FAIR WORK COMMISSION

Four Yearly Review of Modern Awards

AM2016/26

Outline of submissions in reply on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd regarding the Saturday pay rates applications

22 December 2016

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Submissions in reply to the Applications of the ASU and the RTBU in respect of the Rail Industry Award 2010 ('Award')

1 Introduction

1.1 These submissions are made on behalf of Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (**Rail Employers**).[1]

1.2 The Australian Municipal, Administrative, Clerical and Services Union (**ASU**) and the Australian Rail, Tram and Bus Industry Union (**RTBU**) filed identical applications to amend clause 23.2(b) of the Award on 5 November 206 and 6 November 2016, respectively (**Application**). The RTBU and ASU filed joint submissions in support of the Application on 6 December 2016 (**RTBU/ASU Submissions**), and the Australian Manufacturing Workers Union (**AMWU**) filed submissions in support of the Application on 12 December 2016 (**AMWU Submissions**).

1.3 The Rail Employers opposes the Application, and makes the following submissions in reply to the ASU and RTBU Submissions, and the AMWU Submissions.

2 Relevant legislative provisions

2.1 On 10 October 2016, the Rail Employers made submissions in support of the application to vary the annualised salary clause in the Award. At paragraphs [2.1] – [2.9] of those submissions, the Rail Employers set out the legislative framework for the variation of existing modern award provisions. We adopt those submissions in respect of the present Application.

2.2 Most notably, the Rail Employers submission at [2.4] of those submissions states:

> A Full Bench of the FW Commission has noted that[2]:
>
> > The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must **advance a merit argument in support of the proposed variation**. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a **submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation**.
>
> (our emphasis)

2.3 In addition to this, the same Full Bench the Fair Work Commission stated[3]:

> In conducting the Review (4 yearly review of modern awards) the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Im**plicit**

[1] Referred to in previous proceedings as the Rail Skills and Career Council (**RSCC**) and the Australasian Railway Association (**ARA**).
[2] [2014] FWCFB 1788 at [60] sub-point 3. We have provided links to previously filed submissions.
[3] [2014] FWCFB 1788 at [24]

> **in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective.** The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. 14 **In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective** at the time that it was made.
>
> (our emphasis)

2.4 The Rail Employers submit that the RTBU/ASU and the AMWU, in their respective submissions, fail to address the relevant legislative provisions, and fail to include any probative evidence which supports their requested variation. In circumstances where the Fair Work Commission is to proceed on the basis that *prima facie* the award under review achieved the modern awards objective at the time it was made, without any probative evidence supporting the variation to the award, the Application must fail.

3 Exposure Draft and written submissions

3.1 On 12 September 2008, the Australian Industrial Relations Commission (**Commission**), as it then was, published an Exposure Draft of the Rail Industry Award 2010. The Exposure Draft contained the following clause

> **21.1 Overtime payments: employees other than shift workers**
>
> (a) Except where provided otherwise in this clause, an employee must be paid the following additional payments for all work done in addition to ordinary hours:
>
> (i) 50% of the ordinary hourly base rate of pay for the first three hours and 100% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until noon Saturday;
>
> (ii) 100% of the ordinary hourly base rate of pay for overtime worked after noon on a Saturday or at any time on a Sunday; and
>
> (iii) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.

3.2 On 26 September 2008, the Rail Employers provided a copy of draft submissions and a mark-up of the Exposure Draft (**September 2008 Submissions**) to affected Union representatives, and met with such representatives on 29 September 2008 and 7 October 2008.[4]

3.3 The September 2008 Submissions stated:

> [11.2] The proposed overtime clause has been substantially amended. The clause as drafted did not reflect the fact that parts of the industry operate on a 24 hour/7 day basis. The draft also operated inequitably depending upon the period of time in which an employee worked overtime on Saturdays. This would particularly impact upon the ability of staff to swap shifts to meet personal convenience because of the variable pay rate.

3.4 The mark-up exposure draft attached to the September 2008 Submission proposed (among a number of other proposed revisions) a deletion of clause 21 in the Exposure

[4] See Submissions of the RSCC on 13 October 2008, at [1.1]

Draft, which dealt with overtime and penalty rates, and the inclusion of the following clause:

> **21.2 Overtime rates**
>
> Subject to a variation agreed in accordance with Clause 8 Award Flexibility or any other arrangement that averages hours of work, employees will be entitled to be paid:
>
> (a) at the rate of time and one half of the base rate of pay for the first three hours, and double the base rate of pay for time thereafter for any time worked over 8 hours on a Monday to Friday, except for public holidays;
>
> (b) for all ordinary hours worked between midnight Friday and midnight Saturday time and a half the base rate of pay, and for time outside of ordinary hours or a combination of both, time and a half for the first 11 hours and then double time thereafter.

3.5 The RTBU made submissions on 10 October 2008 which adopted the overtime clause contained in the Exposure Draft without amendment. The only submission made in respect of overtime in the RTBU submissions was:

> In relation to overtime, the Rail Unions reject the employers' proposal to limit overtime to Clerical, Administrative and Professional Employees above a particular classification.
>
> Further, an additional clause has been inserted to ensure that part-time employees are eligible for overtime if they are required to work more than their agreed hours of work, not only after 38 hours per week.

3.6 The ASU also made submissions on 10 October 2008, which set out a number of variations to the Exposure Draft. The ASU did not, however, seek any variation to the overtime clause in the Exposure Draft.

3.7 The Rail Employers then finalised its submissions, which were filed on 13 October 2008 together with a further mark-up of the Exposure Draft (**October 2008 Submissions**). The October 2008 Submissions stated in respect of overtime and penalty rates:

> [13.3] The reality within the rail industry is that overtime is common place. The NES address this by the inclusion of reasonable additional hours. However, it was agreed with the unions that a clause including the obligation in respect of overtime should be specified.
>
> [13.4] The proposed overtime clause has been substantially amended. The clause as drafted did not reflect the fact that parts of the industry operate on a 24 hour/7 day basis. The draft also operated inequitably depending upon the period of time in which an employee worked overtime on Saturdays. This would particularly impact upon the ability of staff to swap shifts to meet personal convenience because of the variable pay rate.
>
> [13.5] The clause as drafted would also result in a substantial cost increase.
>
> [13.6] The new clause 21.3 identifies specific rates from Monday to Friday and Saturday overtime. The entitlement is subject the award flexibility clause and other

arrangements in respect of averaging hours where steps are taken to meet particular needs.

[13.7] As clause 21.3(b) would lead to a direct additional cost to ARTC, the clause is varied in its application to ARTC.

[13.8] Overtime rates will not apply to Sunday work because of the loading in the amended clause 21.6.

3.8 The mark-up Exposure Draft attached to the October 2008 Submissions contained the following draft clause 21.2, slightly varied from the Exposure Draft attached to the September 2008 Submissions (the amendments are shown in bold text below):

> **21.2 Overtime rates**
>
> Subject to a variation agreed in accordance with Clause **7** Award Flexibility or any other arrangement that averages hours of work, employees will be entitled to be paid:
>
> (a) at the rate of time and one half of the base rate of pay for the first three hours, and double the base rate of pay for time thereafter for any time worked over **ordinary hours** on a Monday to Friday, except for public holidays;
>
> (b) for all ordinary hours worked between midnight Friday and midnight Saturday time and a half the base rate of pay, and for time outside of ordinary hours or a combination of both, time and a half for the first 11 hours and then double time thereafter.

3.9 We adopt the September 2008 Submissions and the October 2008 Submissions in the current proceedings.

3.10 The RTBU also made submissions on 1 August 2008, 3 August 2008, 13 August 2008, 22 August 2008, and 7 November 2008, none of which addressed the issue of Saturday overtime.

3.11 The ASU also made submissions on 1 August 2008, 28 August 2008, 10 October 2008 and 29 May 2009, none of which addressed the issue of Saturday overtime.

4 Award modernisation process

4.1 On 20 - 31 October 2008 and 5 November 2008, a hearing regarding Award modernisation was held before Justice President Giudice, VP Lawler, VP Watson, SDP Harrison, SDP Watson, SDP Acton and Smith C.

4.2 The RTBU submitted that it has skimmed the transcript of these proceedings and it is at a loss as to how the overtime clause changed from the Exposure Draft to the clause that now exists in the Award.[5]

4.3 The Rail Employers have also reviewed the transcript of this hearing. The transcript of proceedings on 21 October 2008 records the following submission made by Mr Woods on behalf of the Rail Employers[6]:

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[5] RTBU/ASU Submission, at [6].

[6] Transcript of proceedings AM2008/5, 21 October 2016, at PN1058-PN1059. Mr Woods' oral submissions are from PN1029- PN1071.

> In respect of the overtime clause which is 21, I appreciate the difficulties Commission may have had in identifying how to approach this given the variety and nature of work within the industry. You will see in our submission we have substantially recast the way in which the overtime clause operates. In particular in relation to clause 21.1A which deals with some of the basic overtime rates we have recast it to reflect the nature of the work that is done in the industry, rather than looking at a metal industry style overtime clause, because otherwise, for example, we will see disparity of treatment between someone who started work on Saturday morning as opposed to a Saturday afternoon.
>
> We understood from our consultation with the union that they agreed with our approach in respect of the overtime clause. They haven't adopted it in their draft, I am not quite sure what happened between our consultation and the outcome, but in terms of dealing with the overtime clause as a whole and dealing with the shift penalties, we have addressed what we say is the way the industry is actually working and reflects what people are being paid.

4.4 Ms Persdee on behalf of the RTBU then made oral submissions.[7] The RTBU's oral submissions did not address the issue of Saturday overtime.

4.5 Mr O'Brien on behalf of the ASU then made oral submissions.[8] The ASU's oral submissions did not address the issue of Saturday overtime.

4.6 The AMWU did not make oral submissions in respect of the Rail Award at this hearing.

4.7 A copy of the relevant extracts from the 21 October 2008 hearing is attached and marked annexure "**A**".

4.8 Further to the hearing of 21 October 2016, on 5 December 2008, an informal conference was held before SDP Harrison.[9] At this conference, draft amended clauses were tabled including the overtime clause, which included the following suggested provision:

> …(b) for all ordinary hours and overtime worked between midnight Friday and midnight Saturday, time and a half the base rate of pay.

4.9 In response to the RTBU/ASU Submissions at [6], the Rail Employers submit that, after reviewing the transcript and the other available extrinsic material (such as the draft clause submitted at the conference of 5 December 2008), it is clear that at all times the Rail Employers opposed the formulation of the overtime clause as it existed in the Exposure Draft.

4.10 Mr Woods clearly articulated this in his oral submissions (extracted above), citing the "*disparity of treatment between someone who started work on Saturday morning as opposed to a Saturday afternoon*" as the basis behind the Rail Employers' opposition to the Exposure Draft. The proposed alternative sought to "*reflect the nature work that is done in the (rail) industry*" rather than simply adopt the metal industry approach. This view was reflected in the draft clause tabled at the 5 December 2008 conference and the clause as eventually inserted by the Commission. The Rail Employers recognise that the informal conference of 5 December 2008 was not attended by representatives of the ASU.

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[7] Transcript, 21 October 2008, PN1073 – PN1087.
[8] Transcript, 21 October 2008, PN1089– PN1100.
[9] Affidavit of Mr Woods dated 22 December 2016.

4.11 In response to the AMWU Submission at [10], the Rail Employers submit that while the transcript identifies Mr Woods on behalf of the Rail Employers noting a correlation between the technical and engineering classifications in the rail industry and the metal industry,[10] this oral submission actually deals with the issue of hours of work, and in fact identifies that such an approach is "not entirely appropriate" in the rail industry, supporting a move away from the position in the metal industry.

5 Pre-reform Awards and Enterprise Agreements

5.1 In response to the pre-reform Awards referenced in the RTBU/ASU Submissions at [8] and the AMWU Submissions at [3], the Rail Employers submit that these pre-reform Awards were available to and before the Commission at the time of Award modernisation.[11] The Commission made its decision with respect to the overtime clause with this information before it. In our submission, the pre-reform awards are irrelevant to the current proceedings.

5.2 In response to the AMWU Submissions at [9], the manner in which overtime is provided for in various enterprise agreements in the rail industry is irrelevant to the formulation of the Award. The Award provides a safety net of minimum entitlements for all employees across the industry, whereas enterprise agreements are collective agreements between employees and employers at an enterprise level, to address the needs of specific enterprises. In our submission, the fact that the majority of enterprise agreements provide for overtime on Saturday at double time for all hours worked, or after the first 3 hours, is irrelevant for the content of the Award.

6 Modern award objective

6.1 The AMWU submissions at [12] highlight the fact that the modern award objective was not in force in 2008 when the modern awards were made and did not appear within the Minister's Request or Part 10A of the Workplace Relations Act 1996.

6.2 The modern awards objective, as set out in section 134 of the Fair Work Act 2009, provides the Commission must ensure that modern awards, together with the National Employment Standards, provide a **fair and relevant minimum safety net** of terms and conditions, taking into account a number of specific matters.

6.3 The Workplace Relations Act 1996 also provided that modern awards:

> (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
>
> (b) together with any legislated employment standards, **must provide a fair minimum safety net** of enforceable terms and conditions of employment for employees; and
>
> (c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and
>
> (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and

[10] Transcript, 21 October 2008, PN1056.
[11] See, for example, [2008] AIRCFB 1000, at [242]

(e) must result in a certain, stable and sustainable modern award system for Australia.[12]

6.4 Further, the objects of Part 10 of that Act, which dealt with awards generally, included ensuring that **minimum safety net entitlements** are protected through a system of enforceable awards.[13]

6.5 While the modern award objective in the Fair Work Act specifically refers to certain matters which should be taken into account in providing a fair and relevant minimum safety net, including the need to remunerate employees for overtime and weekend work, the provisions of the Workplace Relations Act set out above also provided for the protection of minimum safety net entitlements.

6.6 The concept of additional payment for overtime is a common concept in awards generally. The presumption that *prima facie* modern awards under review achieved the modern awards objective that was in place at the time of creation means that it must be presumed that the Award provided a fair minimum safety net (see paragraph 2.3 above). The Rail Employers submit that based on this presumption, it can be accepted that the Award contains a provision providing an adequate safety net addressing additional payment for overtime. The RTBU, ASU and AMWU have not established a sufficient evidentiary case to bring the Commission's formulation of this provision into doubt.

6.7 The AMWU submissions at [12] cite the fact there is no distinction between ordinary hours and overtime hours worked on a Saturday in making the submission that the current Award fails the requirement to provide additional remuneration for working overtime. The current overtime clause provides a 50% loading for **all hours worked on a Saturday**, rather than loading only for hours worked outside of ordinary working hours. The Rail Employers submit that, in accordance with our earlier submissions, the current overtime clause properly addresses the nature of work in the rail industry as a 24/7 business, and the way in which work is actually being performed. The current overtime clause not only provides additional remuneration for employees working outside of normal working hours on Saturday, but it provides additional remuneration for **all** hours of work performed on a Saturday. In our submission, the clause therefore addresses the modern award objective provisions cited by the AMWU.

7 Conclusion

7.1 Based on the above submissions, and our prior submissions referred to therein, we respectfully submit the Applications should be dismissed, and that there be no variation to the current overtime clause in the Award.

Anthony Woods
Henry Davis York

22 December 2016

[12] Workplace Relations Act 1996 (Cth), s 576A.
[13] Workplace Relations Act 1996 (Cth), s 510.

Affidavit of Anthony Joseph Woods

FAIR WORK COMMISSION

Commission Matter No: AM2014/87 / AM2016/26

Four Yearly Review of Modern Awards

On 22 December 2016 I Anthony Joseph Woods of 44 Martin Place, Sydney, Solicitor, say on oath:

1. I am a solicitor and a Partner of Henry Davis York (**HDY**). HDY acts for Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (**Rail Employers**) in proceeding AM2014/87 and AM2016/26 in relation to the 4 yearly review of the Rail Industry Award 2010.

2. I am the Partner with carriage of this matter.

3. HDY also acted for the Rail Skills and Career Council (**RSCC**) during the award modernisation process in 2008 and 2009. I was the Partner with carriage of this matter.

4. On Friday 5 December 2008, I attended the private conference before SDP Harrison with other members of the RSCC, and representatives of the Rail, Tram and Bus Industry Union, including Ms Presdee (solicitor) and Mr Harvey, and the Communications, Electrical, Electronic, Energy, Postal, Plumbing and Allied Services Union of Australia/Electrical Trades Union, including Mr Murphy. At this meeting, we discussed a number of matters, including hours of work and overtime. The RSCC provided a draft amendment to the clauses regarding ordinary hours of work and overtime at this meeting.

   A copy of this draft amendment is attached and marked **AJW-1**.

Sworn at Sydney
Before me:

Solicitor
Albert Khouri
44 Martin Place, Sydney, NSW, 2000

Anthony Joseph Woods

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17. Annualised wage and salary arrangements

17.1 An employer may pay an employee an annualised salary in lieu of any or all of the following provisions of the award:

Clause 15—Classifications and minimum wage rates;

Clause 16—Allowances;

Clause 18—Ordinary hours of work;

Clause 21—Overtime and penalty rates;

Clause 22—Annual leave loading;

Schedule C—Transitional Provisions.

17.2 Where an annual salary is paid the employer must specify in writing the annual salary that is payable and what provisions of this award will not apply as a result of the annual salary arrangement.

17.3 The annual salary must be no less than the amount to which the employee would have been entitled to receive under the rates and allowances prescribed by this award. 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.

17.4 For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant minimum weekly rate of pay in clause 15 and excludes any incentive based-payments, bonuses, loadings, monetary allowances, overtime and penalties and any other separately identifiable amounts incorporated into the annual salary.

Part 5—Hours of Work and Related Matters

This clause supplements Division 2 of the NES which deals with Maximum weekly hours.

18. Ordinary hours of work

18.1 The ordinary hours of a full-time, part-time or casual employee will be in accordance with clause 10—Types of employment.

18.2 For the purposes of s.12 of Division 2 of the NES an employee's weekly hours may be averaged over a period of up to ~~52~~ 16 weeks.

18.3 The maximum length of ordinary hours in a shift is 12 hours.

18.4 Ordinary hours can be worked on any day of the week.

18.5 For employees in Technical & Civil Infrastructure classifications, ordinary hours are worked within the span of 0600 to 1830.

19. Rostering

19.1 The employer may change shift rosters or require an employee to work a different shift roster at the direction of the employer where operational circumstances require. The employer will provide the employee with as much notice as practicable prior to any change in the roster and, wherever possible, the employer will consult with the employee before any change to the roster is made.

19.2 The employer will arrange overtime work or shift work in a manner that ensures employees are provided with a break between work on successive days or shifts. The minimum break will reflect the operational requirements and conform to the principles of fatigue management.

20. Breaks

An employee may be rostered for an unpaid meal break of not less than 30 minutes during the course of an 8 hour shift provided that it does not interfere with operational requirements. Where an unpaid meal break is provided, the employee, where practical, should not be required to work more than five hours without a break.

21. Overtime and penalty rates

21.1 Overtime and penalty exclusion

(a) Employees within the clerical, administrative and professional classifications engaged on a base rate of pay per annum that is at or above Level 7 will not be entitled to overtime, shift penalty or penalty rates.

(b) An employee working on a Saturday, Sunday or public holiday or working overtime will not receive a payment of a shift penalty.

(c) Clause 21.3(b) will until 1 January 2015 apply to Australian Rail Track Corporation on the basis that double time only applies after the first 12 hours.

21.2 Overtime work

Employees are obliged to work reasonable additional hours. Additional hours may attract an overtime payment in accordance with this clause 21.

21.3 Overtime rates

Subject to a variation agreed in accordance with Clause 7 Award Flexibility or any other arrangement that averages hours of work, employees will be entitled to be paid:

(a) at the rate of time and one half of the base rate of pay for the first three hours, and double the base rate of pay for time thereafter for any time worked over ordinary hours on a Monday to Friday, except for public holidays;

(b) for all ordinary hours and overtime worked between midnight Friday and midnight Saturday, time and a half the base rate of pay~~, and for time outside of ordinary hours or a combination of both, time and a half for the first 11 hours and then double time thereafter~~.

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TRANSCRIPT OF PROCEEDINGS

Workplace Relations Act 1996 *19207-2*

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

AM2008/2 AM2008/3 AM2008/4 AM2008/5 AM2008/6 AM2008/7 AM2008/8 AM2008/9 AM2008/10 AM2008/11 AM2008/12

s.576E - Award modernisation

Award Modernisation
(AM2008/5)

SYDNEY

10.13AM, TUESDAY, 21 OCTOBER 2008

Continued from 20/10/08

Hearing continuing

reconsidered, at least in relation to transport workers, elsewhere, in relation to other areas.

PN1026

JUSTICE GIUDICE: Yes, thank you, Mr Fager. Yes. Are there any other submissions in relation to the mining draft award?

PN1027

MR SKENE: I would like to say one very quick thing arising from the LHMU submission, your Honour, and that it is that he said that the LHMU has put an assumption that we don't oppose this issue. Plainly we do, particularly in relation to scope and coverage where they seek that the award be limited to direct mine employees …. all the submissions put by AMMA on this issue. So to the extent that there is any confusion about that, we would say it was misplaced.

PN1028

JUSTICE GIUDICE: Yes, sure. We'll now hear some contributions in relation to the exposure draft in the rail industry and we'll start with the employers. Mr Woods.

PN1029

MR WOODS: Thank you, your Honour. Again addressing, going through the draft, the exposure draft and dealing with the issues raised and I will not refer in any detail to our written submissions. With respect to clause 3 dealing with definitions, the combined union and the ASU in particular, raised the need for definitions in respect of annual salary and annualised wage or salary arrangement. We don't see that they've got any particular purpose. I think in respect of the draft as it is, they don't add anything of significant substance to warrant being present. To the extent that they are seen as any aid to assisting coverage and that was a matter that was discussed during the meetings between the parties and if it's got some link back into that, you'll see that we have identified what is effectively an annualisation of the base rate of that is an issue in respect of coverage.

PN1030

In respect of this draft, exposure draft, unlike many others, there's not a lot of consultation in any of the submissions about the parties bound. The parties that I represent are in fact the individual employers so we don't have any particular issue in respect of that. There has not been any comment by the union, but in particular as I recall in respect of being a party or respondency and we don't have any particular view to put in respect of that. I note the comments by the Minister in respect of what might come in, legislation that they hope to have passed, but it may well be a matter that this Commission will have to deal with once we actually have some genuine legislation and to make a determination about who should be a party.

PN1031

In respect of the standard rate definition, there is a difference between the combined union submission and ours. We have, in the course of the consultation, discussed a standard rate calculation to deal with the disability based payments when we were discussing allowances and we used that calculation method to then standardize the rest of them, hence the difference in the standard rate proposal that we have put forward.

PN1032

In respect of the application of the draft award, you'll see that there's agreement between the unions and the employers by becoming a clearly exclusive award. That's the intention. When you look at the general structure of the award around an employer respondency based upon the rail transport operator, we do have then an introduction of clause 4.1(a) into the exposure draft to affirm that position.

PN1033

There has been some other discussion in respect of the way in which the application clause would act. In respect of clause 4.1(d), in our version of the draft that we have submitted, the second line of that has words, "and to those employees of the". I suggest that's a bit hard to follow and better replaced by "employed by the rail transport operators", or "employed by rail transport operators". In clause 4.2(b) the unions raise a different way of dealing with the issue around private signings and proposed annual work. Predominantly at the beginning of that clause, we will adopt that and don't therefore need the additional words we'd place at the end of that clause.

PN1034

The unions then make submissions in relation to a number of other matters. First of all they seek to add into clause 4.1(c) dealing with employees of labour hire agencies. Apart from the fact that it addresses employees but not employers and trying to identify how the draft would apply, it is clearly not intended to be employees of the rail transport operators in that draft. We see this award as being one addressed to the industry operating and identified by the rail transport operators. In respect of labour hire employees, or employees of labour hire companies who might come in and work, we see them as falling in this award. They will have whatever employment conditions relayed back to their employer. The same issues apply in respect of contractors and contractors' employees. We don't see them as necessarily therefore falling within the scope of this award.

PN1035

In respect of some of the other matters, the CFMEU and AWU have raised issues in respect of construction and we have addressed those in our submissions already. The RTBU has raised, or the union has raised issues of deleting tourism, heritage exclusion. We see that the people who operate purely tourism and heritage operations as certainly being outside the scope of the main frame rail transport operators dealing with passenger, main line passenger and freight services. That's why the exclusion is there and they're not operating effectively in the permanent heavy rail industry.

PN1036

They also seek to remove the exclusion in respect of freight terminals. In our version of the draft we have identified freight terminals that are operated by the rail transport operators to maintain the inclusiveness in respect of the employers and that's what we see as being appropriate. Someone else who happens to be a freight terminal operator, that is coming within the scope of the award, so we would maintain that exclusion. In respect of a change to what is clause 4.2(j) in our draft, that's agreed between the union and ourselves.

PN1037

The unions have a clause in respect of clause 4.5 and the draft submitted would appear on reflection to be missing some words. Its design came up in discussions

with the ASU where they would propose that it links back to some existing awards where the ASU has coverage. Our submission, and our comment to them in the past is that in drafting a modern award is not a time to include references back to past awards to try and deal with the coverage issue. If that's what it's really there for, he question of coverage should be faced head on in the modern award context. We reject that inclusion.

PN1038

In respect of the dispute settlement procedure, the union's general submission is in support of the ACTU and your comment in that respect of the status quo, we have similarly raised some issues in respect of that in the current draft in dealing with the clause. There was comment earlier this morning in respect of that. I appreciate the issues associated with that and I won't advance other than to say that we are opposed to including a status quo clause for the reasons previously advanced.

PN1039

Similarly in respect of the dispute, in the proceeding that the ACTU raised introducing training leave. This, in the context of an award of this structure, particularly where we don't know who was respondent, raises the question of who gets the leave, when do they get the leave, does everybody get the leave? Historically we know that that leave has been around and provided to delegates to attend particular training. In the structure of this award, it seems to be an unusual feature to load up the employer with this obligation when it's not clear exactly who is going to get it and how, and we would submit that it should not be brought into the award.

PN1040

In respect of probation, clause 11, there is one submission by the AWU in respect of the period and we reject that and maintain the clause as proposed in the exposure draft. In respect of the classifications, the Commission encouraged the parties to take some further work on that and there has been some further work. Unfortunately I can't say that it's concluded work. In dealing with the different classifications, in respect of the stream dealing with clerical, admin and professional, there is reasonably clear propositions in respect of anything about that, about what is the right way to go and I don't propose to go any further in respect of those. I think that puts the respective position of the parties.

PN1041

There is one issue in respect of the linking back of an entry level for a third year graduate equivalent to C5 and a four year university graduate to C6. I haven't been able to identify what historical thinking generates that. That's in the ASUs submissions in paragraphs 46 and 51. In any event we have identified where we see the entry level for university graduates on the basis they might have a degree, but they ….. on their commencement.

PN1042

In respect of the operation stream, there's a significant divergence in approach in terms of what's been submitted to date. We have today had some further discussion about that. It may be that the parties will have achieved some further discussion within the next week about what might come of that stream. For the

time being obviously we stand by the submissions that we have made. If there is any advance that can be made, the Commission will be informed in respect of that.

PN1043

In respect of the technical and civil stream, we had submitted that there was general agreement. There obviously is some difference on the written submissions. Again we've had some further discussions continuing today. There seems to be down to only a couple of points in respect of that and I'm pretty confident that we will in fact nail an agreed structure in respect of the technical and civil structure.

PN1044

The issue of allowances, as it does across all the modern awards, cause much the same problems. We have made submissions in respect of the draft allowances and I've left that at that point. There are a number of additional allowances introduced by the union, they would suggest that their draft clauses 16.8 through 16.12, What we have attempted to do because the allowances are so disparate across the various state based historical railway systems is to include a schedule C which identifies the allowances that are continuing on a transitional basis for all individual employers. This raises a question about, well, why should something be transitional as opposed to being substantive, so that it doesn't die out?

PN1045

The one important thing in respect of this industry is that it is quite heavily populated by enterprise agreements that really address most of this and perhaps part of the problem in trying to deal with the issues in the awards as a standard, because they have been largely left on the sideline because of the way the industry has developed and we see that recognising these other allowances are not sufficiently consistent across the industry as a whole. It's best to preserve the entitlement to employees through the transitional provision and accepting the reality of how they are dealt with by enterprise agreements.

PN1046

Some of them pick up these allowances, some of which have found a way to roll to a basic aggregated wage approach. So we've invited the unions to identify in respect of our schedule C if there are any other specific allowances that are prevalent, that should be incorporated and we can discuss that, but we've approached it on the basis of those that we see as being consistent. As you'll see in respect of the bulk of the disability style allowances which are covering off from clause 16.9 in our submission or our draft through to the end of clause 16, there is substantial agreement with the drafts proposed by the union, particularly as set out in the AMWUs submission.

PN1047

The unions raise in respect of the expense allowances and linking back to CPI and effectively adopt the submission in respect of the ACTU in that regard. We're quite content to leave the allowances as a calculation back against the standard rate. There is one structural problem that I see for the Commission in respect of the request because it identifies allowances being adjusted when wages are - and I understand that's perhaps the essence behind the structure adopted by the Commission, that might be able to be overcome by identifying that when a wage

increase occurs, you go back and apply a CPI formula to try and come up with the new allowance.

PN1048

If you did that you would need to incorporate into the definitions a base expense allowance, presumably a dollar, given the range of some of these allowances, and then work out the percentages against the dollar amounts as identified in the draft that we have now. We've tended to go to real values of the expense allowances now and adopt that against the standard rate percentage. So there is a way to get around it. I think it's ultimately an issue, if that's the way the Commission would see to do them. We could come up with a formula that linked to CPI, but it's the issue structurally, as we see it, in terms of looking back to the Request and how that is addressed.

PN1049

JUSTICE GIUDICE: I think that our concern was to find some automatic and simple way of doing it so that you didn't need to physically alter the award. You could simply rely on a percentage or some figure and that's really where the expense basis that's traditionally been adopted is difficult to apply. We've had a range of reactions to the suggestion, on balance probably not too many of them very favourable. People are saying, well, expense related allowances are related to expenses, so that's how they should be adjusted. The possibility is that the proposal we've put forward might work if, in the contemplated four year review of awards some exercise was done to just simply update those expense related allowances, but anyway we'll have to consider what we do in light of people's responses.

PN1050

MR WOODS: And, as I said, we're content to go with the current Commission flow on that.

PN1051

JUSTICE GIUDICE: Yes.

PN1052

MR WOODS: There is in respect of expense allowances a raising of the accident payment flagged by the Commission, and picked up by the union that that is included. In respect of the rail industry I think without having done a full analysis of how accident pay fits into a definition of, historically, allowances, and it doesn't appear to link to way in which a job is done as opposed to an absence from a job and it may not fit into that in terms of the legal definition, but whatever the outcome of a legal definition, maximum pay has not been a feature of any of the rail industry awards, and so on the principle of not introducing an extra cost, we would see it as not being included into the rail industry award.

PN1053

The ASU raised in particular the issue of the annualised salaries and wages clause. We have responded to part of their issue in terms of identifying the wage as opposed to salary. The main issue for them, as we understand it, is the issue of an employer imposition of an outcome. The importance about the clause as proposed, it just converts the various dollar amounts, into a real amount. There is actually no net loss to employees the way we see our clause operating and allows for streamlining across to an annual amount, then can be paid appropriately, so we

don't see that that causes any particular issue and it is very different to the issues surrounding the award flexibility clause which could have a number of changes in respect of the whole approach of the award.

PN1054

In respect of the issue of hours, there is substantial room between ourselves and the unions as to what should happen in respect of that, and we have identified that in our written submissions, particularly ultimately as it flows out averaging as to whether or not there is a particular period in which it is averaged. As I say, we address that in our written submissions. In respect of having a span of hours, again the industry is very diverse.

PN1055

There is clearly a position in what we describe as the operational stream, there is no span of 24 hour operation and the rates and the issues of overtime, et cetera, respond to that. In respect of the clerical, admin and professional stream, again commonly in a number of places no span of hours reflecting more the nature of the work that is predominantly Monday to Friday work, though in some awards they do have it.

PN1056

In the technical and civil stream there is a higher level of consistency of some span, generally relating back to the metals, but again it's not entirely appropriate. Because of that level of disparity is why we have put forward having no span of hours and then otherwise allowing the issues of rates in pay, et cetera, which span what otherwise have identified being left to the overtime penalty rates clause to effectively provide remuneration levels that respond to that. In respect of clause 20 that deals with breaks, there is agreement in respect of the amendment at clause 20.1 from the exposure draft.

PN1057

The unions have then put in another clause dealing with minimum rest periods and intervals. We say that that is not necessary. Ultimately it's taking a long term in the past historical approach to safety issues and ensuring appropriate long rest spans. This industry has come a long way with management and safety issues with national legislation and national guidelines and in that sense it is not necessary to bring it back into an award.

PN1058

In respect of the overtime clause which is 21, I appreciate the difficulties Commission may have had in identifying how to approach this given the variety and nature of work within the industry. You will see in our submission we have substantially recast the way in which the overtime clause operates. In particular in relation to clause 21.1A which deals with some of the basic overtime rates we have recast it to reflect the nature of the work that is done in the industry, rather than looking at a metal industry style overtime clause, because otherwise, for example, we will see disparity of treatment between someone who started work on Saturday morning as opposed to a Saturday afternoon.

PN1059

We understood from our consultation with the union that they agreed with our approach in respect of the overtime clause. They haven't adopted it in their draft, I am not quite sure what happened between our consultation and the outcome, but

in terms of dealing with the overtime clause as a whole and dealing with the shift penalties, we have addressed what we say is the way the industry is actually working and reflects what people are being paid.

PN1060

SENIOR DEPUTY PRESIDENT ACTON: Mr Woods, when do you get overtime?

PN1061

MR WOODS: Pardon?

PN1062

SENIOR DEPUTY PRESIDENT ACTON: When does overtime kick in?

PN1063

MR WOODS: Overtime kicks in based upon the number of hours that are worked and relates back to your shift, your Honour.

PN1064

SENIOR DEPUTY PRESIDENT ACTON: So is it after 38 hours?

PN1065

MR WOODS: Again, it depends upon the averaging in terms of what arrangements are made in respect of averaging because if we take, for example, one of the issues we addressed was that the issues in respect of Queensland about the lack of a season where they compress hours over the whole year into a nine month period, so it can't in that sense operate purely in respect of 38, but the industry does work essentially over 76 hours over a fortnight, that's true and that links back to the 38, but otherwise it picks up as it does in clause 21.3 in respect of the hours that are worked.

PN1066

SENIOR DEPUTY PRESIDENT ACTON: You are proposing it averaging over 52 weeks, aren't you, is that right?

PN1067

MR WOODS: Yes, we did because we were trying to address some of those longer spanning issues in terms of the flexibility that is required.

PN1068

SENIOR DEPUTY PRESIDENT ACTON: Yes, all right.

PN1069

MR WOODS: In respect of - there is no other submissions in respect of particular clauses in the draft. As to matters that are not there at the moment, the AMWU raises the superannuation clause, had a lot of excitement yesterday. The superannuation clause was not included in the draft award consistent with the Commission's earlier statement that it is not going to apply a clause that doesn't already exist.

PN1070

The correct position in respect of rail and we would say that that should be left aside also because of the government related historical arrangements in relation to superannuation which we have addressed in our written submissions. The AMWU identifies a particular sub-clause which will apply to superannuation in

respect of an employee on workers compensation. Our response to that is the new cost that is not current in the provision because the standard superannuation clause is not part of the current industry awards. In respect of transitional provisions, we will see how we have addressed those.

PN1071

There is one further point in respect of transitionals. We certainly don't see that the introduction of this award as generating a reduction in the current effective award rate. The reality is that I don't think anybody in the rail industry is currently on an award rate. If it was deemed as appropriate to include a transitional provision that identified that as a result of this there was no change in their award rate of pay, then that could be included.I If that's of assistance, we are happy to provide a draft clause, but given the nature of the industry, we don't see it as having a particular immediate relevance going through this transitional provision. Finally in respect of schedule C, there's a couple of typographical amendments which we will forward through.

PN1072

JUSTICE GIUDICE: Thank you. Yes, thank you very much.

PN1073

MS K. PERSDEE: Kristy P-e-r-s-d-e-e for the RTBU.

PN1074

JUSTICE GIUDICE: Thank you.

PN1075

MS PERSDEE: Your Honour, the RTBU will be brief. We rely on our previous submissions, the submission of the union dated 13 August and the combined rail union submission dated 10 October. I will just say in terms of the combined rail unions in relation to parties bound we recognise that the Australian Workers Union does have coverage in the rail industry. However, because of time constraints and work load in relation to award modernisation, they weren't there when we were having a lot of the negotiations so we felt we couldn't agree on their behalf. However, in relation to parties bound, we have no objection to the AWU maintaining a status as a rail union.

PN1076

My friend, Mr Woods, said that there wasn't much discussion on parties bound. That is correct because largely the unions support the ACTU position that you can and should be bound. That is a position that the RTBU strongly believes because it goes to our reason for existence in that we are acting on behalf of workers within that industry. I would just like to raise some additional points in relation to coverage allowances, the shift breaks and hours of work and the transitional provisions. In relation to the award coverage, our position is that basically if you are involved in operation of rolling stock, be it as a tourism rail link such as Puffing Billy or the train that runs through the Melbourne suburban line that gets you to Puffing Billy, you should be covered by the rail award, not just because you are a tourism operator. You have to employ a skilled driver, you have to employ mechanics to maintain those locomotive engines, therefore we believe that those operators should be covered by the rail award.

PN1077

We note that the employers have accepted some of our proposed amendments in relation to private sidings and shipping and other transport. Basically, we wanted to narrow the rail transport operator because anyone who controls a rail is defined as a rail transport operator and we wanted to limit it to those who have a tangible interest in the rail industry, not just the fact that they happen to have a rail line connecting their factory to the main line and so we don't see those as being part of the rail industry, but we do see the operator of the train is taking the freight along that line as definitely being a member of the rail industry, he should be covered by the award.

PN1078

In relation to labour hire firms, while we note that there are a number of contracting awards in the construction and electrical industry in particular, there is no award for rail drivers. Now, rail drivers are probably the group that labour hire firms are likely to be using and that we are certainly most concerned about. We are not concerned about clerical workers who have been acquired from a temp agency, but we are concerned about rail drivers who are employed by Skilled Engineering, who supply labour to freight operators to cover relief or to cover workers in remote areas. Those workers will no longer be covered by a rail award or a locomotive engineman's award and so we seek that they be covered by the modern rail award.

PN1079

In relation to allowances, in our submission of 13 August we raised the issue of a freight allowance, but we weren't entirely sure how it could be calculated, given that some states use tonnage, some states use distance travelled and other states used the capacity of the engine. In negotiations with the employers, we have come to a point of disagreement. The employers have sought to incorporate that sort of allowance as a classification. That is not our position.

PN1080

Our position that it is driving a train, that it has several engines, up to four or five or being in control of the train that is carrying 12,000 tonne is a separate skill to whether you are a driver only operator of that train and so we are at present formulating an allowance which will hopefully reflect the differences across Australia in terms of engines used and average tonnage that we would put to the employers in the next few days.

PN1081

Our position is also that while we note that there are a number of employers who don't pay certain awards which we have raised, there are a number of employers who do and we believe that the award safety net encompasses all allowances that are currently paid, not just those who are paid by every employer. It is our position that those allowances should be included in the body of the award, not just in the traditional provisions.

PN1082

They are the allowances such as the away from home allowance, the relieving expenses allowance, to name two. We note that they are set out in detail in the transitional provisions in relation to Connex and RailCorp and we note that there are some employers who by quirk of history or just the way work has been organised have not had to pay those allowances. We believe the transitional

provisions can allow for employers who are subjected to a new allowance or a new shift penalty to have that then phased in.

PN1083

The federal awards have not applied across all the states, they have applied across probably four States, being South Australia, Tasmania, New South Wales and Victoria and there have been differences within those awards within those states as well, so we have a difficulty that there is no uniformity at all in terms of allowances. However, we have sought for where federal awards have provided for allowances, that they are reflected in the main body of the award.

PN1084

In relation to hours of work and in particular breaks in shifts, while we are aware that employers in the rail industry are extremely conscious of fatigue management and OH&S responsibilities, the difficulty that we have that there is no system currently in place. There are guidelines, but they are unenforceable. There is model legislation that has not yet been adopted in all jurisdictions and where there is safety legislation, it is not necessarily consistent.

PN1085

It is our view that because there are state differences that there should be a national standard for shift breaks and that standard to be included in the award. We have chosen the maximum shift breaks that are contained in the current allowances, but we do note that the Commission may choose to vary the time, but we do believe that that is a provision that should be carried over from the existing award regime.

PN1086

Finally, in relation to the transitional provisions, we will be continuing our search for other allowances that have not been captured by the RSCC provision that are still currently paid as part of the award as opposed to through agreements, but one measure that we would suggest should be included is that there be a phasing in of these allowances for the transitional provisions where the allowance that is contained in the award, compared to the allowance contained in the transition provision.

PN1087

For example, higher duties, there be a phasing in, so that the transitional provision which is for say RailCorp five days, compared to the chief executive shifts or two days as is contained in the award be phased in over the five year period as opposed to being just left if you are an employee of RailCorp or Connex and two days and two shifts if you an employee of any other rail transport authority, so unless the Bench has any questions - - -

PN1088

JUSTICE GIUDICE: Thank you. Mr O'Brien.

PN1089

MR O'BRIEN: Thank you, your Honour, and the Bench. The ASU is putting three submissions in this matter, one on 1 August, one on 28 August and 10 October. The 10 October submission is in two parts. The first part of the submission is in relation to the state and exposure draft. I will go through each of the particular paragraphs and deal with those in that submission and the second

part is an attachment 1 to that submission and it is a summary of the variations sought and the grounds for those variations.

PN1090

Now, just a little bit of background to the ASUs membership in Rail and its coverage in awards. Rail members in New South Wales are covered by the Railway Salaried Officers Employees Award, the Salaried Officers Railways New South Wales Award and the Senior Officers Rail, Bus and Ferries Award. Rail membership in Victoria is covered by the Railway Salaried Employees Award. So you can see they're all basically salaried awards, with the exception of the Queensland Rail Award. Now, the reason I raise this at this stage is because the exposure draft was expressed in weekly wages and I'll now hand up a document to explain to the Bench the ASU has a rules/eligibility issue in that clause.

PN1091

JUSTICE GIUDICE: Yes.

PN1092

MR O'BRIEN: The ASUs coverage in the rail industry is really three parts. One, the clerical side which came from when it amalgamated with the Federated Clerks Union. The other one, this is the Australian Transport Officers Federation, and that's what I've just handed up, and you can see it's the expressed part,I've actually put it - I've made it heavy. The first is the employee on an annual salary rate in any capacity in the transport industry, and therein lies our problem. Our eligibility is affected by the - back to the exposure draft - although it consumes a number of salaried awards, it does not express wage,- pay is annual salary rates. So we had to take some measures, which we have proposed, and I refer to the actual document which is attachment 1 to our 10 October submission. We propose a number of issues.

PN1093

Now, the first two, although they relate to definitions of salary, we have defined annual salary as being 52.178 times the weekly pay, and the second one is to annualise wage and salary arrangements. Those two issues are separate to the issue which I was talking about. The third issue is, we wanted to be certain in the clause 4 application all the employees who, immediately prior to this award coming into force, classified as salaried officers will continue to be employed on an annual salary as defined, and pay periods for annual salaries may be either weekly, fortnightly, as is the custom and practice, and any employee may be employed on an annual salary as defined and paid either weekly, fortnightly, four weekly or such other pay period as is the custom and practice of the employer.

PN1094

Now, that's one part of an attempt to try and deal with that issue. The other part is, I believe, that it would be no skin of anyone's nose, so to speak, if we were to put annual salaries in as well as weekly wages, and also hourly rates would probably be of assistance. And I raise that particularly from a translation point of view where, if you're translating from a particular award rate to another award rate, when they're expressed in annual rates and weekly wages, an hourly rate might be a common denominator to use as a translation. And I've made reference to that in earlier submissions. It's the second submission that we lodged. Now, that's an attempt to deal with those issues which are unique to the ASU.

PN1095

The fourth issue in our attachment 1 deals with a salary structure which differs to the salary structure which is in the exposure draft. And I've given a very detailed reason for that and I don't intend to go over it, but we do rely on our submission there. There's quite a few pages going into all of that. But I do draw your attention to the right hand column which puts in all the weekly wage rates chosen for the clerical, administrative and professional stream, and you can see where they line up against the structure that we have proposed. And one of the advantages of that structure is that it has excellent definitions which arise from the Queensland Social and Community Services Award, which also deals with clerical, administrative and professional people in an eight level structure as it happens.

PN1096

And we could have used other similar structures, we could have used the structures from local government which also deal with eight levels of clerical, administrative and professional, but we felt that this gave us somewhere to go where we had appropriate definitions. And within the rail industry you would probably have noticed from the Rail Awards there are no classification definitions, there's nowhere to go in that respect, so we had to look elsewhere.

PN1097

Now, there is the fourth or the fifth item in our summary of variations required that deals with annualised wage and salary arrangements. And we note that in paragraph 26 of the Commission's statement annualised wage and salary rates, but they're not as a matter of course introduced, yet they were introduced into this award and they were as a suggestion, as a suggestion of the Rail Skills and Career Council, but there was no agreement to that from anyone and there's no history on it in any event, of course. There's no annualised pay classification structure in any of these awards.

PN1098

The first two items in our summary of variations were to deal with that particular issue to try and define the difference between annual salary and annualised salary. And there is a vast difference between those two things. So we oppose that clause, and we ask the Commission to reconsider inserting that into the exposure draft. It does impose on employees - there's no agreement to this - it's imposing and it could apply to every single classification throughout the award. There's no history of it whatsoever, and we feel that it's got no place in this Light Rail Award. But if it does and you deem to see that there is an error in putting it in, we have proposed an alternative clause which works off the flexibility provisions of the award and provides similar safeguards. But our primary position is there should be none, it shouldn't be in there, and if you do deem it's essential, on a case properly put to you, mind you, there has not been a case properly put, but that particular clause should be in a form sought by the ASU and not sought by the Rail Skills and Career Council.

PN1099

That summarises things, apart from issue, which I had better speak on, and that is, on page 11 of the Rail Skills and Career Council's proposal at clause 15, the approach taken by the Rail Skills and Career Council to the clerical, administrative, professional structure differs in two main ways from the actual

structure in the exposure draft. Firstly, in the exposure draft the Commission had an entry level and eight additional levels. The Rail Skills Career Council in its proposal has converted the entry level to a graduate 1. So grade 1 becomes grade 2 et cetera and up to a new grade 9. The Commission only had a grade 8. Now that has had the effect of - now at page 23 of the Rail Skills and Career Council's document you will see there is schedule A Clerical and Administrative Professional Classification and they've put in some classification criteria. Now, the classification criteria that they've introduced is sketchy. It's narrow in focus. It's inadequate to properly classify people within these grades. It's unenforceable.

PN1100

That coupled up with another issue is that the entry level which used to be level 1, that has now become level 1, they've introduced each of these classification criteria in a way where it's say an entry level will become a grade 1 and with a grade 1 descriptor beside it, grade 1 will have a grade 2 descriptor beside it. So it distorts the value base of the actual pay that the Commission initially decided by putting a higher level rate or classification descriptor against a lower rate of pay. So we oppose that in its present form and it's one of those issues that I'm not quite sure how it will be decided but certainly there's an inadequacy within the classification criteria. I think I've had my go. Thank you very much, sir.

PN1101

JUSTICE GIUDICE: Thanks Mr O'Brien.

PN1102

MR BROMLEY: Thank you, your Honour, Commissioners. The CEPU as part of rail unions undertook to look at the technical and civil infrastructure classification structure. Before I continue with that I might just indicate support by the CEPU for the submissions made by the RTBU and the ASU. With regard to the technical and civil infrastructure classification structure you will note in the submissions lodged, the written submissions lodged by 10 October by RSCC and the rail unions, there is some small difference in numbers of classifications and in fact the wording associated with the various classifications.

PN1103

There's been some frenetic, I suppose Mr Wood might agree, discussions this morning in regard to that. Unfortunately we were unable to reach agreement because of the difficulties in putting various alternatives to the other unions. Simply put, whilst in regard to the submissions there may appear on the face of it certain difficulties and some significant differences, we believe those differences have narrowed to the point that some further discussion more particularly in relation to the wording associated with each classification level and the involvement of the other parties in those discussions would be productive.

PN1104

So my submissions will end, your Honour, on the basis that we would urge you to allow and indeed encourage some further discussions between the parties to quickly finalise the proposed technical and civil classification structure. If there are no further questions, your Honour, that would conclude my submissions.

PN1105

JUSTICE GIUDICE: Thank you. Well we do encourage further discussions, I can assure you, and if they could be concluded before the end of next week that would be extremely useful. Yes, Mr Maxwell?

PN1106

MR MAXWELL: Thank you your Honour. Your Honour I'll be fairly brief. We rely on our written submissions in regard to the issues and there's a similar issue that applies in regard to the other industries that you have heard us on today in regard to the application to construction and maintenance work. We point out that construction maintenance work may be brought under building industry conditions. We've attached at appendix C of our submission copies of some New South Wales state awards that deal with construction and maintenance. We also point out that building and construction of railways is covered by the Building and Construction Industry (Northern Territory) Award which has common application in the Northern Territory.

PN1107

In regard to the submissions of the RSCC the only submission they make is that they give some examples where RailCorp undertakes at some point to manufacture. We're not talking about the manufacture of items. The exclusion we're seeking is in regards to the construction and maintenance of the track and in regard to the Australian Rail Track Corporation our understanding is that that was a statutory body set up by the federal government to deal with the maintenance of the rail tracks in South Australia and I think Victoria covered by the old Australian National line.

PN1108

Our understanding is that that body is mainly an administrative body, that they employ very few construction or maintenance workers as such and that where they undertake maintenance work they normally do it on the basis of a joint venture with a construction company such as John Holland and so we say that their conditions of employment should be covered by the appropriate construction awards. We'd also point out that the construction and maintenance of railways is also covered by a number of respective portable building and construction long service leave schemes that operate in a number of the states and therefore their conditions are better served by coverage of Construction Awards and we say that if you are against us on that well then we rely on paragraph 70 of the Minister's submission in regard to the binding terms and conditions for occupation consistent across the relevant industry awards. If the Commission pleases.

PN1109

JUSTICE GIUDICE: Thanks Mr Maxwell.

PN1110

MR DECARNE: The AWU submission will be brief and relative to coverage in relation to clause 4.2(g) of the exposure draft. We've provided the Commission with submissions on our opposition for the potential operation of that clause. I'll refer to the submissions of the CFMEU at paragraphs 3.5.5 and 3.5.6 and in principle we support the position put by the CFMEU at those points and the statements of my friend Mr Maxwell today. The RSCC at paragraph 3.6 of their submissions refer to what they call the reality that employees shall not move between awards where work is ultimately for the benefit of their employer. The

operation of clause 4.2(g) goes much further than that of avoidance in our submission. The AWU submits the terms of that clause should be left to be fully considered within stage 2 or at least in light of the pre-drafting consultations and submission instruction.

PN1111

JUSTICE GIUDICE: Thank you. Any other contributions in relation to the rail industry draft? No. In that event we'll start on security. Mr Delany is it?

PN1112

MR DELANY: Yes, thank you, your Honour, Commissioners. I'm here for the Australian Security Industry Association Ltd and some others. They're listed in our exposure draft submissions.

PN1113

JUSTICE GIUDICE: Mr Delany, just before you start, we will have to adjourn at five so what we intend to do is to make some further time available over the next week if we don't finish in the next 20 minutes which seems likely but you never know, but I can indicate that now. So a few minutes before five we'll talk about what might need to be done to finish the submissions.

PN1114

MR DELANY: Yes, thank you, your Honour. I intend to be fairly brief.

PN1115

JUSTICE GIUDICE: Good.

PN1116

MR DELANY: We stand by the submissions against the exposure draft that we presented in October. There are a couple of matters I'd like to go to and I would like to discuss our opposition in some instances to the LHMUs application.

PN1117

JUSTICE GIUDICE: Yes.

PN1118

MR DELANY: We've worked pretty well together actually and there isn't too much between us quite frankly. May I first go to our submissions. We talk in the application about the occupational nature of the security industry and we seek that the Commission consider very carefully applying two other awards where they include a security officer of the same classification structure that we have here. There is good reason for that. There is good reason for that. It's explained in our submissions for the exposure draft. Clearly I think you will see in other submissions from other parties that there will be - that the exposure draft go ahead in its current form, rates of pay increasing up to about $50 per week for security officers. That may very well put us out of business against directly employed security officers say in other areas of hospitality, retail, hotels, clubs and so on.

PN1119

We would argue that to maintain the integrity of security work that any other awards where directly employed security guards are engaged should carry the same classification structure and rates of pay that come out of the Security Services Award. I won't talk about part-time, I think that speaks for itself Licensing speaks for itself. Redundancy, we would seek - - -