating in the ski areas that would fall into that category. There are, of course, your Honour, for example in Jindabyne there are operations that might be described as resorts in terms of accommodation and things of that nature which some other facilities, but they do not operate in the ski area and do not fall under the intended coverage of the exposure draft.

PN3690

JUSTICE GIUDICE: And with the exception of lifting, do those resorts or other establishments provide the same or similar services to the public as the resorts covered by this award.

PN3691

MR HARMER: The example I just used, your Honour, was talking about lower areas of altitude, so they're not operating in the precise region, they're not as heavily impacted by snow and they're not providing any of the services associated with skiing that we are dealing with, in our respectful submission, your Honour.

PN3692

JUSTICE GIUDICE: Thank you.

PN3693

MR HARMER: It's not a like with like comparison.

PN3694

JUSTICE GIUDICE: Thank you.

PN3695

SENIOR DEPUTY PRESIDENT WATSON: Mr Harmer, the wage rates in the exposure draft reflect those proposed by the association you're representing, is that correct?

PN3696

MR HARMER: In large part as I understand it, your Honour, I think those with me will correct me if I'm wrong, certainly as I understand it there are some rates and conditions that exceed both the existing awards in Victoria or New South Wales, but the rates reflect the historical rates in large part, your Honour.

PN3697

SENIOR DEPUTY PRESIDENT WATSON: In your initial submission you explained the derivation of those rates as obtaining of rates from various awards in a broad-banding sort of exercise. How did the Association derive a range of hospitality rates from a single resort worker rate or were there other hospitality rates drawn upon?

PN3698

MR HARMER: In relation to the issue of hospitality workers, on my instructions a large number of resorts in New South Wales, for example, utilise that resort worker category for child care, for hospitality, for municipal and a range of other services not elsewhere included. In relation to hospitality specifically, there are resorts such as Thredbo, your Honour, which is part of the Amalgamated Holdings Group and that group controls ..... hotels and that particular resort has been a member of the AHA and so historically has complied with the federal Hospitality Award, but that's an exigency based on their specific employer group membership. As I understand it, your Honour, the resorts building off the not elsewhere included classification and having reference also to the federal Hospitality Award came up with their own specific categorisation. Your Honour, I can't be any more particular than that.

PN3699

SENIOR DEPUTY PRESIDENT WATSON: Is it true that the rate in each case for a comparable hospitality worker is in fact less than that in the Hospitality Modern Award?

PN3700

MR HARMER: Marginally, your Honour, and again - - -

PN3701

SENIOR DEPUTY PRESIDENT WATSON: That's on the base rate and then there's the issue of penalties as well.

PN3702

MR HARMER: Yes, your Honour, and that's historically been the case going back again for example in New South Wales to the decision of Watts J and that was understood to be the case given the whole range of other exigencies of the industry and benefits of it, that was specifically listed in his Honour's decision in approving what were essentially consent arrangements between the AWU and the resorts at that time, but seeing as I indicated establishing a suitable equitable base in compliance with the principles of wage fixation at that time have since been adjusted by reference to National Wage Case decisions up to the point where the New South Wales awards became PCSAs by virtue of a quirk of New South Wales legislation. I understand that the rates in the exposure draft had been adjusted to acknowledge the lack of adjustment of PCSAs since the inception of WorkChoices, your Honour.

PN3703
SENIOR DEPUTY PRESIDENT WATSON: And when you say rates, you mean the rates generally beyond hospitality?

PN3704
MR HARMER: Yes, your Honour.

PN3705
SENIOR DEPUTY PRESIDENT WATSON: Because there's only one classification in that award.

PN3706
MR HARMER: That's correct, your Honour.

PN3707
SENIOR DEPUTY PRESIDENT WATSON: Dealing with you say hospitality. Very well, thank you, Mr Harmer.

PN3708
MR HARMER: Thank you, your Honour.

PN3709
JUSTICE GIUDICE: Is there any other submissions in relation to the alpine resorts draft? Very well, we will move to the ports and harbours area. Who would like to commence, port and harbour services?

PN3710
MR MCNALLY: Your Honour, the Maritime Union wish to rely on their written submissions filed on 12 June.

PN3711
JUSTICE GIUDICE: Thank you, Mr McNally. Mr Morris.

PN3712
MR MORRIS: Thank you, your Honour.

PN3713
JUSTICE GIUDICE: Mr Warren.

PN3714
MR WARREN: Your Honour, with specific reference - could I firstly indicate that the AFEI maintains the position that the exposure draft of Ports, Harbours and Enclosed Water Vessels Award 2010 and the enclosed coverage clause in that award is appropriate, properly meets the needs of the industries that it covers and the Commission should with respect to my learned friend reject the suggestion or the submission that the persons currently covered by that award should be covered by some general marine award and we support the establishment of a Ports, Harbours and Enclosed Water Vessels Award and would submit that the coverage clause should be maintained.

PN3715
With respect to the submission of the MUA most recently filed and clause 25 of that submission, it is put against the position of the AFEI that there is a requirement from the Minister that there be no reduction in terms and conditions and therefore the position put by the AFEI should be rejected with respect to rates. It goes without saying, but we once again remind the Commission that the

Request is not a requirement. The Request in paragraph 2 from the Minister expresses an intention. It expresses a lack of intention that any modern award should disadvantage employees.

PN3716

Equally it expresses a lack of intention that it should result in an increased cost for employees. It is an equal and balanced intention and it is not a requirement. We further note that there has been a legislative response it would appear to the concerns with respect to take home pay and the problems or the perceived problems from the trade union movement that that might create and the Commission or Fair Work Australia will be placed in a position where it may consider an application from an employee and make appropriate orders it deems fit in the circumstances where there is a disadvantage in take home pay without in any way conceding whether that is or isn't the case so far as on a merit basis is concerned. It clearly is a matter that the union could take up under the new regime and the Commission need not concern itself with the submission made by the MUA in paragraph 25. Unless there are any questions, those are our submissions.

PN3717

JUSTICE GIUDICE: Yes, that's in relation to the whole of this area, I take it, Mr Warren, is it?

PN3718

MR WARREN: It's in relation - we obviously stand by the AFEI submission made with respect to the exposure draft and we note that that is the only issue it appears that the MUA has taken with the Australian Federation of Employers' submission and it's noted in paragraph 25 of their submission and their submission is a general submission which deals with a number of awards and in particular with the Port, Harbours and Enclosed Water Vessels Award, that is the submission made and is our response to that submission.

PN3719

JUSTICE GIUDICE: Thank you.

PN3720

MR WARREN: If the Commission pleases.

PN3721

JUSTICE GIUDICE: We might take any other submissions in relation to the Ports, Harbours and Enclosed Water Vessels Draft Award.

PN3722

MR HARVEY: Your Honour, in Melbourne - - -

PN3723

JUSTICE GIUDICE: Yes, Mr Harvey.

PN3724

MR HARVEY: Thank you, your Honour. Just very briefly, your Honour, the ASU has made a written submission with regard to this group of awards, but including the Ports, Harbours and Enclosed Water Vessels Award 2010 which is at pages 3 and 4 of our written submission of 12 June, we simply sought there an exclusion for local government employees.

PN3725

I notice in the written submissions of the MUA there is a line at the end of their submissions simply saying that they oppose our submission for the exclusion of local government, but don't expand on it any further and I think we should just desist with our application for an exclusion for local government employees without expanding on it any further. If the Commission pleases.

PN3726

JUSTICE GIUDICE: Thank you, Mr Harvey. We will deal next with - - -

PN3727

MR MCNALLY: Your Honour, can I - - -

PN3728

JUSTICE GIUDICE: Yes.

PN3729

MR MCNALLY: As Mr Warren submitted, the Maritime Industry General Award or whatever its name is going to be is confined to enclosed waters. The whole area beyond the coastline would be award free if the vessel wasn't a passenger or cargo transporting vessel, a tug, a dredge, et cetera, but that's the very reason why we propose the general award to cover all that's left such as pipe laying vessels and those types of vessels who work beyond the coast.

PN3730

JUSTICE GIUDICE: Yes. Thank you. We will deal next with the coal export terminals draft. Mr Morris.

PN3731

MR MORRIS: If the Commission pleases, I need to make a number of detailed comments on the content of this award because of the submissions filed on behalf of the CFMEU on 19 June which we haven't previously dealt with and which raise a lot of points going to content, but before going to the detail, can I make these general submissions?

PN3732

The employer group, the Coal Terminals Group, with respect accepts with the very limited exceptions that we deal with in our 12 June submission, the terms of the exposure draft. The main change that we sought was to the definition of coal export terminal that's dealt with in our submission and I don't repeat it. The second point is that there has been quite a deal of consultation between the employer group and the unions interested in the coal terminals sector and as a result of that, the employers have accepted quite a number of changes.

PN3733

Those were dealt with in our 24 May submission and our 12 June submission - sorry, 24 April submission and 12 June submission and with the exception of some that I will deal with, we don't accept the further changes that the unions are now proposing or in particular the CFMEU is proposing. The third point we make is that the CFMEU submission of 19 June has relied in numerous respects for supporting the proposal, the changes that it seeks to the exposure draft on the Stevedoring Industry Award and I refer there to I think the Stevedoring Industry Award, not the Stevedoring Industry Modern Award.

PN3734

What we say about reliance on the Stevedoring Industry Award is this. First of all that award has not applied over some decades, three or four decades the coal terminals have been operating, it has not applied to the coal export terminals. Furthermore, the Stevedoring Industry Award and its predecessors has not been used as a benchmark. It hasn't had a nexus with the coal expert terminal terms of employment.

PN3735

It really is a late reliance on what we would say is an award that doesn't provide a proper benchmark or a proper starting point for the Coal Terminals Award. I say that submission at the beginning so that I don't have to sort of repeat it as we go through the various specific terms which the CFMEU has proposed relying in part or wholly on the terms of the current Stevedoring Industry Award.

PN3736

The next preliminary point I make or opening point I make is that the CFMEU in its submissions has relied in many instances on particular current coal terminal enterprise awards. The one that is most regularly relied on in the CFMEU submission is the Port Waratah Coal Services Enterprise Award. That is an enterprise award and what we say about that or any of the other enterprise awards is that again they don't provide on a sort of a cherry picking basis a proper justification for altering the terms of the exposure draft or, indeed, for setting standards in the award.

PN3737

JUSTICE GIUDICE: Despite the fact a lot of people are suggesting that they do.

PN3738

MR MORRIS: I am sorry?

PN3739

JUSTICE GIUDICE: Despite the fact a lot of people are suggesting they do.

PN3740

MR MORRIS: Yes.

PN3741

JUSTICE GIUDICE: There's been a fair amount of cherry picking on all sides.

PN3742

MR MORRIS: Yes, but I emphasise the point that it's one enterprise award. There are some seven current operators at coal export terminals on the east coast, that's Queensland and New South Wales and again one repeatedly finds the CFMEU's submission relies on that Port Waratah Coal Services Award or one or other of the awards and finally by way of opening comment, many of the CFMEU submissions of 19 June were covered in substance in submissions by the CEPU as far back as 6 March so we have proceeded on the assumption that those submissions that the CEPU put and which the CFMEU now in many instances repeats really have been considered by the Commission in developing and formulating the exposure draft.

PN3743

Now, if I could go then to the CFMEU's proposed changes to the exposure draft contained in its 19 June submission and I do have to spend a little time on these. I

will go as efficiently as I can. The CFMEU proposes some expansion of the definition of coal export terminal in clause 4.2. We've accepted that. That's provided for in our 12 June submission and is agreed.

PN3744
JUSTICE GIUDICE: Yes, I am looking at the CFMEU's submission. The structure of that appears that the left hand column is based on the exposure draft, is that right?

PN3745
MR MORRIS: Yes.

PN3746
JUSTICE GIUDICE: Yes. So any alteration which your clients may have conceded or thought appropriate in light of that submission won't be reflected in that document?

PN3747
MR MORRIS: That's correct. The left hand side is, that's right, the exposure draft. The middle column, whilst it's not uniformly the case, it's generally what the CFMEU contends for and the right hand column is sort of an elaboration by way of comment.

PN3748
JUSTICE GIUDICE: Yes. I'm just stating the obvious I think, Mr Morris.

PN3749
MR MORRIS: Sorry, the combined unions. I am corrected by the - - -

PN3750
JUSTICE GIUDICE: Yes. That's what the heading says, yes.

PN3751
MR MORRIS: Yes. Now, as I say, the CFMEU if one goes to clause 4.2, I'm sorry the combined unions, I'll get that right.

PN3752
JUSTICE GIUDICE: Yes.

PN3753
MR MORRIS: The combined unions don't actually suggest the change to the words defining a coal export terminal but we rely on the reference to minor or incidental work associated with the coal export terminals operations.

PN3754
VICE PRESIDENT LAWLER: They do propose a change, don't they? It's includes rather than is.

PN3755
MR MORRIS: I'm sorry, I still didn't hear you?

PN3756
VICE PRESIDENT LAWLER: They propose a change from the coal expert terminal is to a coal export terminal includes.

PN3757
MR MORRIS: Yes.

PN3758

VICE PRESIDENT LAWLER: Which is allowing for sort of a practical expansion on a case by case basis by reference to facts.

PN3759

MR MORRIS: Yes. Your Honour, we propose a different approach. In terms of the principle I think we agree to but our approach, if I could just go to it, would be to add, and this is in our 12 June submission, the words after where it says - I'm sorry, I'll read the whole clause:

PN3760

A coal export terminal is a facility that receives and stockpiles coal and loads coal onto vessels for export and which does not deal with other cargo or undertake other port activities.

PN3761

That's the exposure draft. We propose to add the words and I quote:

PN3762

Unless such cargo or activities are of a minor nature or incidental to that facility's activities relating to the receipt, stockpiling and loading of coal.

PN3763

And we explain why we seek that. One or other of the terminals may from time to time handle a very small amount of slag or coke I think in the case of Port Kembla Coal Terminal, and we don't want to inadvertently exclude the coverage of maintenance work, for example, on plant or infrastructure that is carried out by a coal export terminal but may not be strictly speaking the receival, stockpiling and loading of coal. I thought that was going to be the easy part.

PN3764

Then the next change of substance proposed by the CFMEU is a new clause - I'm sorry, by the combined unions is a clause 9.A providing for employee representative leave. That is opposed. It does not presently exist in any of the Coal Export Terminal Awards with the exception of the enterprise award for Port Waratah Coal Services and the unions here have relied on that award and the Stevedoring Industry Award. So we say it isn't a feature of the industry, it should not now be introduced. The next change proposed by the unions is in clause 10.3(b) where the combined unions propose a clause providing for conversion of casuals to permanent employment - I'm sorry, I will withdraw that.

PN3765

10.3(b) is a proposal that the minimum engagement for a casual should be seven hours. That's not a feature of any of the current instruments applying. The employers have previously agreed to a four hour minimum engagement for casuals. There's just no basis for a seven hour minimum engagement. Then 10.3(d) is a proposal by the unions for conversion of casuals to permanent employment. That again doesn't apply in any of the ports at the moment and it should not be included in the new award. The unions rely on the Manufacturing Award and Building and Construction Modern Awards. That is opposed.

PN3766

Then the next item is clause 11 where the unions appear to contend for the inclusion of provisions about employee duties and so that was a clause in the draft

filed in the proceedings. We know the Commission has withdrawn those generally from its exposure drafts and the employers don't seek that it be included. So to the extent that the unions are opposing it we don't find ourselves in support of that. We are content for it not to be there. Then clause 11.2, here the unions seek that the notice required by an employee of termination of employment be one week, whereas the exposure draft provides for a symmetry of notice, leaving aside the extra week for employees over the age of 45 whether the termination is by the employer or the employee.

PN3767

Again the employers oppose that change and the provision in the exposure draft it is submitted by the employers is appropriate. Clause 12, redundancy is the next area where the unions propose a change. They propose redundancy provisions in excess of the National Employment Standards. The union proposal is opposed by the employers. There is currently no redundancy scheme applying across the industry and we submit, with respect, that inclusion of a redundancy provision in excess of the NES would run counter to the intent of paragraph 36 of the Minister's Request as to when redundancy provisions should be included.

PN3768

I then come to clause 13, classifications and minimum wage rates. The rationale for the employer proposal which has been reflected in the exposure draft was set out in the employer group's 6 March submission. We dealt with it in some detail and explained how we had arrived at it. The employers did indicate they were willing to consider alternatives in consultation with the unions. Those consultations occurred. Agreement hasn't been reached. The employers submit that the exposure draft provisions are appropriate and the testing of those in the consultations that we've had with the unions has reinforced us in that view.

PN3769

We say the unions' proposal is not appropriate and is not an appropriate alternative and we just make these comments by way of a critique of the unions' proposed classification structure. First of all, the unions propose that the entry level for all employees whether they're trades or non trades should be equivalent to the C!0 in the Manufacturing Award. Again there's just no justification advanced for that. Secondly, the union proposal assumes that trades and non trades' personnel should have identical progression, there should be no differentiation. Again, there's nothing really put in to justify that. The employer proposal juxtaposes or aligns trades and non trades and we submit that that employment proposal which is now in the exposure draft is fair, it's practical.

PN3770

Thirdly, the unions argue for larger increments between the wage rates for the classifications. Again there's no real justification put for that and we submit that what's in the exposure draft establishes an appropriate progression in terms of increments between the classification levels. The next matter that we think is inappropriate in the union proposal is that it introduces at the higher levels of its proposal and these can be seen in the unions submission, it starts to include in the higher classifications really what are job titles such as wharf foreman, control room and then relief coordinator, relief supervisor, project officer and so on, or contract coordinator.

PN3771

What we say about that is that those are job titles that one or other of the terminals may have but others just don't and one confuses a classification structure which is generic when one starts to include job titles in it. The modern award has a generic - sorry, the exposure draft has a generic classification progression which accommodates people regardless of their title and we say that's the appropriate approach, with respect, and it simply confuses the structure when one starts to include these job titles which a terminal may or may not have. And again one notes on that page of the unions' submission table after the classifications there's a reference to SIA, clause 10.1. That appears to be a reference to the Stevedoring Industry Award which again we'd say is unhelpful and has seven grades but it tells us very little else.

PN3772

So for all those reasons and for the reasons that we've put in support of our submission on 6 March, we strongly submit that the exposure draft classification structure should be adhered to. If I could then go to clause 13.2 which provides for the frequency of payment of wages, the unions have sought weekly payment of wages as the standard. Initially we proposed monthly. We have accepted fortnightly. That was accepted in our 22 April - sorry, our 24 May submission - sorry, I will get that right in a moment, 24 April. So we have moved from monthly to fortnightly. We submit that fortnightly is entirely reasonable.

PN3773

The unions have also sought the deletion of clause 13.3 of the exposure draft which enables an employer to deduct overpayments from subsequent payment of wages or allowances. The employers oppose the removal of that subclause. We say it's a sensible one, it appears in a number of modern awards, it reasonably enables an employer to recover overpayments without complicating issues of being in breach of a modern award in the future. Then clause 13.4 the unions have sought that adult apprentices be provided for. The employers accept that. We accepted that in our 12 June submission. We accepted the percentages in effect that the unions have proposed.

PN3774

We submit that there should be a short definition of an adult apprentice being an apprentice who commences his or her apprenticeship at the age of 21 or over. Then the next item on the unions' submission is in relation to clause 13.5 and the supported wage system. The unions argue that there should not be such a provision in this award. The employers are not opposed to its inclusion. If it's in the award it operates according to its terms. If it's not appropriate for particular work then it will have no work to do.

PN3775

Then the unions submission, and I'm using its ordering now, proposes that overtime be provided for in clause 14. It is clause 18 in the exposure draft. The unions' submission proposes a number of changes to the overtime provisions. All of those changes are opposed by the employers. The employers accept the exposure draft. The precise reasoning of the unions is not very clear. We'd say it's not clear at all, but it's apparent that they rely repeatedly on the Stevedoring Industry Award. As you'll see in the middle column there's regular reference to

SIA clause 19.2 or clause 19. I have made my submissions already about the invalidity and lack of justification for relying on the Stevedoring Industry Award.

PN3776
The unions rely also again on the Port Waratah Coal Services Award and I have made submissions about that already. Overall what the unions appear to be seeking is just a lifting of a number of the penalty rates. We submit for the reasons we have put in our initial submissions on 6 March that the overtime provisions are appropriate. If one goes then to clause, this is in the unions' submission; it's over a couple of pages. At the bottom of the prior page it's clause 18, 18.2, 18.4 and then over the page there's (b), where the employee does not get a 10 hour break. The unions propose that the reference in the second dot point in paragraph (ii) and the third dot point in paragraph (iii) should be changed from reference to the word ordinary to the word rostered.

PN3777
I'm happy to say that that was a change that the employers indicated in their 12 June submission they accept. Then clause 18.5, which is what the unions would propose as clause 14.4, there's reference to call back provisions. The employers oppose any change to the exposure draft there. There's really no basis put forward for the changes other than again the Stevedoring Industry Award or the Port Waratah Coal Services Award and for example, the unions propose that where an employee is called back to work overtime he or she should be paid a half hour travel time. That is just simply not a feature of this industry with I think the one exception of again, Port Waratah Coal Services.

PN3778
Perhaps I should just pause at this point just to note, if it needs noting, that as an enterprise award the Port Waratah Coal Services Award will continue to apply and this award will not apply while that enterprise award applies.

PN3779
JUSTICE GIUDICE: Mr Morris, if that's a convenient time we might adjourn now for lunch and we'll resume at 2 o'clock.

<LUNCHEON ADJOURNMENT [1.01PM]

<RESUMED [2.07PM]

PN3780
JUSTICE GIUDICE: Yes, Mr Morris.

PN3781
MR MORRIS: If the Commission pleases. Might I make one correction to what I put before lunch, it relates to clause 13.2 and the frequency of payment of wages?

PN3782
JUSTICE GIUDICE: Yes.

PN3783
MR MORRIS: I said I think before lunch that we had agreed to move that to fortnightly in our April submission. In fact it was our 12 June submission.

PN3784
JUSTICE GIUDICE: Yes.

PN3785
MR MORRIS: There's been so many submissions. The next provision in the union submission I want to deal with relates to the superannuation clause, that's clause 15 in the exposure draft. There, as we say in our 12 June submission, we would accept the reference to further specific current superannuation funds in clause 15.4 and I understand Ms Gray will be tendering the names of some further funds. As I say, we're happy with those insofar as they are presently funds that are receiving employer contributions.

PN3786
Then if I could turn to clause 14 in the exposure draft and the various allowances and the submissions that are made by the unions in respect of those. By way of opening, our 6 March submission explained the approach of the employers in relation to allowances. Essentially we sought to only include allowances that were in common usage across the terminals and not include allowances that only had a scattered operation in one or other or maybe a couple of the terminals. So generally we submit that the exposure draft allowances are sufficient and appropriate.

PN3787
The allowances then specifically referred to by the unions, they refer first to the tool allowance and they propose an allowance based on the Port Waratah Coal Services Award. We say that's not a proper basis to deviate from the exposure draft. Then the next one is the licence allowance. The exposure draft provides for reimbursement of the cost of licences which are required. That is, we say, appropriate and there's no justification for introducing licence allowances of the kind that might appear in the Stevedoring Industry Award or indeed in the case of Port Waratah Coal Services Award which is relied on by the unions, it appears to be a reimbursement provision. We submit again, no need to deviate from the exposure draft.

PN3788
The meal allowance, we say the allowance in the exposure draft is appropriate. There's no cause to adopt any other allowance. The allowance that is in the exposure draft matches that in the Manufacturing Award and, as one would see from the middle column of the unions' submission, allowance are all over the place in terms of quantum, if anything, our allowances at the upper end of what's currently in use.

PN3789
First aid allowance, over the page in the unions' submission, the Commission has included an allowance in the exposure draft. It was what we submitted for in our 6 March submission. There's no cause to increase that and again, the allowance in the exposure draft matches that in the Manufacturing Award, modern award that is.

PN3790
Then protective clothing and equipment allowance, again we say there's no cause to move away from what's in the exposure draft. The union has relied on stevedoring and again there just doesn't seem to be a case to make any change.

PN3791

Then the unions propose, and for this I think you need to go back a little earlier in their submission. They propose an industry allowance of 5 per cent. That's on the page where clause 14.2 of the exposure draft is set out in the left-hand column. In the right-hand column there's reference to all purpose industry allowance of 5 per cent to compensate for common disabilities. That's not supported by the employer group. We say there's no particular justification for 5 per cent or any other particular figure and again, so far as the unions rely on the Stevedoring Industry Award, not a proper benchmark or starting point.

PN3792

Then if I can go forward in the union submission, there's a proposal for a leading hand allowance - sorry, that's under the all purpose industry allowance I was making submissions about a moment ago. The employers oppose a leading hand allowance in this award and we do that because the classification structure in the exposure draft supported by the employers provides in each of the levels, as one goes up the classification ladder, for supervision of employees, supervision of work. In other words, supervision or leading people is built into the requirements of the classifications and the descriptions of the classifications and the requirements for classification. With respect, a leading hand allowance might make sense where you have jobs that don't have a supervisory requirement, but we say it's really double-counting if your classification already takes account of supervisory responsibilities. You don't then add a leading hand allowance because someone is then doing what the classification itself contemplates. Leading hand allowances are very much the exception currently in the coal terminals.

PN3793

Then going to the next page in the unions' submission, across the page from where it says clause 14.7 in the left-hand column, there's reference to other allowances such as laundry allowance, vehicle allowance, travel allowance, other allowances specific to the industry. In our submission again there is no justification for those at this stage. The CEPU back in its March submission sought various additional allowances. There's really no cause to have those included at this stage and again the union relies, opportunistically we'd say, on the Stevedoring Industry Award and the Port Waratah Coal Services Award. Summing up on allowances, our submission is that the exposure draft includes the right allowances and no further allowances should be included in the modern award.

PN3794

If I could then move off allowances to clause 16.1, averaging of ordinary hours, the exposure draft provides for shift workers' ordinary hours to be averaged over the cycle of a roster or up to 26 weeks. We submit that's appropriate. The unions propose 10 weeks. We submit that 26 weeks is not unreasonable in the circumstances. There are other industries, mining, coalmining where 26 weeks is the period used for averaging. We had previously agreed that for day workers the averaging should be over four weeks. that was in our 24 April submission and again the averaging of hours was dealt with in the CEPU's 26 March submission which was prior to the exposure draft.

PN3795

Then clause 16.2 the provision in 16.2(a) for the span of hours for day workers, the exposure draft provides that day workers' hours can be between 6 am and 6 pm Monday to Sunday. The unions submit from 7 am to 5.30pm Monday to Friday. We submit that the exposure draft is appropriate there. There's no cause to move from what is a not uncommon provision for day workers. As it happens, at present the earlier starting point in any of the terminals presently for day workers is 6 am. The latest finishing time for day workers appear to be 5.30 pm so six to six is a not unreasonable safety net provision.

PN3796

The unions propose then in clause 16.3(iii) a new definition of dayshift. We don't support that. It's unnecessary. Nightshift and afternoon shift are defined and a shift that's not an afternoon or a nightshift must be a dayshift. We note that, for example, in the Mining Award, modern award, the dayshift is not itself defined.

PN3797

Then in clause 16.3(b) shiftwork rates, the unions propose various increases, higher loadings that is for various shifts. They rely again on the Stevedoring Industry Award and the port Waratah Coal Services Award. We submit that the exposure draft should not be departed from, we do make this one perhaps qualification to that. The exposure draft provides for a shift worker or continuous shift worker whilst on permanent night shift being paid a loading of 25 per cent of the ordinary hourly base rate of pay. We would not oppose that being 30 per cent. We I think used as a reference point initially in our submissions on this the Mining Industry Award and we note that a permanent night shift worker appears to be 30 per cent.

PN3798

Clause 16.4(c), roster and shift changes, the unions propose to vary or propose the variation of the exposure draft by increasing the notice period from 48 hours to seven days. We submit that the 48 hours is reasonable. It matches the Mining Industry Award, then clause 17 - - -

PN3799

SENIOR DEPUTY PRESIDENT HARRISON: Mr Morris, I should comment that we never used the Mining Industry Award as some justification. I then remember what you're criticising the union about in their cherry picking, but continue to do so.

PN3800

MR MORRIS: I was using the Mining Award as the Modern Mining Award as being an award that covers obviously a vast industry and includes amongst other things the bulk commodity ore loading in iron ore, for example, and in our initial 6 March submission we made reference to that. There is some similarity between what a coal terminal does, loading coal onto ships 24 hours a day, seven days a week, using highly automated gear at the coal terminal and a iron ore loader, that was really the - so the extent that we've been selective in that, we've been consistently selective.

PN3801

Then if I could go to the clause concerning meal breaks or breaks, clause 17, the exposure draft provides for and this is in 17.2 for 20 minutes per shift and in 17.3

40 minutes per shift. In our 12 June submission we accepted that the 20 minute should become 30 minutes in 17.2 and the 40 minutes should become 60 minutes in 17.3, then clause 19.2, leave entitlements, the exposure draft provides for annual leave to be in accordance with the NES.

PN3802

The unions propose an additional week's leave in effect so that continuous shift workers would get six weeks and non-continuous shift workers or day workers would get five weeks. Indeed, I think they may say all shift workers should get six weeks. We submit that there is no cause to provide for an enhancement on top of the NES.

PN3803

Some terminals do provide more leave, others don't and it's properly a matter for enterprise agreements or bargaining, then in clause 19.4(a), the annual leave loading, the exposure draft provides for a loading of 17.5 per cent. The unions propose it appears 20 per cent and again they rely on some particular enterprise awards. We submit that the common standard of 17.5 per cent is appropriate and should not be departed from.

PN3804

In clause 19.6 there's provision for the taking of annual leave during annual shutdowns or during shutdowns, rather. The exposure draft provides for - does not provide for a notice period for that. The unions propose a minimum four weeks' notice before a shutdown when employees are required to take annual leave. The employers accept that and we put that in our 12 June submission, so we would agree to that notice period being required.

PN3805

Then clause 19.7 which is a provision enabling the employer subject to certain preconditions to require an employee to take leave where a very substantial accrual of leave has occurred for a particular employee and the exposure draft provides that - this is in 19.7(a), at the time of the direction the employee has eight weeks or more of annual leave, the unions have proposed that it be in the case of employees with an entitlement to five weeks' annual leave a year that the trigger, if you like, or the threshold when the employer can require this leave to be taken should be 10 weeks.

PN3806

We put this in our 12 March submission, so we accept in effect that the threshold or trigger for the obligatory taking of leave at the direction of the employer arises when the employee has accumulated a total of two years of leave, then clause 20, personal and carer's leave and compassionate leave, here the unions propose 13 days personal carer's leave, in other words three days more than the NES.

PN3807

We submit there is no case made for that. There's some employers who provide presently more, others don't provide more than the NES and it should not become a general standard safety net provision and the NES is appropriate. Likewise in respect of compassionate leave, the unions propose that there should be not two days on each occasion as provided in the NES, but three days. Again some enterprise awards provide for three days, others don't and again there is no justification for generally requiring as a safety net provision more than the NES.

PN3808

Can I then turn to schedule A? The unions have proposed a new schedule A, clause A.1.2 which is a set of provisions relating to training and how training is to be afforded and how it's to be treated. The exposure draft didn't include such a provision. We oppose its inclusion now. We say training is properly a matter for local arrangements and local agreements and does not require and does not justify a safety net provision and then if one goes to the clause A.1.2 in the exposure draft, so that's in the left-hand column, there's provision in relation to progression.

PN3809

The unions appear to be saying in the middle column that progression above level 3, competent, will be on appointment. There doesn't seem to be a difference between us. Of course, we have a different classification structure from what the unions are proposing, but I think I can leave that, then I've made submissions already when I was dealing with clause 13 I think it was about the classification structure that we think there are a number of features of what the unions are proposing in the classification structure that are inappropriate.

PN3810

One I perhaps didn't deal with earlier relates to mixed functions. The unions have proposed in their middle column, A.1.4, a mixed functions clause. We say that it's inapt or inappropriate to have a mixed functions clause where you have a generic classification structure, rather than job titles. The structure contemplates that people work to the limit of their skills and competence and perform all the work that might be required at a lower level and all the work required at their level.

PN3811

Putting in a mixed functions clause in a grading system, particularly where appointment is required to grade to the higher levels, is just going to be a cause of confusion and if you look at our classification structure which has the competent, the advanced, the dual trade, there's just no work for a mixed functions clause to do that in that structure so we submit that a mixed functions clause just is inappropriate and then finally the unions' proposal refers to particular job positions and we submit that that's inappropriate.

PN3812

By positions I mean particular titles, so we strongly support the current structure of the exposure draft. Those I think are the submissions we make. If the Commission pleases.

PN3813

JUSTICE GIUDICE: Thank you, Mr Morris. Ms Gray.

PN3814

MS GRAY: Thank you, your Honour. Your Honour, I note that Gladstone Port Authority didn't put in a submission in respect to the export coal terminals exposure draft in the latest round and I was wondering if it might be more economical if Mr Herbert who is representing them today just indicates if there's any submissions to make in respect to that award and then I can cover any response to that in my submission, but I am happy to go ahead before him. I just may need to jump again after him.

PN3815

JUSTICE GIUDICE: What do you think about that suggestion, Mr Herbert?

PN3816
MR HERBERT: I'm happy to co-operate.

PN3817
JUSTICE GIUDICE: Very well. Thank you.

PN3818
MR HERBERT: Your Honour, I didn't announce an appearance in this matter, although what I have to say about the Port Authorities Award is in a sense a mirror image of one thing that we do have to say about the Coal Terminals Award. The only thing that Gladstone Port Authority really has to say about the Coal Terminals Award is that it should continue not to apply to it and that the way in which the Commission has presently arranged the terms of the respective exposure drafts of the Port Authorities Award and the Coal Terminals Award is that they are neatly and logically mutually exclusive as they should be and the Gladstone Port Authority as a port authority properly so called, similar to many other port authorities around Australia give or take various mixed of functions, is contained on the appropriate side of the dividing line between those two awards, that is firmly and squarely on the side of the Port Authorities Award.

PN3819
The Gladstone Port Authority is content with all of the other terms and conditions proposed for the Port Authorities Award and in particular clause 4.1 of the exposure draft that lists that - it specifies that the award covers employers who are port authorities to the exclusion of any other modern award. It follows that if the Port Authorities Award is to stay in that form, the alterations proposed as we submit it should for all of the reasons that were put in, in the earlier submissions on behalf of the Gladstone Port Authority and in that respect if I can say - Gladstone Port Corporation, I should say, in that respect can I say that the submissions by the CFMEU in response to the exposure drafts put nothing new in factual terms.

PN3820
All that is asserted again is that there is nobody at Gladstone Port Authority who is exclusively devoted to coal operations. There are a number of employees who are predominantly engaged in the loading of coal. There are a very much larger number of employees who have nothing whatsoever to do with coal and are a group in the middle, particularly the maintenance employees who work across the entire facility, everything that Gladstone Port Authority does from front to back and stem to stern and because of that amalgamated situation and the aggregated situation constituted by the workforce and the flexibilities that are able to be drawn from the present situation, it's earlier been submitted and accepted by the terms of the exposure draft that Gladstone Port Authority should not be required to be disaggregated in its respective functions simply because the CFMEU wants to take part of its functions away and put it under another award, but in order to facilitate that approach, as I understand matters, could I refer the Commission to the submissions of the CFMEU and in particular the spreadsheet setting out proposed award changes in relation to the Coal Terminals Award that Mr Morris has just gone through very recently and can I refer the Commission to the curious terms of the proposed clause 4 of the CFMEU or the unions' proposal as to how clause 4 of that award would read if the CFMEU was to have its wishes in this regard.

PN3821

If the Port Authorities Award is to stay in its current terms, that is it applies to the exclusion of any other modern award, a variation of the terms sought to the Coal Terminals Award would set up an immediate tension where in fact by the terms of the CFMEU proposed amendments, that the Port Authorities Award would not apply to the exclusion of any other modern award, even though it's said that it does, because this proposed award would apply to port authorities as well, so that the neat mutual exclusivity achieved by these current terms of the two exposure drafts would immediately be lost, but the terms of clause 4.1 as proposed by the CFMEU suggests that the award covers employers who operate coal export terminals in respect of work by the employees in classifications and to the exclusion of any other modern award.

PN3822

Now, essentially what that would mean is that Gladstone Port Corporation would be covered because it operates a thing which is defined in clause 4.2 as being a coal expert terminal and being the Tanner terminal that's been described in the material, so that this award would operate in relation to Gladstone Port Corporation to the exclusion of all other modern awards, despite what the Port Authorities Award says, that it doesn't.

PN3823

The definition in 4.2 of a coal export terminal is as Vice President Lawler pointed out earlier, has a subtle, but very important change. The word is has been changed to the word includes, that it does permit the possibility of future debates and arguments about the possible creeping coverage of this award over other facilities such as Gladstone Port Corporation and like facilities. It defines the coal export terminal as including facilities of receiving stockpile coal and as I submitted earlier, Gladstone Port Corporation along with a number of other port operations does have such a facility so it would be caught by clause 4.1 and 4.2. 4.3 however goes on to say:

PN3824

The award does not cover an employer who is covered by the Port Authorities Award.

PN3825

Well, it would seem from 4.1 that that provision is not necessary because it excludes other awards anyway. But it goes on to say:

PN3826

Except as otherwise covered by 4.1 or 4.2.

PN3827

Now, frankly my client doesn't understand that and I can't explain to the Commission how that would work. Presumably the intention is what was submitted by the CFMEU in April of this year in a written submission that what they intend is that the Port Authorities Award can cover everything in Gladstone except the coal terminal. The problem with that is the coal terminal is a place. It is a place of work. It is not an identifiable group of employees and given the structure which has even been asserted by the CFMEU in its recent material, that coal terminal has a rotating workforce of employees who move in and out and work in other places of the Gladstone Port Authority's operations.

PN3828

In some cases they work in the coal terminal one week in four. Some places they work predominantly there but do other work in other terminals. Some employees who do maintenance rotate in and out on a daily or hourly basis and some employees never go there at all. Now, for that reason it would seem that these clauses would appear to set up a circular inclusion and exclusion which doesn't make a great deal of sense except that it would appear that there would need to be something in the nature of a Bundy clock installed at whatever entrances are available for the coal terminal and as employees go in and out they have to punch the clock as to the amount of time they spend in the coal terminal area so that the award will apply to them when they're in it but it won't apply to them when they're out of it.

PN3829

As I say, that may well alter on an hourly, weekly or monthly basis. That of course, if that is what is intended and it's not at all certain that that's what the words say, that would be a nonsensical outcome in the context of the award modernisation process and the intention to simplify matters and to bring, as far as can be done, employers who have overall operations under the umbrella of a single award and in the context of award modernisation process which really encourages this Commission to do precisely what it has done in this case and that is to characterise employers by reference to their overall activities and the industry in which they sit and to make award regulation which is suitable to their overall characterisation and the industry in which they sit.

PN3830

The Commission has, as I have submitted, landed precisely on the point in relation to this particular matter by granting mutual exclusivity as between port authorities properly so called and privately owned coal terminals who effectively do nothing but. The CFMEU proposal would be to rub out all of those lines and to create an enormous smudge mark, as it were, within the operations of Gladstone Port Corporation for reasons that aren't entirely clear. It certainly won't promote any form of efficiency. It won't promote simplicity and it won't promote the objective of reducing the number of awards that apply. It really would apparently suit the interests of the CFMEU only without serving any other particular objectives.

PN3831

Now, for those reasons it is submitted that the proposed alterations to the Coal Terminals Award in terms of clause 4 coverage provisions should all be rejected by the Full Bench and that the respective coverage clauses of each of the awards, that is the Port Authorities Award and the Coals Terminal Award, be left precisely in the exposure drafts, be left precisely where they are and that the CFMEU's submissions to the contrary be rejected. Unless there's anything further those are the submissions that Gladstone Port Corporation would wish to make in relation to the relationship between those two awards and what the Commission should do in respect of that issue.

PN3832

Gladstone has nothing else to say to anticipate matters when the Port Authorities Award matter is formally called on. Gladstone Port Corporation has nothing further to say in relation to the terms of that award. It is content to accept the

terms of the award as presently placed or as presently drafted and save and except that in the case of some unions having made submissions to the effect that wage rates ought to be taken from particular awards that have been identified and the Victorian Ports Award is one in particular that was identified as being a potential source of wage rates.

PN3833

The simple submission that Gladstone makes about that matter is that the Queensland Port Authorities Award NAPSA wages and conditions ought to be those which are contained within the award but otherwise leaves the matter to the discretion of the Commission. The question as to how one moves from whatever might be the existing rates of pay that port authorities throughout Australia are currently paying and the Gladstone Port Corporation are currently paying vis-à-vis the rates which are ultimately inserted in a final modern award will be a matter in my submission for the transitional provisions that might apply and are not matters in respect of which the Port Corporation wishes to be heard at this time. Unless there's anything further, your Honours and Commissioner, that's the submission for Gladstone Port Corporation.

PN3834

JUSTICE GIUDICE: Thank you. Ms Gray.

PN3835

MS GRAY: Thank you, your Honour. I might start with the uncomplicated part which is that I have provided to the Full Bench's associates a document headed Export Coal Terminals Existing Superannuation Funds to which Mr Morris has referred. There are already two superannuation funds mentioned in the exposure draft. We say that the four listed in this document completes the default funds currently existing at coal terminals. We note that it also includes Gladstone Port Authority as the bottom one. We have that there for completeness and with the optimism that our arguments in favour of having Gladstone Port Authorities coal termination operations brought within the scope of the Export Coal Terminals Award would be successful when the award is finally made.

PN3836

We note that Mr Morris has no objection to that list of funds which I provided to him earlier today and we also note that we've conferred with Ms Angus of the AWU there is no default fund existing at Dalrymple Bay. Also in respect to the AWU Ms Angus was unable to, due to other work commitments, remain this afternoon. She has asked me to advise the Full Bench that the AWU supports and accepts and adopts the submissions of the CFMEU lodged on 19 June. We then move on to conditions. We have very little extra to say because it has been covered in our submissions. In terms of the table there was an error which is the key at the top of the table which refers to the existing industry awards has next to PWCS Port Waratah Coal Services that Port Waratah Coal Services Consent Enterprise State Award 1995 that in fact the conditions which are cross referenced in our document are to the Port Waratah Coal Services Consent Enterprise Award 2002, a federal award.

PN3837

We note that Mr Morris has relied heavy - well, not heavily, has relied at various times on the Mining Industry Award as commented on by her Honour SDP

Harrison. We would suggest that conditions where not taken from the existing enterprise awards would be more appropriately taken from the Black Coal Mining Industry Award and in respect to that we refer to our submission which was made in support of the priority issues. Unfortunately we were unschooled in the modernisation process at that time and did not date it, but it is contained on the website under Initial Priority Issues May through to June 2008. In that we draw the comparison or connections between coal mining and coal ports and in particular at paragraph 24 we outlined the various coal supply chains which are associated with the coal export ports and in respect to that it identified the regions of coal mining which supplied each of the ports.

PN3838

The second last dot point referred to the Blackwater Gladstone coal chains which supply to Gladstone Port Authority. On conditions, as I say, we have covered that in our submissions. Just briefly, Mr Morris said that the seven hour minimum engagement or one shift minimum engagement for casuals being sought by the combined unions was not a common provision across the existing enterprise awards. That comes as no surprise because the Bulk Terminal Services Bulk Handling Award 1998 and the Hay Point Award don't provide for casuals at all. The Port Waratah Coal Services Award does provide for casuals and has a seven hour minimum engagement, seven hours being a shift under that award being a 35 hour week.

PN3839

In terms of the maximum period for the roster cycle, although the employers are seeking 26 weeks maximum the rosters currently existing at all of the coal terminals have a maximum of 10 weeks and in terms of annual leave we note that Port Waratah Coal Services provides five weeks annual leave with a 45 per cent loading. The Hay Point Award provides for five weeks with 20 per cent loading and six weeks for shift workers and the loading under the Stevedoring Industry Award is 27.5 per cent loading. Although Mr Morris says that the Stevedoring Industry Award is irrelevant, we refer to the submission of the MUA in respect to the modern Stevedoring Industry Award, the exposure draft, and note that an exclusion is proposed with which we agree for the Coal Expert Terminals Award 2010 and is done so on the basis that the loading of coal or fuel oil whether the bunkers or not was included in the Stevedoring Industry Act 1949 as stevedoring operations, that's on page 2 of the MUA's submission of 12 June.

PN3840

We do agree with Mr Morris that since coal ports have become the type of operation which they are today that it is true that the enterprise awards rather than Stevedoring Awards have applied there and that is why we in our submission cross referenced existing conditions from the existing enterprise awards to reflect what is prevalent across the industry and to enable the Full Bench to identify the source that the combined unions claim. I note that your Honour the President had perhaps slight scepticism in your Honour's voice when referring to the combined unions' counterproposal as being the title of the middle column in the CFMEU's submission.

PN3841

I do submit that the CFME Mining and Energy is the coordinating union by the ACTU in this industry. The same process which I referred to in the electrical

power industry last Friday in Melbourne was conducted by the CFMEU Mining and Energy in this industry as well and we have active and consistent participation because of that inclusive and full information process of ourselves, the MUA, the AWU, the AMWU and the CEPU. I note with some concern though that the AMWU appears to have made consistent submissions in the last round of submissions on the exposure draft to the effect that the Manufacturing Industry Modern Award classification structure should be essentially inserted into virtually every other modern award.

PN3842

Mr Guy Noble from the national office of the metal workers was present and involved in the negotiations on the coal export terminals proposed award and the only concern raised by the AMWU different from the other unions was the level of the allowance claimed in respect to first aid. Our submission deals with that by incorporating that AMWU concern that where coal terminal employers do not enable virtually every employee to be trained in, for safety reasons, first aid and receive the lower amount which we claimed but rather only have a selection of employees trained, then the appropriate percentage should be 2 per cent rather than the lesser amount which we had been satisfied with on the basis of existing provisions being essentially a multitude of employees or anyone who wished to be trained receiving that allowance upon completing the training.

PN3843

JUSTICE GIUDICE: Ms Gray, I hope you didn't misinterpret my exchange with Mr Morris earlier. I wasn't sceptical at all about the CFMEU's role in coordinating the other unions. The purport of my remark was actually directed to the fact that I had asked him a question without looking at the title at the top of the columns.

PN3844

MS GRAY: Thank you, your Honour.

PN3845

JUSTICE GIUDICE: Which I should have done and I wouldn't have had to ask him the question.

PN3846

MS GRAY: And sometimes it's a little difficult for us to believe that there is a combined union position with the constituent unions but nonetheless that has been achieved in this case. We also handed up another document to the Full Bench's associates which is headed the Combined Unions Coal Export Terminals Proposed Classification Structure. Your Honours and Mr Commissioner, when the Full Bench made the exposure draft for this industry the only draft award it had was the employer draft. Unfortunately we had a choice between comparing a draft or negotiating with the employers on their draft and time and resources being stretched, as they are by everyone in this process including the Commission, we chose to negotiate with the employer and we did so the first meeting being able to be held on the closing date for draft awards to be put into the Full Bench.

PN3847

So we're saying that the Full Bench has had the employers draft, that employers draft was amended after early meetings that the unions had with the employers and further concessions in respect to the claims which have been pursued by the

unions with the Coal Terminals Group have been referred to by Mr Morris and put into their written submissions. So we commend the combined unions counter proposals and the basis upon which they have been made for terms and conditions and have nothing further to add about terms and conditions which brings us to the scope.

PN3848

This is an area which the union has made a number of submissions, particularly directed towards Gladstone Port Authority. We note that as a result of the submissions of the Coal Terminals Group initially and Gladstone Port Authority that what the Full Bench was appraised of was a - by the Coal Terminals Group was that their operations only dealt with coal. In the main that's true but there are exceptions and those exceptions have led to the proposed amendment to the scope clause now being sought by the Coal Terminals Group. On the other hand, Gladstone Port Authority has put to the Full Bench consistently that their operations are quite different to the other coal terminal operators. We have addressed those differences and demonstrated that in fact - although it was glossed over by Mr Herbert - there is at least a group of employees who do nothing but work at R G Tanner or Barney Point at Gladstone Port Authority. That is 180 production employees and the majority of the tradespeople who perform the majority of their time on coal, but certainly the production people, the 180 people referred to in our submission of 19 June do nothing but coal, except for a load of calcite once every three to six months.

PN3849

When the Full Bench published the draft Coal Export Terminals Award, it did so on the basis of the information that it had at the time. It said in paragraph 170 of the statement of 22 May:

PN3850

The draft award is confined to coal export terminals where the loading of coal for export is the only port operation undertaken.

PN3851

Certainly the Gladstone Port Authority has listed a screed of other functions which it says it undertakes. We heard this morning in respect to the Dredging Industry Award that only Brisbane and Newcastle ports actually perform the dredging operation and yet at paragraph number 35 of the Gladstone Port Authority submissions on 17 April it referred to it having responsibility for the harbour, marine, land reclamation and dredging activities. We don't doubt that it has responsibility but it doesn't perform them. I've been up and done an inspection of Gladstone Port Authority and were shown around by the manager and had it explained to me in recent weeks and certainly a number of the functions which were referred to by Gladstone Port Authority are conducted through contractors as is the case at other coal ports. Port Waratah Coal Services and Port Kembla Coal Terminal both look after vessel management, land development on their own lease sites and the port users at Port Kembla also share dredging costs with the Port Corporation.

PN3852

The same can be said and I only did a comparison between Port Waratah Coal Services, Port Kembla Coal Terminal and Gladstone Port Corporation's areas of

activities but it is true to say that either or both Port Waratah Coal Services and Port Kembla Coal Terminal, the functions outside of coal loading, unloading, blending and stockpiling are also conducted which are referred to by Gladstone Port Authority in its submission of 17 April are also conducted by the operators of the coal terminals at Port Waratah Coal Services and port Kembla Coal Terminal in respect to paragraphs 17, 19, 20, 35, 40, 43 and 44 of Gladstone's submission of 17 April.

PN3853

We say two things, your Honours and Mr Commissioner, that is that coal is not the only product loaded at Port Kembla Coal Terminal. There's about 4 per cent of product that is something other than coal and the functions which Gladstone Port Authority has submitted distinguish it from the operators of the coal terminals are performed in the main at other coal terminals as well where those operators have the lease of the coal terminals from the relevant port authorities in each case.

PN3854

We also have referred in our submissions in April to the expansion of the R G Tanner coal terminal. What we didn't know at that stage but we have subsequently found out is that 50 per cent of that expansion was funded by the coal companies whose product is exported through Gladstone Port Authority. We also note that Gladstone Port Authority stated in its submissions that it may not utilise Barney Point for coal exports in the future, although its annual report stated that the combined throughput at Barney Point and R G Tanner coal terminal were fully utilised.

PN3855

The ability for Gladstone Port Authority to meet its coal export commitments, being the third largest coal exporter in Australia, would only occur to enable it to use Barney Point for something other than coal when its planned Wiggins Island coal terminal is built and I note in respect to Wiggins Island coal terminal that it will be built by a consortium of 16 coal companies. They will develop and own the terminal but it will be operated by Gladstone Port Authority. I have an article from The Age to that effect which quotes the Premier of Queensland in respect to Wiggins Island and I'm happy to hand up a copy of that if the Full Bench requires it.

PN3856

The other area of differentiation between Gladstone Port Authority and coal export terminals does not follow through into the rest of Gladstone Port Authority's operations. In Gladstone Port Authority's submissions of 17 April it identifies in paragraph 31 who operates its other terminals and in that respect we note that Boyne Wharf, which is operated by Boyne Smelters Limited would fall under the Aluminium Industry Award. Rio Tinto Aluminium exports an imports from Fishermens Landing wharves. We say that it is likely that that operation would fall under the Aluminium Industry Award and Auckland Point Number 2, 3 and 4 wharves, which is addressed in paragraph 31(c) of Gladstone's submissions of 17 April, include the operators there being Caltex Australia Petroleum Pty Ltd, BP Australia Limited and Shell Australia.

PN3857

We submit on the scope of the Oil Refining and Manufacturing Award 2010 that those operations of oil and petroleum products would fall under the Oil Refining and Manufacturing Award so Gladstone has a number of terminals which are operated by employers in other industries so its argument that somehow separating out its coal terminals which is 70 per cent of its entire throughput, that's including the other operators - 70 per cent of it coal, separating it out it says will be untenable and impossible. It has done it for the other operators and we say that on the basis of all of our submissions that we've made both in the priority industry stage of award modernisation which is the submission I referred to, the undated one which is in the initial priority issues section of the drop-down menu on the Commission's website and our submissions in respect to Coal Terminals Award support the inclusion of Gladstone Port Authority's coal terminals.

PN3858

We suggest that the appropriate manner with respect to achieve that would be our draft scope, which is in paragraph 7, and explained in paragraph 8 of our submissions of 14 April and we commend that scope to the Commission. We also note that when Wiggins Island is complete and operating, it will double the capacity of Gladstone Port Authority for coal and only for coal and make it by far the largest coal export terminal in Australia. May it please.

PN3859

JUSTICE GIUDICE: Thank you, Ms Gray.

PN3860

MR HERBERT: Your Honour, might I say I understand why Ms Gray wanted me to go first. If I might be heard very briefly, a very large part of what was just said by way of the results of her personal tour guide of what she said she saw in Gladstone is contested. It is just quite wrong as a factual matter, but I understand these are consultations and the normal rules in relation to these matters don't apply, but really, given that she was referring to material that was put on three and four months ago by my clients in writing and available for anybody to challenge or test or to put on further material, to come into these proceedings and recite controversial and quite wrong material of that kind for the bar table in that way from a personal perspective, without - - -

PN3861

JUSTICE GIUDICE: You dispute that this is going to be the biggest coal terminal in Australia when the expansion is completed?

PN3862

MR HERBERT: It will be a very large one. I don't know that, quite frankly, whether it will or it won't.

PN3863

JUSTICE GIUDICE: If it was, do you think it would be rather peculiar to have the largest coal terminal in Australia outside the scope of an Export Coal Terminal Award?

PN3864

MR HERBERT: No, not at all, your Honour. For all the reasons that were mentioned in the Full Bench statement of 22 May as to why port authorities were to be separated out, if one goes to the material about what Gladstone Port

Corporation is, it is a massive operation, quite apart from the coal business. I have mentioned to the Full Bench but the government announced last week that the Bundaberg port is to be added to the Gladstone Port Corporation's responsibility so Gladstone Port Corporation will be responsible for the ports in Gladstone, it is presently responsible for Port Alma at Rockhampton, it will also be responsible for port of Bundaberg and that will cover many kilometres of the coastline, many hundreds of kilometres of the coastline and massive infrastructure, land and facilities that have nothing to do with coal or coal ports or coal terminals.

PN3865

It is the local authority, in effect, for all of those lands and areas and responsibilities. It has quarries. It operates quarries. It engages in land reclamation and the management of massive infrastructure which has nothing to do with coal as appears from the material that has already been put before the Commission in the earlier consultation processes and to that extent it remains what it is, a statutory authority quite separate and distinct from privately owned coal terminals.

PN3866

The question of the regulation of the employees' terms and conditions can be adequately dealt with within the award. It doesn't need to be covered by an award which relates to the specific functions of coal terminal operators, your Honour, privately owned and operated coal terminal operators when it is a statutory corporation with quite a different character so there is no conflict at all involved in that. As I submitted earlier, the appropriate course is for the Commission to characterise the port corporation for that it is, not for its individual functions and what it might do in particular instances. If that reasoning or character was the logical extent, then any port corporation which was involved in dredging activities would have to have the dredging activities carved off and put in the Dredging Award and if it was involved in various other activities which are covered by Port Services, Closed Waters and Maritime Services Awards, each one of them would have to be carved off and handed over to the individual constituent awards in which case there'd be a small rump of employees left in the middle who would be the only ones covered by the Port Authorities Award because they didn't fit comfortably within any of the other constituent activities and that would, with respect, be a very untoward way to deal with these matters.

PN3867

One appreciates lines have to be drawn somewhere and they ought to be drawn in the most logical and sensible and coherent place but the submission I put earlier is that in this particular instance, given the complex nature of what port corporations do and what Gladstone Port Corporation is called upon by statutory charter to do, the logical place to draw the line is at the boundaries of the corporation, not internally within its constituent individual activities.

PN3868

The reason I got to my feet is that much of what is said and much of what was said by Ms Gray is hotly contested in terms of its factual accuracy in relation to the comparisons between what Gladstone Port Corporation does and what some other coal loader in New South Wales might do but we're being, as it were, ambushed by that material here and now today without anybody bothering to put

it in writing so that we could see it coming and we could address it in an appropriate way. Having said that, I understand the limitations of the consultation process in relation to that matter but if the Commission is disposed to act on the truth of some of the matters that were put forward by Ms Gray, I'd seek an opportunity to put some further submissions to set the record straight in relation to those matters. If it please the Commission.

PN3869

MR WRIGHT: Excuse me, your Honour, I seek to make submissions in regard to the Coal Export Terminal Award. Wright, initial M, appearing on behalf of the CEPU. Given the calibre of Ms Gray's previous submissions, these submissions will be necessarily brief.

PN3870

The CEPU joins in the confusion regarding as to why it is that only the Mining Industry Modern Award is of any relevance. We say that it is of some relevance, indeed it forms part of the basis on which we see an electrical licensing allowance, but we would join with the CFMEU in noting the Stevedoring Industry Award and also the relevant enterprise awards

PN3871

In turning to specific issues within the award raised by Mr Morris, we note that the licensing allowance issue is obviously a topic near and dear to the heart of the Electrical Trades Union division of the CEPU. The licensing allowance is not simply covered by - it's to compensate for the additional responsibilities that are attached to holding an electrical allowance. Those are responsibilities that stem from relevant state legislation. The CPEU and its various state branches have made these submissions repeatedly over the years to the Commission and I don't intend to expand on them greatly here. I believe that they are contained in our submissions in regard to certificate other awards such as the Aluminium Industry Award, Gas Industry, et cetera.

PN3872

We wholeheartedly support indeed the whole of the submissions made by the CFMEU in regard to the coal export terminals. Particularly in relation to the classification structure, we appreciate the situation which the Commission was in publishing the exposure draft in that there was only one draft award proposed by the parties, being that from the employers with that heavily drawing from the Mining Industry Award. However, the classification as it's proposed would see a qualified tradesperson starting on a submission C 10 rate. That is quite a peculiar position, frankly, and not something that we would appreciate seeing rolled out in any award.

PN3873

The final two matters would just be the general - there are very few allowances contained within the exposure draft as referenced in the joint unions' submission. As foreshadowed, the licensing allowance is of particular importance. In response to Mr Morris's submissions regarding the leading hand allowance, notwithstanding what he says the effects of the classification structure proposed - it still does not appropriately countenance the work done by a leading hand. A leading hand could be working in a group where all people sit on the same classification level, but because of their role they have additional

responsibilities, that is what is compensated for in the leading hand. We're surprised that it is controversial and accordingly we would seek it and the other allowances referred to in the submissions of the CFMEU to be incorporated into the award. In terms of scope, we have nothing further to say than what Ms Gray has already put to the Commission. May it please the Commission.

PN3874
JUSTICE GIUDICE: Thank you, Mr Wright.

PN3875
MR HARVEY: Your Honours and Commissioner, I am not going to respond to Mr Herbert, but I did drift off when I went to address the other document which I handed up to the Full Bench being the classification structure. I would just like to draw the Full Bench's attention to the fact that this classification structure is in fact the same structure which is in terms of level and pay rates in the 2002 federal award for Port Waratah coal terminal and has been simplified.

PN3876
The process which the unions went through is not only to have all of the unions review it and be satisfied with the levels and percentages and rates, but in terms of the job descriptions column which is clearly only indicative job description, we also had the advantage of having our on site union representatives from Hay Point, Gladstone Port Authority coal loading, Port Waratah, MUAs Port Waratah union delegate and Port Kembla coal terminal representatives who actually perform this work day in, day out and they went through this and were comfortable that the existing roles are accurately reflected.

PN3877
Now, we don't resile from the fact that it could well be improved by having some position descriptors added, but we say that in terms of the number of levels and the internal relativities, the entry for the base trade and the fact that the operator rate and the trade rate do line up and progress at the same level and the salary rates or the wage rates which are 2002 rates in the federal enterprise award for Port Kembla coal terminal make it a far more appropriate classification structure than that prepared by or presented by the employers in the industry.

PN3878
I would only finish by saying that Gladstone Port Authority has not put in any written submissions in response to our written submissions at any stage in this industry development which has taken issue with any of the facts the CFMEU has outlined in its written submission. May it please.

PN3879
JUSTICE GIUDICE: Thank you, Ms Gray. Any other submissions? Yes, Mr Woods.

PN3880
MR WOODS: On behalf of Ports Australia, just to deal with this coverage question. When it arose in the initial consultations, we put forward a proposition that the port corporations or port authorities should be covered by one all encompassing award and that was the basis of a principal decision consistent with the overall principles of award modernisation. There has been obviously a lot of excitement today in respect of Gladstone. In terms of the approach on coal - - -

PN3881

JUSTICE GIUDICE: Do you call that excitement, Mr Woods?

PN3882

MR WOODS: Yes, perhaps I should get out more. There is, of course, another port authority that operates at another coal terminal on the other side of the coast in Fremantle at Kwinana and the principle that was put forward in the drafting of the Port Authorities Award and is then reflected in the exemption in the exposure draft is that the mixture of staff undertaking a variety of duties and therefore the common sense approach in terms of building an award structure that is sought to cover all of those employees and that's reflected also when we come to look at the Stevedoring Award in respect of the exemption that exists in that, so that was a principle in terms of approach that was undertaken and on our understanding the classifications, knowing that we've got coal loaders within the group of ports that are covered by Ports Australia and Gladstone is a member as is Fremantle and other activities, not only exporting coal, but exporting other material, that that is a structure which would provide appropriate conditions across all those employees, so on that principal basis, we support the maintenance of the existing exclusion in the exposure draft and to the extent that there is a tightening of the definition of a coal terminal for the purposes of that award, the further amendment put forward by the Coal Terminal Group.

PN3883

JUSTICE GIUDICE: Thank you.

PN3884

MR HERBERT: Your Honour, if I might with leave respond to something Vice President Lawler put to me, the instructions I have about the Wiggins Island situation is that it is by no means settled that Gladstone Port Corporation will be operating the Wiggins Island facility at all. The facility is being financed by coal companies, but there is still significant negotiations to be undertaken as to whether it will or it won't and I haven't seen any articles in any newspapers, but my instructions from the corporation are that it is not as yet settled in the least that it will operate the facility, but the recent economic downturn in relation to the coal industry in Queensland which is more significant than in other places in Australia because the coal is generally directed towards steel making has thrown whatever arrangements might have been thought of previously to be in frame are now far more doubtful and it may well be that Gladstone Port Corporation stays precisely where it is in terms of its current operations, despite the construction of Wiggins Island.

PN3885

VICE PRESIDENT LAWLER: Do you challenge the Port of Gladstone's website that identifies the Port of Gladstone's major cargo today as coal?

PN3886

MR HERBERT: No, no. We've asserted that in the submissions we've put forward. In volume terms that is certainly so, but there are 30 commodities that are exported through Gladstone. That is certainly the biggest, but as Ms Gray says, there are no employees whose sole occupation is devoted to coal. As she concedes, all employees - - -

PN3887
VICE PRESIDENT LAWLER: I think on the contrary, she said there was a significant group of workers who work exclusively on coal.

PN3888
MR HERBERT: She then qualified that by saying that every couple of months they go out and do something else and as her written submissions say with respect, your Honour, calcite she nominated as being the other commodity that that group is involved with, but that group comprises about a quarter of the workforce of Gladstone Port Corporation.

PN3889
VICE PRESIDENT LAWLER: But in any event, your arguments don't turn upon whether it is or isn't the major export group?

PN3890
MR HERBERT: No, no. That is beside the point on our submissions. One needs to characterise the corporation on an over-arching basis as to what it is and not go around counting the product or measuring the volume of the product. A downturn in the economic fortunes of coal, for example, could convert the Port Authority from one entity to another by that standard, whereas it would remain precisely what it is in respect of what commodities go through. A massive increase in another product, for example, that puts coal in the shade would change the equation yet again so that would be a very unruly horse as they say to hitch these matters to.

PN3891
JUSTICE GIUDICE: Yes, we will deal now with the Port Authorities Award so far as it hasn't already been dealt with. Yes, Ms Gray.

PN3892
MS GRAY: In respect to the amendment in the scope clause of the Coal Export Terminals Modern Award as adopted, then we see that there would be no necessity to make any change to the Port Authorities Award or scope because the remainder of the work other than the coal terminals work would continue to operate underneath it. May it please.

PN3893
JUSTICE GIUDICE: Yes, fine. Very well, Mr Harvey, are you about to do something?

PN3894
MR HARVEY: Yes. Can you hear us, your Honour?

PN3895
JUSTICE GIUDICE: Yes.

PN3896
MR HARVEY: Yes, your Honour, we did want to make a submission, well, the ASU did want to make a submission in regard to the Port Authorities Award, but also the Coal Export Terminals Award. You didn't appear to be able to hear us at the time.

PN3897

JUSTICE GIUDICE: There's a button in the middle of that device in front of you which has the effect of muting your microphone. I don't know whether you touched it or not.

PN3898

MR HARVEY: No, your Honour, I only touched it to take it off mute. Can your Honour hear me now?

PN3899

JUSTICE GIUDICE: Yes, I can hear you.

PN3900

MR HARVEY: Thank you, your Honour. Can I proceed?

PN3901

JUSTICE GIUDICE: By all means, yes, please proceed.

PN3902

MR HARVEY: Thank you, your Honour. Apologies for that and, your Honour, I can hear myself when I speak. Thank you, that's better, your Honour. Your Honour, with regard firstly to the Coal Exports Terminals, perhaps I can group this with the Port Authorities Award submissions. The ASU has filed written submissions with regard to both those matters and we thought the Full Bench had got it right with regard to the coverage as between the two awards. We noticed in the Commission's or the Full Bench's statement of 22 May when they decided to publish a Port Authorities Award, the Full Bench said:

PN3903

We have decided to publish a draft Port Authorities Award. Port authorities are usually government-owned bodies responsible for the overall administration of a port.

PN3904

That's how we see the characterisation of those activities, your Honour, and there are a number of underpinning Port Authorities Awards around the country and we thought that it was appropriate to have such a Port Authorities Award applying to those sorts of organisations. The ASU as I said has members employed by port authorities, including under the Queensland Port Authorities Award that Mr Herbert referred to earlier and that award as I am advised applies to our members who do work at the Gladstone Port Authority and our constant submission in these matters, including at the public consultations, is that our preference was for the modern Port Authorities Award to apply to the port of Gladstone, the Gladstone Port Authority, at least with regard to our membership and coverage areas.

PN3905

We are not concerned about the terms of the Coal Export Terminals Proposed Award because we have no employees who would be covered by that award because it doesn't cover white collar workers, so we haven't been involved in the combined unions' drafting process or negotiating process, because we simply have no membership or coverage areas involved in that, but that does raise the question, that's one of the reasons why we preferred the situation to have the Port Authorities Award apply to all port authorities of the type that I've described,

including, your Honours and Commissioner, the Gladstone Port Authority where our members work under the terms of a port authority now and if the Coal Export Terminals Award was to apply to the Port of Gladstone, one of the presumably unintended consequences of that as applies to us may be that the white collar professional employees would cease to have award coverage as a result which is certainly not a situation that we would prefer so we thought, your Honours and Commissioner, that the Full Bench had got the balance right between the coverage of the Port Authorities Award and the Coal Export Terminals Award in the coverage clauses they propose in both awards.

PN3906

The only other submission to make, your Honour, was we're talking about port authorities at the moment, we made some written submissions about the content of the proposed Port Authorities Award based on the provisions of the Queensland Port Authorities Award that Mr Herbert referred to, including pointing out that it had a substantially shorter ordinary hours of work of 36.35 I think it is as opposed to 38 in the modern award but nobody has dealt with those written submissions by way of any other written submissions or verbal submissions today so I won't repeat any of that, your Honour, but I draw the Bench's attention to it.

PN3907

Just finally, your Honours and Commissioner, at the every end of our submissions we filed with regard to these matters on 12 June at pages 9 to 11 we did refer there to the position of the shipping officers that I referred to this morning with regard to the Clerical Industry Shipping Officers Award. We referred to the situation that was likely to arise as a result of what had come out of the consultations and the exposure draft awards that had been published by the Full Bench and flagged particularly at paragraphs 36 to 40, flagged that issue clearly and what we thought ought to be done about that and that's what we've done yesterday and referred to this morning under the heading of Maritime Officers with regard to that.

PN3908

So at least, your Honour, I feel content that at least we flagged that to the Bench and also to other parties to these proceedings at the earliest possible opportunity with regard to that particular award, obviously not with regard to the specifics of what we proposed, but we did address that issue at the earliest possible opportunity. They're the submissions of the ASU this afternoon in this matter, your Honour.

PN3909

JUSTICE GIUDICE: Mr Harvey, as I understand what you've just said is simply repeated what's in your written submission.

PN3910

MR HARVEY: Only on the last point, your Honour, that is true, but your Honour questioned me about that this morning.

PN3911

JUSTICE GIUDICE: I mean generally.

PN3912

MR HARVEY: No, your Honour. I only wanted to comment in response to the debate that we've just had about whether Gladstone in particular should be in the

Port Authorities Award or effectively covered by the Coal Export Terminals Award and some of the material that I mentioned to that was material that I felt I needed to include only in response to comments that have been made in verbal submissions this afternoon. If the Commission pleases.

PN3913
JUSTICE GIUDICE: Yes. Any other submissions in relation to the Port Authorities Award? Mr McNally?

PN3914
MR MCNALLY: The Maritime Union and the institute have filed written submissions. We rely upon those. I was asked by Ms Angus on behalf of the AWU to indicate to the Commission that they support MUA AIMPE position in that dredgers should be excluded from the Port Authority Award and assigned to the Dredgers Award which is in stage 4.

PN3915
JUSTICE GIUDICE: Thank you, Mr McNally. No other submissions?

PN3916
MR WOODS: Your Honour, if I could respond to the Ports Award?

PN3917
JUSTICE GIUDICE: Yes, Mr Woods.

PN3918
MR WOODS: I just have a couple of submissions. Mr McNally had made a submission as in their reply in respect of some allowance questions to submissions that we had put in writing and the point was that if there was one port that had one of the allowances they should all appear. We have addressed why we have sought to have 14.2(c) and 14.3 excluded in our submissions. If there is a matter where there is a port that needs to have that continued then that can be addressed either through a transitional matter or through a take home pay order as anticipated if needed.

PN3919
In the APESMA's submissions there was a reference back to the Ports of Victoria Consolidated Award in respect of engineers. When you turn to the classification structure that we have put into the draft award and been delivered as part of the exposure draft by the Commission we see that there is a descriptor of types of duties and responsibilities and qualifications at the upper ranges of those classifications which actually satisfactorily addresses the points raised by APESMA in respect of engineers so that there's no need to otherwise vary that classification structure.

PN3920
In respect of the ASU's submission in respect of the Queensland Port Authority provisions, what we say in respect of the operation of that is that again if it's a matter that is peculiar to these relevant ports then it's a matter that could be addressed either through a transitional provision or through a take home pay order as the appropriate way of dealing with a particular state based provision. There is in respect of the Towings Awards we have identified in our submissions that having looked at that and for the two ports that operate towage operations, rather than incorporate all of the effective provisions into a class of employee because

they are unusual we sought to depart from that principle that we had identified in respect of the Ports Authorities Award having total coverage and I understand Mr McNally's clients support that proposition.

PN3921
That would probably require a minor change to clause 4.1 in the Port Authorities Award that has a total exclusion in respect of other modern awards to incorporate that and I make the point that the reason that we see the towage applying is simply rather than to replicate those very seagoing particular clauses that operate to those employees into the Port Authorities Award.

PN3922
The only other point was there are submissions at 2.1(b) of our written submissions that are about marine pilots and to the extent that there's a heading above that referring to superannuation that was incorrect. There should have been a heading in respect of the marine pilots' submissions we make in respect of their non inclusion in the award.

PN3923
JUSTICE GIUDICE: I don't quite follow that, Mr Woods.

PN3924
MR WOODS: Sorry?

PN3925
JUSTICE GIUDICE: I don't follow what you just said.

PN3926
MR WOODS: Right.

PN3927
JUSTICE GIUDICE: I'm looking at 2.1, superannuation, clause 18.5.

PN3928
MR WOODS: Yes, and 2.1(b) relates to marine pilots and there should have been a heading. It should have been numbered differently.

PN3929
JUSTICE GIUDICE: I follow, yes. Yes, thank you. All right. If there's nothing else on the Port Authorities Award we'll turn to the Stevedoring Industry Award.

PN3930
MS GRAY: Your Honour, I wonder if I might go first and then be excused because I have a very, very quick submission and that is - - -

PN3931
JUSTICE GIUDICE: You're confident that Mr Herbert isn't involved in this matter?

PN3932
MS GRAY: I don't care. We support the MUA's submissions in this respect and I appreciate the exclusion in respect to the Coal Export Terminals Award being proposed. But we do note that the reference to fuel oil in cargo may lead to some overlap between the Oil Refinery and Manufacturing Award which initially on its draft is only seeking to cover those terminal operations conducted by oil companies then Terminals Pty Ltd came along and sought an inclusion which was

agreed to by all parties subject to the Full Bench finding that acceptable. So we just say that it may be the cautious approach to also have an exclusion to the Oil Refining and Manufacturing Award 2010 and we note that if an oil terminal is not being operated by an oil producer or Terminals Pty Ltd then it may well be done by stevedoring employees, an employer would be covered appropriately by the Stevedoring Industry Award. May it please. If the Full Bench would - - -

PN3933
JUSTICE GIUDICE: Yes, certainly, Ms Gray. Mr McNally.

PN3934
MR MCNALLY: The MUA and the AIMPE have no difficulty with the exclusion of the awards referred to on behalf of the CFMEU. We have filed a written submission here in this matter dated 12 June and we rely on those written submissions. Mr Morris's client raises a difficulty in relation to expression of allowances in their written submissions - sorry, that's another matter. Thank you, your Honour.

PN3935
JUSTICE GIUDICE: Very well. Yes, other submissions in relation to the Stevedoring Industry Award, draft award? Very well, I think that leaves us with marine towage.

PN3936
MS C OPPY: Your Honour, I just had a very brief submission in relation to the Port Authorities Award but I don't think at the time you could hear me. Would it be appropriate for me to make that submission now?

PN3937
JUSTICE GIUDICE: Why don't you make whatever submission you wish to make in relation to any of these matters, Ms Oppy, and then provided it's not controversial you will be free to do something else.

PN3938
MS OPPY: Thank you, your Honour. Westscheme is seeking the inclusion of the named default superannuation fund in the Port Authorities Award. It was previously included as a default superannuation fund in the Marine Stores Award and on this basis it is submitted that it should be included as a default fund in the Port Authorities Award. Your Honour, that concludes my submissions and with your permission I will be departing the proceedings. Thank you very much.

PN3939
JUSTICE GIUDICE: Thank you, Ms Oppy. Yes, Mr McNally, you were saying?

PN3940
MR MCNALLY: We rely upon our written submissions. There were allowances in respect to multiple towing allowance, cooking allowance and added skill allowance expressed in the exposure draft on a per hour basis. We agree with Mr Morris's submissions that the multiple towage allowance should be expressed per day and the other two allowances expressed per week. If the Commission pleases.

PN3941
JUSTICE GIUDICE: Thank you, Mr McNally. Mr Morris.

PN3942
MR MORRIS: If the Commission pleases. We likewise rely on our 12 June submission in relation to this award and as Mr McNally says, we've drawn attention to an issue in respect of those tug and barge allowances in clause 16 which Mr McNally indicates is acceptable so that seems to be a matter on which we're totally agreed. We also accept the union's proposal in its submission to delete schedule A which lists classifications and the relevant clause, clause 13.1(b) that refers to schedule A. Mr McNally made submissions this morning in relation to Maritime Awards about this classification issue.

PN3943
We don't see a need to include classifications or definitions of classifications in this award. There's a master, an engineer and a rating. They're the classifications. Everyone knows what they are. They're not really capable of confusion and we have no further submissions to make. If the Commission pleases.

PN3944
JUSTICE GIUDICE: Thank you, Mr Morris. Any other submissions?

PN3945
MR MCNALLY: Can I draw the attention of the Full Bench to the fact that while we were here this morning there was promulgated regulations relevant to chapter 1, division 3, geographical application of the Act which regulations deals with the coverage of the Act in certain areas beyond the territorial sea and deals with the permit and licence situation.

PN3946
JUSTICE GIUDICE: I see. I think I gathered from this morning's exchanges, Mr McNally, that there are two potentially relevant developments, one being the regulations and the other being the foreshadowed amendment to the Request.

PN3947
MR MCNALLY: Ministerial direction, yes.

PN3948
JUSTICE GIUDICE: Thank you for bringing that to our attention. If there are no other submissions, Mr Harvey, you have been very quiet.

PN3949
MR HARVEY: No, we have no submissions with regard to this particular award, your Honour. Thank you.

PN3950
JUSTICE GIUDICE: Thank you. This court room is going to be used for a largely ceremonial purpose in the morning. If there is anybody here who was contemplating leaving anything in the court room to use tomorrow I would urge you not to and we will adjourn now until 11 o'clock tomorrow morning.

<ADJOURNED UNTIL WEDNESDAY, 1 JULY 2009 [3.50PM]