

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 2495 of 1990

IN THE MATTER OF an application by
the Federated Miscellaneous Workers
Union of Australia, Tasmanian Branch
for interpretation of the
Miscellaneous Workers Award

re General Attendant classification
- employees at Dockside Fitness

T No. 2686 of 1990

IN THE MATTER OF an application by
the Federated Miscellaneous Workers
Union of Australia, Tasmanian Branch
for interpretation of the
Hairdressers Award

re application of award re Dockside
Fitness Centre

PRESIDENT

Hobart, 1 October 1990
Continued from 4/9/90

TRANSCRIPT OF PROCEEDINGS

PRESIDENT: Yes. Yes, Mr O'Brien, did you want to ...?

MR K. O'BRIEN: I'm not sure if I appeared with Ms Shelley on the last occasion. I just thought I'd correct the appearance if ...

PRESIDENT: Let me check that.

MR O'BRIEN: Yes, I did, I'm sorry.

PRESIDENT: Yes, you did.

MR O'BRIEN: Yes. I understand that today Mr Fitzgerald seeks to present some evidence and we are agreed that the evidence ought to be proceeded with prior to submission in this matter ...

PRESIDENT: Yes.

MR O'BRIEN: ... if that's acceptable to the Commission.

PRESIDENT: Yes. I note that there may be another appearance.

MR J. EVANS: If the Commission pleases, EVANS, J. representing the Department of Employment, Industrial Relations and Training. I wasn't ... didn't appear in the initial matter, Mr President.

PRESIDENT: Yes. Thanks very much, Mr Evans.

MR FITZGERALD: Mr President, I should I think in this instance, even though MR STEPHENS is a witness here this morning, on this occasion he does also appear with me, so if I could note that for the record.

PRESIDENT: Yes. Thank you, Mr Fitzgerald. Well, do you want to proceed?

MR FITZGERALD: If I could. I expect that, depending on the extent of cross-examination, evidence to be fairly brief as to the duties which was given by ... evidence which was presented by the two FMWU witnesses. I have evidence of rebuttal by Mr Stephens this morning. If I could call Mr Stephens please.

PRESIDENT: Yes.

Mark James STEPHENS sworn

MR FITZGERALD: Mr Stephens, just for the purposes of the record, could you state your address please?

MR STEPHENS: 5 Dillon Street, Bellerive.

MR FITZGERALD: Thank you. What's your current position, Mr Stephens.

MR STEPHENS: Managing Director at Dockside Fitness.

MR FITZGERALD: And how long have you held that position?

MR STEPHENS: Eighteen months.

MR FITZGERALD: Right. Prior to that, can you give the Commission some idea of your work history?

MR STEPHENS: Yes, prior to that, I was the manager at the Eastern Shore Indoor Cricket Centre in Bellerive for 18 months. Prior to that I was a commercial diver for 12 months. Prior to that in the Royal Australian Navy for 9 years.

MR FITZGERALD: Okay. Do you any formal qualifications in respect to the industry in which you're working?

MR STEPHENS: Yes, I am an accredited fitness leader.

MR FITZGERALD: I'm not sure, Mr President whether you just want me to take ... given Mr Fry's presence, I'm happy to just briefly break if you wish me to.

PRESIDENT: We'll go off the record for a moment.

OFF THE RECORD

PRESIDENT: Sorry about that, Mr Stephens and Mr Fitzgerald.

MR FITZGERALD: That's fine, Mr President. So I just ... if you could just recap. What formal qualifications do you hold in respect to this particular industry you work in?

MR STEPHENS: Yes, I am an accredited fitness leader. A course ...

MR FITZGERALD: Can you describe ...

MR STEPHENS: Sorry ... I beg your pardon?

MR FITZGERALD: If you ... I did cut you short there. Could you describe what that involves?

MR STEPHENS: A course designed to educate instructors within the safe exercise practices of individuals.

MR FITZGERALD: Right.

MR STEPHENS: It is a 4-month course.

MR FITZGERALD: Who's the accrediting organisation there?

MR STEPHENS: It's actually a government body and in Tasmania they're called TASFAC which is the Tasmanian Accreditation Certificate Foundation.

MR FITZGERALD: Right, thank you. Were any other employees ... have a similar qualifications ... employees ... by Dockside.

MR STEPHENS: Yes, all employees at Dockside are required to have a field of expertise, a qualification as such, whether or not it be an Australian or an overseas one, they still must have a qualification.

MR FITZGERALD: Okay. Did you have any ... or during your time as managing director of Dockside, did you have any view as to which industrial award applied to that organisation?

MR STEPHENS: To my belief there was not an award, and I basically came to that conclusion when I took up employment at the ... at Dockside Fitness. Upon discussion with my partners I was led to believe we were award free.

MR FITZGERALD: Right. Did you discuss with your partners how they came to that view?

MR STEPHENS: Yes. At meetings it had been discussed, apparently, that the Department of Labour and Industry had been contacted and we did not fall within an award.

MR FITZGERALD: Okay. So just to clarify that: the advice which they gave indicated that you were award free, is that correct?

MR STEPHENS: That's correct.

MR FITZGERALD: During the time as managing director has any employee approached you in respect to the issue of rates of pay?

MR STEPHENS: Yes, Mark Risdon approached me, recalling to memory, twice.

MR FITZGERALD: Right. Can you recall when that was?

MR STEPHENS: Once again, I hope I'm accurate, because I am recalling to memory. It would have been towards the end of 1989; I'd say November or December. And I think the second time Mark approached me was just prior to his dismissal, which would have been, I think May. I hope I'm accurate.

MR FITZGERALD: Okay. And what was the basis of his approach to you?

MR STEPHENS: Mark suggested he wasn't happy with the rate of pay that he was receiving and he asked me to make that known to my fellow directors, which I did. And my response to that was that the award ... there was an award for the industry, which at that time appeared imminent.

MR FITZGERALD: Right. So you're aware that negotiations have taken place in respect to an industry award?

MR STEPHENS: Oh, most definitely, yes.

MR FITZGERALD: Yes. Have you ever been involved in that process yourself?

MR STEPHENS: Yes, I have actually.

MR FITZGERALD: To what extent? Can you ...

MR STEPHENS: Just visiting the TCI to discuss the award and its proposals.

MR FITZGERALD: Okay.

MR STEPHENS: And with Mr O'Brien as well.

MR FITZGERALD: Thank you. Did any employee ever indicate to you that it was their belief that either the Miscellaneous Workers Award or the Hairdressers Award applied to them?

MR STEPHENS: No, never.

MR FITZGERALD: Just moving onto another ... a different tack. What sort of services does Dockside offer?

MR STEPHENS: Excuse me. Dockside predominately offer personalised instruction of individuals to increase their fitness through various means, such as: gymnasium programs, aerobics, et cetera. That is our primary function. There are other passive activities that can be undertaken, such as swimming, spa, sauna. But our main aim is to prescribe programs for individuals.

MR FITZGERALD: Can individuals become members simply to use those passive activities, as you describe them?

MR STEPHENS: Yes. Yes, that's most correct. There is a membership that encompasses more passive activity as opposed to a full membership which includes all of the activities, including a prescribed training program.

MR FITZGERALD: What's the pattern of membership at Dockside? Is it full membership or is it only those others?

MR STEPHENS: Yes, there's four actually. There's ... number one is a deluxe membership, which also gives you, apart from a personalised training program, a full fitness assessment. The next membership down would be a full membership, which the only thing it deletes is a fitness assessment. Then we go to an aerobics membership. The aerobics membership is basically designed for people who do not have an interest in weight training activities or a personalised program. And the other ... fourth is just basically a discounted membership for students or pensioners.

MR FITZGERALD: Okay. Can you categorise the staff which you engage in terms of their functions at Dockside?

MR STEPHENS: Certainly. We, number one, have gym programming staffs. We call them, obviously, the gym programmers. There are aerobic staff as well. And basically, I guess, the third category would be reception staff.

MR FITZGERALD: Which category did the Miscellaneous Workers Union's witnesses, Mr Thorn and Mr Risdon, fall into?

MR STEPHENS: They were gym programmers.

MR FITZGERALD: What were ... or can you describe the functions which they would normally perform?

MR STEPHENS: Right. As their title suggests, their number one job was to administer the personalised programs. In the event of that not being applicable i.e. early in the morning or during the quiet parts of the day when people weren't actually visiting the centre to have programs made up for them, they would cover certain other areas as well. Things like reception, general cleaning duties - cleaning not being like the end-of-the-day-type cleaning, but just wiping down of equipment; various maintenance tasks - if a cable et cetera needed to be replaced on a machine, those type of tasks. That

PRESIDENT: Could you recap on that last segment please?

MR FITZGERALD: Last question? Yes. I think I was just asking you the functions which they performed. Did you have anything further to add there, Mr Stephens?

MR STEPHENS: As suggested, the opening and closing which they may incur at ... depending on their shift. Just general tidying of the centre throughout the day. We have a lot of traffic through.

MR FITZGERALD: Right. If I could take you to ...

PRESIDENT: Could I ask a question ...

MR FITZGERALD: Certainly. Yes, certainly.

PRESIDENT: ... just to interrupt. Was there ... is there any cleaning of pools or ...

MR STEPHENS: Yes. Yes.

PRESIDENT: That is all.

MR STEPHENS: Once a week, usually on a weekend the pool and the spas are vacuumed there during the quiet times, i.e before the centre is opened or after it's closed so members can still use that facility during the times of operation.

PRESIDENT: Yes, thank you.

MR FITZGERALD: Thank you. Thanks, Mr President.

Mr Stephens, if I could take you to a piece of evidence given by Mr Risdon, and Mr O'Brien asked Mr Risdon the following questions: In terms of your duties at Dockside can you tell us actually what you did as an employee at Dockside Fitness Centre? And Mr Risdon answered: Well, my responsibilities included opening and closing of the centre, general reception duties which covered cash handling, telephone work, selling memberships, general assistance of the members and indeed non-members using the centre, instructions and supervision in the gym and varied cleaning and maintenance duties of the various equipment and facilities in the centre.

Do you think that's an accurate description of the duties performed by Mr Risdon?

MR STEPHENS: I think it's accurate in the respect that he could incur those duties. I think they're not in any order of preference, are they?

MR FITZGERALD: Well, it doesn't seem that way but I ... if I could say that the gymnasium duties or, as he describes it, supervision in the gymnasium is, in fact, one of the last items. Is that an accurate ranking of duties?

MR STEPHENS: Not an accurate ranking. It's an accurate summary of the tasks he may have been employed to do. That's definitely accurate, but in rankings, no.

MR FITZGERALD: So you say the principal duty is still for gym instruction?

MR STEPHENS: Most definitely.

MR FITZGERALD: Mr Thorn, and I think in his evidence indicated that in terms of the time spent, he spent more time on the ancillary duties rather than gymnasium instruction duties. Would that be the case?

MR STEPHENS: It's a hard one to answer because it depends on the volume of the traffic of people. It also depends on the shift incurred by the individual. If an individual has an early morning shift, for instance, we don't do things like prescribed training programs at 6 o'clock in the morning. To answer accurately would be hard, but I'd say more time was spent doing actual programs than the ancillary duties.

MR FITZGERALD: Thank you. I think you may have answered this before but just to confirm it, there was from managerial's point of view ... management's point of view a need for formal qualification to ...

MR STEPHENS: Yes.

MR FITZGERALD: Right. And were you aware whether Mr Risdon and Mr Thorn were both qualified?

MR STEPHENS: Well, I knew Mr Thorn had a qualification. I spoke with Mr Risdon on certain other occasions and he expressed to me he did ... actually wrote a screed for me on his qualifications which was a British qualification. I can't recall to memory exactly what it was, but as far as I was concerned he did have a qualification - yes.

MR FITZGERALD: Okay, thank you. Mr Stephens, if I could read to you the following definition, and it's a definition from the Miscellaneous Workers Award of the classification general attendance, and then I'll ask you a question following the reading of this definition.

The definition is as follows: A general attendant means a person whose presence is required on premises for protection, good order, or convenient use thereof and may also have other duties in respect of the cleanliness or upkeep thereof.

Is that a definition which you believe accurately encompasses the job which has been performed by both Mr Risdon and Mr Thorn?

MR STEPHENS: No. My understanding of that is the person there is employed more on the reception and as a cleaner basically. So I'd say no.

MR FITZGERALD: It does go further and it does talk about: 'whose presence is required on premises for protection'.

MR STEPHENS: Protection. No.

MR FITZGERALD: Can you elaborate?

MR STEPHENS: I don't fully understand the line of question there. Protection ...

MR FITZGERALD: Well, it talks about protection, good order or convenient use thereof, which is talking about the premises.

MR STEPHENS: I guess they incur some of those tasks.

MR FITZGERALD: Is that their principal task?

MR STEPHENS: It's not their principal task. No.

MR FITZGERALD: You mentioned earlier in your evidence that you ...

PRESIDENT: Sorry, Mr Fitzgerald.

MR FITZGERALD: Sorry.

PRESIDENT: Was that classification you were asking about then ...

MR FITZGERALD: It was ... I'm sorry, it was the general attendant out of the Miscellaneous Workers Award which is, in fact, the subject of these proceedings.

PRESIDENT: But that doesn't appear to have anything about protection and good order and convenient use in it.

MR FITZGERALD: I may have misquoted it but I hope not.

PRESIDENT: That appears to be the definition of a caretaker or janitor.

MR FITZGERALD: I'm sorry, I have misquoted it in my haste. I apologise. Thank you for that, Mr President. I will have to, in fact, rephrase the question. In my haste it appears that I have taken the wrong classification. If I could rephrase that question.

Ignore what I just put to you earlier. The general attendant, in fact, means: A person whose presence is required on premises to both ensure its security and assist the public in their use of the building and its facilities. How - just if I can stop at that point because it does go further - how does that fit in with the jobs ... duties done by Mr Risdon and Mr Thorn?

MR STEPHENS: As a primary function?

MR FITZGERALD: Yes, that's my question.

MR STEPHENS: No.

MR FITZGERALD: All right. I'll go further. It says: 'He may also have other duties in respect of the cleanliness or upkeep of the premises'. Again, could you comment on that?

MR STEPHENS: Once again, as a primary function, no.

MR FITZGERALD: What cleaning duties were performed?

MR STEPHENS: Well, we have a lot of traffic, as I suggested, through the centre throughout the day. Cleaning tasks may involve checking the toilets to ensure that they have soap, toilet paper et cetera. Obviously, if there's papers et cetera thrown on the floor to ... just to maintain a neat, tidy appearance. At the end of the day, the equipment is used so extensively, particularly the electronic equipment - which consists of electronic cycles, a running machine, a rowing machine - they're wiped down at the end of the day. That type of thing but it's not a full-on cleaning task as such.

MR FITZGERALD: Does the centre actually engage cleaners?

MR STEPHENS: Oh, most definitely, yes.

MR FITZGERALD: And what ... how do they perform their functions?

MR STEPHENS: The cleaner comes in after closing which depends on the particular day and, therefore, cleans the centre. They're employed basically, depending on the time they spend there, 5 to 6 hours an evening.

MR FITZGERALD: Okay, thank you. You mentioned in your evidence earlier that you'd been involved to some extent in the making of a new Health and Fitness Centres Award.

MR STEPHENS: Yes.

MR FITZGERALD: What's your view on whether that award is appropriate or not?

MR STEPHENS: I, in fact, welcome the award and I look forward to it being put in place just basically to give a clear-cut definition of what the employees should be paid.

MR FITZGERALD: Is there any commission ... wage commission structure in place at Dockside?

MR STEPHENS: There has been. Yes, in the past we ... during times of specials for individuals, to give them more of an incentive, we actually offered an incentive for membership

sold. I can't quite exactly quote you the figures. But, yes, that's a common practice throughout our specials.

MR FITZGERALD: Okay.

MR STEPHENS: A cash bonus system.

MR FITZGERALD: And which staff participate in that incentive scheme?

MR STEPHENS: It's open to all ... well, when I say all staff I guess I should clarify it. It's certainly not open to aerobics instructors et cetera, but our full-time staff, our part-time permanent staff, the gym instructors who occasionally spend some time in reception. It's open to all the staff.

MR FITZGERALD: Has Mr Risdon participated in that incentive scheme before?

MR STEPHENS: Yes, he has.

MR FITZGERALD: Right. Has he indicated any view in respect to how it should operate?

MR STEPHENS: Yes, he has. A couple of times at staff meetings that we regularly hold, Mark suggested it was a little unfair that he was spending a lot more time in the gym consequently he couldn't make the bonus system as attractive as he would liked it to have been.

MR FITZGERALD: Right. Mr Stephens, how long have you been involved in the industry for?

MR STEPHENS: I've been involved at Dockside Fitness for 18 months. Prior to that, when I was living in Perth, my wife and myself had a small business, an aerobics business that we operated for 2 years. That was 1985 to 1987. I've always been an active member since 1980. Actually, as more, I guess, a participant in the industry. As from about 1985 more actively in the administration side of it.

MR FITZGERALD: Do you have any knowledge of how the industry or ... and particularly when the industry was established, not only in Tasmania but the rest of Australia?

MR STEPHENS: Yes, I have my personal opinion on that. To categorise exactly when it started it would be hard to say but aerobics became very popular - very popular - and its inception to me would appear to have been in the 1980 period, 1979 to 1980 period.

MR FITZGERALD: And centres such as - I think it was then called Lifestyle - are you aware when they were established in Tasmania?

MR STEPHENS: No. Having visited Lifestyle some years ago - I was not a resident of Tasmania so it was just on a visit basis - I certainly knew of the place. I have no idea when it actually started ... well, I do now but I wasn't involved in the initial formation of that company. I believe 1982, I think it is.

MR FITZGERALD: Mr President, evidence will be produced later in the Commission that, in fact, a registered agreement came before this Commission soon after the commencement of the Lifestyle operation.

What's a term which describes the industry? Are you aware of those terms, or term?

MR STEPHENS: The industry ... it's a pretty broad question. The fitness centre, is that what you're ...

MR FITZGERALD: Yes.

MR STEPHENS: Well, we are a fitness centre.

MR FITZGERALD: Are you aware of any other titles which could be ... could aptly describe the industry?

MR STEPHENS: Some people tend to lean towards the name gymnasium but a fitness centre is more appropriate.

MR FITZGERALD: What about the term, 'physical culture studio'? Does that mean anything to you in terms of the industry?

MR STEPHENS: Certainly not. I've never heard that interpretation of it or, you know, or that title for it, so it really means ... no, I don't equate it to fitness centres at all.

MR FITZGERALD: Are any centres that you may be aware of, call their centre a studio, for instance?

MR STEPHENS: No. None that I am aware of.

MR FITZGERALD: I have no further questions, thanks, Mr President. Thanks very much, Mr Stephens.

PRESIDENT: Yes, thanks, Mr Fitzgerald. Mr O'Brien?

MR O'BRIEN: Thank you. Mr Stephens, you've been the managing director of Dockside for approximately 18 months, I think you said.

MR STEPHENS: Correct.

MR O'BRIEN: Who was the managing director prior to you taking that position? Are you aware?

MR STEPHENS: Prior to me, the managing director I don't know. There was a manager. Her name was Lucy Given.

MR O'BRIEN: Right. In terms of running the centre, I take it that you are the person who is in charge of the administration of the centre.

MR STEPHENS: Yes.

MR O'BRIEN: So you're aware of the day-to-day operations, when people work, and you'd also be involved in advertising the centre, public relations, things like that?

MR STEPHENS: Certainly. Number one, yes, I am aware when people work et cetera. When it comes to advertising, we have a board of directors and although I'm actively involved it falls more into the expertise of one of the other directors, Mr Bob Cheek.

MR O'BRIEN: Right. You gave some evidence about the duties of Mr Risdon and Mr Thorn ...

MR STEPHENS: Yes.

MR O'BRIEN: ... who were previously employed at Dockside. Now, I want to read you a passage from the evidence of Mr Thorn, at page 25 of the transcript, a question that I asked him: You have given us a long list of duties. How much of your time would have been spent in that reception area, of your working time, how much of your time?

Answer: It's quite difficult to say. As far as gym instruction that we do - sorry - as far as the gym instruction that we do is done on a booking basis so if there is no bookings on a particular day then I may be asked to watch reception while other people can go about doing various other duties. Definitely any time working on weekends, which I did quite a lot of weekend work, the whole time was spent on reception. Also in the evenings, the last hour or two at night would be spent solely on reception because I would be there by myself and early in the morning when I began at 6 o'clock in the morning until 9.00 would be solely spent on the desk and also during the day, you know, you probably put in quite a bit of time.

Would that be a fair assessment of the amount of time that Mr Thorn would have put in on reception?

MR STEPHENS: It's always the last hour in the evening because we have another shift worker up until 8 o'clock. Definitely the morning is accurate up until 9 o'clock. Yes. As I said before, trying to answer the question as honestly as possible, it really is hard to quantify because it depends on the booking system. Geoff - oh, sorry - Mr Thorn stated that he was asked to mind reception while other people did other work, well, that could be true on occasion. Also, other people minded the reception area while he actually carried out certain tasks as well.

MR O'BRIEN: Some of those tasks would have been working with people in the gym?

MR STEPHENS: Yes.

MR O'BRIEN: And some ...

MR STEPHENS: Just handing out advice to individuals et cetera.

MR O'BRIEN: Some might have been while he was doing a maintenance job or a cleaning job?

MR STEPHENS: Correct.

MR O'BRIEN: And he does ... or the first sentence of his answer is, 'it is quite ... it is quite difficult to say', so he agrees with you, just ...

MR STEPHENS: Yes. It's hard to quantify. I mean, the overall picture it's hard to give an exact answer, yes.

MR O'BRIEN: And as to his comments about working on weekends, that the whole time would be spent on reception, what do you say about that?

MR STEPHENS: I'd say that's accurate. With the gym programs, as he stated also, it's by a book-in system. We oblige as much as possible to give the people the prescribed programs during those times. Outside those times, yes, he would have - particularly on weekends he would have worked on reception, yes.

MR O'BRIEN: In terms of your discussion with your partners about the application of an award to Dockside Fitness, did you ever personally make enquiries to satisfy yourself about that matter?

MR STEPHENS: No. I made enquiries to certain other ... on certain other occasions, but, no, I had no reason to doubt my partners. I took them by their word.

MR O'BRIEN: When was the first time the question of the applicability of awards was raised with you?

MR STEPHENS: Just recently. I would say, once again it's hard to recall exactly to memory, but I'd say during later discussions with Mr Risdon - that's when the award really started to raise itself. As I said, I was totally under the belief that we were award free.

MR O'BRIEN: Yes. Is it not a fact that in May a letter was delivered to you which made a claim on behalf of Mr Risdon specifying both the Hairdressers Award and the Miscellaneous Workers Award?

MR STEPHENS: That is correct, yes. That's basically when I became aware of the situation at present.

MR O'BRIEN: And what steps did you take at that time to investigate that matter?

MR STEPHENS: Right. As stated before, with the partnership at Dockside we're quite lucky in the respect that we have five ... six directors, I beg your pardon, and each of those appears to have a field of expertise. My reaction was to hand it across to Steven Chopping, who is our legal representative. He said he would handle it from there.

MR O'BRIEN: Did he report back to you with a view on the matter?

MR STEPHENS: No, he did not.

MR O'BRIEN: So that claim was lodged, I think, in May, you agreed, and it's now 1 October and there's been no report-back to you as managing director about that matter?

MR STEPHENS: About the matter of?

MR O'BRIEN: The application of one of those awards.

MR STEPHENS: Oh, yes. Well, we've taken it further than that. We've had meetings with yourself at the TCI to try and establish an award, or some grounds for the award.

MR O'BRIEN: No, I mean the claim that the other awards did apply. You said you ... just said that you asked Mr Chopping to handle the matter ...

MR STEPHENS: Sorry, I'm a little confused. I apologise.

MR O'BRIEN: The awards being the Hairdressers Award and the Miscellaneous Workers Award which were the subject of correspondence which was hand-delivered to you in May.

MR STEPHENS: Right. Well, I thought basically this was to resolve that.

MR O'BRIEN: Right. Well, I'm asking you: you said that you handed the matter on to Mr Chopping.

MR STEPHENS: Correct.

MR O'BRIEN: And then I asked you, well, had he come back to you with a view on it. And I thought that you were saying that he hadn't come back to you with a view on whether those awards applied or not.

MR STEPHENS: Sorry, I'm getting confused. Yes, he did. And consequently he was under the belief, he reported to me that they did not apply.

MR O'BRIEN: Okay.

MR STEPHENS: I'm sorry, I got confused there.

MR O'BRIEN: And did he give you any reasoning or it was just a simple view?

MR STEPHENS: It was basically a simple view. We've always had in the back of our minds, well, recently, that an award solely for the fitness industry was being handed down.

MR O'BRIEN: Your centre has an entry in the Yellow Pages, does it?

MR STEPHENS: Yes, I believe it does. Yes.

MR O'BRIEN: That's something that's an ongoing, organised thing, is it?

MR STEPHENS: No, it actually just a one line.

MR O'BRIEN: Yes.

MR STEPHENS: And if you are a business I believe it's a complimentary ...

MR O'BRIEN: Right. Have you ever looked at the entry or how it's indexed in the Yellow Pages?

MR STEPHENS: Yes, I may have flicked over it once. It's basically just under Dockside Fitness Centre.

MR O'BRIEN: Could I show the witness an entry from ... it's actually the index to the Yellow Pages. I've marked the relevant section. Have you ever noticed that entry that's marked there before? It's just the indexing of health and fitness centre.

MR STEPHENS: Yes. I've never really studied it but, yes, I would have seen it listed there before.

MR O'BRIEN: And that reference is health and fitness centres through the term 'Health Studios'.

MR STEPHENS: Yes.

MR O'BRIEN: Does that indicate anything to you about the use of the term 'studios' in your industry ?

MR STEPHENS: Definitely not. Definitely not, and if you ... I've actually more than looked at the index. I've looked at the advertisement - you like to see how your opposition advertise - and no-one really calls themselves a studio.

MR O'BRIEN: No-one.

MR STEPHENS: I beg your pardon, to my knowledge I don't know any other centre that call themselves a studio.

MR O'BRIEN: In this State or ... what about in other States?

MR STEPHENS: Well, I've been a fairly active participant in aerobics for quite some time and I've used a lot of gymnasiums - we have reciprocal rights all around the country with other centres. I personally know of no other centre that performs the same activity as us that call themselves a studio.

MR O'BRIEN: Yes. So the reference to studio in the YMCA ad on page 308 of the Yellow Pages hasn't been drawn to your attention?

MR STEPHENS: No. No, it hasn't.

MR O'BRIEN: I'm sorry, I don't have a copy to tender.

MR STEPHENS: It's a fairly old term.

MR O'BRIEN: Yes, it is isn't? It is an old term.

MR STEPHENS: You won't see many places actually use that any more.

MR O'BRIEN: No. Well, I agree, it is an old term and it won't be used regularly.

PRESIDENT: The awards use a lot of old terms, don't they?

MR O'BRIEN: They do, Mr President. I guess we might be modernising a few.

In terms of your comments about Mr Fitzgerald's reference to the definition of a general attendant under the Miscellaneous

Workers Award, do you really say that it is not one of the duties of your staff to assist the public in the use of the facilities of your premises?

MR STEPHENS: No, I don't mean to say that at all. What I'm saying is they were primarily employed as gym instructors.

MR O'BRIEN: Yes. You see, someone working in the reception area of Dockside Fitness would, in fact, be involved in assisting the public in the use of those facilities, wouldn't they, in a number of ways?

MR STEPHENS: Yes.

MR O'BRIEN: And would they also be responsible for ensuring that people who weren't entitled to be in the centre didn't enter the centre?

MR STEPHENS: I guess you could say that, but it's not a common situation.

MR O'BRIEN: No. No, it wouldn't be a common situation, but it would be one of their functions in that reception area I would have thought.

MR STEPHENS: Well, yes. Okay, I'll agree with that.

MR O'BRIEN: And I don't think there's any contest that someone who worked in that area would, probably from time to time, have some maintenance or cleaning duties to perform.

MR STEPHENS: Certainly.

MR O'BRIEN: Yes. I've got no further questions and, as to that document tendered, I will be seeking to make that an exhibit, Mr President.

PRESIDENT: Right. Yes. Thanks, Mr O'Brien. We'll mark that FMWU.1. Cross-examination?

MR FITZGERALD: Re-examination?

PRESIDENT: Re-examination, rather.

MR FITZGERALD: If I could. I'm not sure whether, in terms of these procedures, Mr Evans has an entitlement or wishes to ask any questions.

MR EVANS: I have no questions I want to put to Mr Stephens, Mr President.

PRESIDENT: Oh, I wasn't going to let you anyway, Mr Evans.

MR FITZGERALD: I raise it just out of curiosity, Mr President.

Just to reiterate ... just a couple of questions which I'll ask in re-examination, Mr Stephens. Just to reiterate, how were ... or what positions were Mr Risdon and Mr Thorn engaged for?

MR STEPHENS: They were employed as gym instructors.

MR FITZGERALD: And Mr O'Brien indicated that in terms of the general attendant definition in the Miscellaneous Workers Award, that there are maintenance and cleaning functions involved. Is that an important part of a gym instructor's job?

MR STEPHENS: It's a secondary task. It's important, but it's a secondary task. We have other basic reception people, including management who are also responsible for that. We would not employ a gym instructor to do cleaning at the expense of, say, taking someone through a gym program.

MR FITZGERALD: Okay. Thank you. Just to clarify and I think it has been clarified, but just for the sake of the record, you indicated you spoke to your board member who's a legal practitioner, Mr Chopping ...

MR STEPHENS: Yes.

MR FITZGERALD: And what was his response to the claims made by the Miscellaneous Workers Union?

MR STEPHENS: He basically felt that we did not fall within what they were suggesting, within the Hairdressers Award or the Miscellaneous ... the Workers ...

MR FITZGERALD: Thank you. Mr O'Brien produced the exhibit which was shown to you in respect to the index page of the Yellow Pages where it refers to health studios. Were you unaware of that?

MR STEPHENS: I wasn't aware of the titling, yes.

MR FITZGERALD: He mentioned also (and he intends, I think, to produce an exhibit) the YMCA. Are they a competitor of yours?

MR STEPHENS: Fairly passive ... I guess it would be fair to say that, yes, they perform some of the same functions so they could be deemed as competitor, but a fairly passive one.

MR FITZGERALD: Do they compete with you in terms of members?

MR STEPHENS: I shouldn't imagine so.

MR FITZGERALD: Could you say who your competitors are in Tasmania?

MR STEPHENS: Yes. I'd say that our number one competitor would be the Cazaly Fitness Centre. Number two, the university have a large aerobics and gymnasium facility.

MR FITZGERALD: Okay. Are you aware of other health and fitness centres throughout Tasmania?

MR STEPHENS: Throughout Tasmania, yes, certainly. Theogenes.

MR FITZGERALD: Where are they situated?

MR STEPHENS: In Launceston. We have a reciprocal right with Theogene. There's also Templars in Devonport. Once again we share a reciprocal arrangement with them. In Hobart I know of Bobby Parsons.

MR FITZGERALD: Are you aware if any of those organisations refer to their particular centre as a studio?

MR STEPHENS: I'd have to check the Yellow Pages but I could, a hundred per cent ... well, not a hundred per cent, I could ninety per cent say that they would not refer to themselves as studios.

MR FITZGERALD: It seems that the compiler of the index of the Yellow Pages has a significant say in interpretation before the Commission.

PRESIDENT: That remains to be seen.

MR FITZGERALD: Well, apart from the Yellow Pages, in terms of ... well, sorry, before that - do you have contact in any way with other managers in the industry?

MR STEPHENS: Certainly. With our reciprocal rights we share a fairly good networking system and that's right throughout the country and I've been lucky enough to attend conferences and visit many gymnasiums in other States.

MR FITZGERALD: In terms of that contact, are you aware of any other manager in a centre such as yours referring to the centre as a studio?

MR STEPHENS: Definitely not. I don't know any that refer to ...

MR FITZGERALD: What about the term, 'physical culture'? Is that one which is commonly used?

MR STEPHENS: I've never heard it used before.

MR FITZGERALD: I have no further questions. Thanks very much, Mr Stephens, for your evidence.

PRESIDENT: Yes, thank you very much, Mr Stephens. You can step down.

MR STEPHENS: Thank you.

PRESIDENT: Do you intend to proceed with your submissions at this stage, Mr Fitzgerald, or should we hear from, perhaps Mr Evans?

MR FITZGERALD: In fact I thought I'd be responding to the application, Mr President. I think probably Mr O'Brien or maybe Mr Evans would proceed first and I would respond to their submissions.

PRESIDENT: Well, are you going to put further submissions, Mr O'Brien?

MR O'BRIEN: Yes. Mr President, this matter is pursuant to section 43 and there are two applications before you, but in summary the position which we take is as outlined earlier. That is, that we'd be asking you, Mr President, to determine that the work of the employees generally ... at Dockside Fitness Centre falls under the terms and conditions of the Hairdressers Award.

In the alternative, should that not be your finding, and only if that not be your finding, then the question arises: does the general attendant classification of the Miscellaneous Workers Award have application to employees either generally or as to part of their duties in relation to the performance of work at Dockside Fitness Centre? And I think we've identified people ... the duties fairly generally with regard to what I'll describe as the non-gym instruction, for want of a better term. There would be a number of various tasks which would fall within that general heading.

And we'd be asking that the finding be that the award be found to apply as to that work, if not generally. And depending on the view that the Commission might take of whether the award was generally applying to anyone who performed work in the reception area would depend upon the view taken on assisting public in the use of the facilities of the building. And as it's a secondary argument I'll spend less time on that than I will on the primary argument.

The test for the Hairdressers Award doesn't go to the question of classification. I think it's generally accepted that the 'all others' classification would be sufficiently broad to

cover any employee engaged in the industry falling within the scope of the award.

So the question is: does the scope of the award apply to Dockside Fitness? And the term 'health and physical culture studio' is the key factor in that determination.

If the Commission found that the term 'health and physical culture studio' had application, was broad enough to include an operation such as Dockside Fitness, then the award, in our view, would be found to have application. And the alternative is, obviously, a negative finding on that question.

We would concede at the outset that the terminology is one which is of the past. Indeed, Mr Fitzgerald initially put us to the test in other proceedings of proving that we had constitutional capacity to cover the health and fitness area. And ultimately that matter was not determined as the TCI withdrew an objection to our obtaining an interest in the proposed award.

However, the term, in our rule, is the industry of health and physical culture. And that terminology, as we indicated in those proceedings, is terminology which we are now seeking to update, but is terminology which is relevant to this industry as it is ... it's ordinarily understood terminology capable of being applied to this industry and, indeed, was drawn for that purpose when the rule was made.

And we did, at that time, present the Commission with details of the meanings given to the key words in that rule in the ... I think it's the Concise Oxford Dictionary. (It was concise with the Oxford Dictionary, yes, I think.) And I have a number of exhibits which extract the relevant pages from that dictionary: pages 231, 460, 772 and in this case, 1058.

PRESIDENT: Will we mark this all the one?

MR O'BRIEN: Yes. I think that's the easiest.

PRESIDENT: FMWU.2.

MR O'BRIEN: And one more - I can only give you one of this because I only brought one copy. I guess if we deal with the ... them in order, the word 'health' is the first word in the phrase and if one looks on page ... the extract of page 460, health is ... the word 'health' is a noun meaning - 'soundness of body or mind' and also in the context for one's health - 'for one's material advantage; condition of body'. Actually I think that's all that we would take from that particular page.

Then on ... the extract at page 772 the word 'physical' - adjective, and there if you go through it says: 'belonging

to physics; bodily (physical examination, exercise, strength, love, beauty, education)'.

And going further - 'physical jerks, (colloq.) physical exercises'.

Page 231 the term 'culture' - 'noun. 2. improvement by (mental or physical) training' is the relevant passage from that particular extract. And on page 1058 - 'studio' is a noun - 'the working room of painter, sculptor, photographer, et cetera, often with skylights or windows specially designed to secure suitable light'.

Now, clearly this is not an industry of a painter a sculptor or a photographer, but the term is one which we would say has more to do with being a working room and having something to do with, you know, light and airiness for the purpose of its activity rather than being restricted merely to those particular occupations. Indeed the exhibit which we tendered earlier shows the use of the term 'studio' with the word 'health' being referenced to health and fitness centres and we say that there's a great deal of importance which has to be placed on that, not contrary to the ... you now, the suggestion that somehow the Yellow Pages is determining interpretations.

What we say that shows is that there is an element of common usage in the term or that there has been an element of common usage in the term in relation to these activities. And after all, if we're seeking in this context to understand what words might have been intended to mean, having regard to the fact that they were drawn some time ago, we must have regard to views which may, in our view, be relevantly drawn to their usage. For example, in a fairly detailed index of a resource which is supposed to assist the public in accessing various businesses through the telephone system.

We say that the health and physical culture studio within the terms of those particular definitions, having regard to also the common usage factor, which we say exists as to the word 'studio' or that did exist as to the word 'studio', is and ought to be sufficient for the Commission to find that this business, what is a fitness centre or a health and fitness centre, having regard to the evidence of the witnesses who have given evidence and to the services provided, would fall within the term 'health and physical culture'. That is, that people engage in this industry for attaining health and through physical exercise, particularly, but also through other means, therefore, health being described as soundness of body and mind and in the context described therein would be a sufficient description for one to take the view that the word 'health' in the context of soundness through exercise is relevant to this industry.

Secondly, the question of the term 'physical culture', we take the two definitions: 'physical' meaning bodily and 'culture' meaning improvement by mental or physical training. In other words, improved bodily, improvement by mental or physical training is an appropriate meaning to be given to the term 'health' ... sorry, 'physical culture'. So it really is an industry of attaining soundness of mind or soundness of body (soundness of body in this case) through exercising bodily improvement by training, then this falls within the terminology as described in the Hairdressers Award.

The question of whether the term 'studio' is sufficiently broad to encompass the type of operation described here, and we know that it's probably what's best described as an old industrial building on the Hobart wharf, which has been converted to a variety of uses, which is single-storey, which has swimming, aerobics, weight training and other facilities contained within it.

We must decide whether that, for the purposes of the award, is a studio. Now, it would seem to me that if we have regard to, as I said, what in my view would be a reasonable extension of what the dictionary might have understood that word to mean and have regard to what common usage would have in the past have had that word mean and have regard to an extract from the Yellow Pages, then it seems to me reasonable to form the conclusion that a health and fitness centre is a studio as well as being a centre, or an establishment or a building or some other structure of some other description, and would fall within the terms of the award being the Hairdressers Award.

If that is the finding, then one needs to go no further. If the Commission found that the terminology in the Hairdressers Award scope, was broad enough, then the Commission having found that would, in my submission, simply be required to determine that the award did apply to the operations of the employer in this case.

In the alternative of course, if the Commission was not so persuaded, then the question arises: would the Miscellaneous Workers Award apply? Now, a lot of that turns on the evidence which has been led in this case through Mr Risdon, Mr Thorn and now Mr Stephens.

And we say as to that evidence, it is helpful to have regard to a number of matters. Mr ... and perhaps I should say here on the question of the term 'studio', Mr Risdon gave some evidence that he worked in premises in the United Kingdom where the term was used. And I believe that an examination of the transcript will show that under cross-examination Mr Stephens conceded that the word was an old term which may have had relevance in the past, which tends to support my argument.

MR FITZGERALD: I'm not sure it went that far.

MR O'BRIEN: Well, let's have a look at what the transcript says. It's my belief that the transcript will reveal that and I don't think we'll achieve a lot by arguing about what the transcript will say. It will say one thing or the other.

In terms of the question of the duties performed, I think it is fair to say that a significant proportion of the work performed would have been performed in the reception area.

Now, whether it was an absolute majority or a minority of the work, whether it, as a collective group, was more of the work than any other single collective item of work, is something which in detail is difficult to ascertain without regard to physical records.

But the evidence of Mr Risdon and the evidence of Mr Thorn is fairly clear. And that is that they put a substantial amount of time in in the reception area. And at that stage I think it is fair to say they would have been engaged in duties in assisting the public in the use of the facilities of the centre and in keeping the premises secure. There is also evidence which is not challenged that they were involved in cleaning and maintenance duties.

So it is our submission that as to that work, if no other award applies, then the Miscellaneous Workers Award clearly does. And the question arises then: what about other duties when Mr Thorn and Mr Risdon, and any other person who is potentially affected by these proceedings, would have been performing duties? Whether it be in leading a circuit class or an aerobics class or giving individual instruction in a gym, or making an assessment of a person's physical fitness for the purpose of establishing a program for them. Whether that constitutes within the meaning of the term assisting the public in the use of the facilities of the building constitutes such assistance.

And that's a point which my mind has turned to. And I think that in general terms it would be true to say that in the performance of those duties they would be assisting the public. Now, whether the Commission is minded to find that the award was written with the intention of covering such specialised duties with such a broad term, is a matter for the Commission.

In the absence of any other award coverage the finding ... if the Commission so found, the finding would, in my submission, be one of two. And that is that, yes, the classification apply and where the classification applied to a significant proportion of the work, and the part of the work was arguably work which fell within the definition, that the Commission might be minded to say, well, in those circumstances, it being

not established that they weren't assisting the public in the use of facilities while performing these duties, the classification applies to of work'.

Alternatively, the Commission might be minded to say, well, that's a bit of a long bow, but clearly as to a significant proportion of the work, that is, that work which revolves around work in the reception area, the classification does apply.

And then there would be a question mark as to how one determines what the employer's obligations were as to particular parts of the day. And I realise that there would be some difficulty in ascertaining just when people were performing which particular duty.

On balance, we would prefer the former. We understand the way the Commission would probably look at that matter very critically but, on balance, if the Commission found, as we believe would be an inevitable consequence of not finding the Hairdressers Award to apply, then there would be a problem certainly for the parties in working out how to apply the award to part of the operation.

Indeed, we, in some respects, may be looking at this more in retrospect than for the future because of other proceedings that I'm sure the Commission is aware of and which Mr Fitzgerald has referred to in his submission and through the evidence of Mr Stephens. However, that matter is not determined and has no bearing at all on these proceedings. These proceedings are about a determination pursuant to section 43 of the Act, that is to interpret two awards of this Commission and, in the way that we put it, it may come down to interpreting only one. If the Commission found that, as I said, that the Hairdressers Award apply, there is no need to exercise any of the powers under section 43 as to the Miscellaneous Workers Award application.

If those proceedings go on, following these proceedings, then they will come to whatever conclusion is appropriate, either as agreed between the parties and subject to the approval of the Commission or as determined by the Commission. They, as I said, do not bear in any way upon the determination of the matter currently before the Commission.

The only thing the Commission could draw from those proceedings was a solution to the problem which might arise, depending on the view the Commission forms as to the Miscellaneous Workers Award application and its partial application, and it may be in circumstances where that was the view of the Commission, which obviously is not our primary view on the matter, then the Commission might be minded to make comments directed towards those proceedings, having

regard to the State that they're in and the determination of this matter.

The other factor that would possibly bear upon those proceedings is the question of the application of the principles and, if the Commission finds that there is award application in this area, that bears upon the question of application of first award principles, in our view, and we would be of the view and would be proposing, if there is a need to argue, argue that there is existing award coverage if and when those proceedings do come to that.

PRESIDENT: That's for the Commission constituted in another way.

MR O'BRIEN: Yes, and proceedings which have been going since 1987 on an on and off basis.

In terms of the Hairdressers Award, just going back to that briefly, the only other question which arises, in our view, is whether the owner of this business is a proprietor and I don't think that's a question that's really going to exercise anyone's mind in this matter to any great degree, and in terms of the definition in the Miscellaneous Workers Award, I don't think there's going to be a great deal of contest about those words and don't propose to submit any dictionary definitions.

I think we would say that the question of security arises in the way that we put it to Mr Stephens, basically in securing the premises for the purpose of use by persons authorised to use it.

There could be, apart from locking and unlocking as well, there could be also ensuring that persons on the premises, who were authorised to do so, didn't damage it. But it also could arise in the question of assisting the public in the use of the building and its facilities. And we have, I think what I would term, a grudging admission from Mr Stephens that those ... that terminology would apply at least to that non-gym-leader-type work. And the other aspects are not contested.

So, really, we believe this matter is reasonably clear-cut. The Commission's determination really turns upon its view of those words in clause 2 - Scope of the Hairdressers Award. And in our view, on the dictionary definitions and on evidence, both oral and written, there is sufficient for the Commission to find that this business is a business which was intended to fall within the term of a health and physical culture studio in the scope of this award.

And the alternative, in our view, need not arise if it does. And we put a submission on that matter, as to the appropriateness of orders in the matter. For the purpose of

any orders, we think that there ought to be an order that the Hairdressers Award apply - a declaration to that effect, and an operative date of the date on which our application, original application, was lodged in this matter, and that is in May, I believe.

PRESIDENT: Do you think an operative date is necessary?

MR O'BRIEN: Well, in terms of dealing with the matter, it's not critically of relevance one way or the other.

I've put the view elsewhere and I think it holds true, that if the Commission makes a determination from whatever date as to the meaning of an award, that's going to be equally binding to, I guess, legally, the meaning of the award.

The other courts are only bound, for example, to the extent of the declaration. So if the declaration was prospective then they may find that they are only bound prospectively. It would be a rather messy exercise for the courts to say, well, we're going to apply the award. No awards from one date and this award from another, merely because the declaration was dated to operate from a date in the future rather than a date in the past.

PRESIDENT: And the date of the application was?

MR O'BRIEN: I thought it was May - the first application.

PRESIDENT: 19 June ...

MR O'BRIEN: Oh, was it June.

PRESIDENT: ... in respect to Miscellaneous Workers.

MR O'BRIEN: Yes. Well, we would seek that as the operative date for either determination. There was notice to the employer clearly about this matter prior to that date. There's no surprise in us making this alternative submission, in our view. And that being the case I think that it would be fair in all the circumstances that that was the order made.

One would hope that the Commission ... neither the Commission nor other parties need be further involved, that that would operate to resolve any outstanding differences relevant to these awards between the parties.

PRESIDENT: If I was to make an order in the terms that you're seeking it, the Hairdressers Award application which would be the matter ...

MR O'BRIEN: Yes.

PRESIDENT: ... that I would be addressing, if I conceded your point of view. That application was made on 29 August.

MR O'BRIEN: Yes. I realise that. I just think that the employer was aware of the alternative submission that we put in May. And I don't think it's an unfair proposition to ask for that operative date. Although I would expect that, if the matter is determined in these proceedings, that that would be the initiative to allow any other outstanding matters to be resolved. And that would be guidance, for example, to the Commission as otherwise constituted in relation to existing award principle on your ...

PRESIDENT: But really it means retrospectivity. The terms of the order really isn't ... doesn't have any great ...

MR O'BRIEN: No, only potentially in relation ...

PRESIDENT: ... practical impact.

MR O'BRIEN: No, only potentially in relation to the question of a determination by, for example, the Magistrate's Court or the Supreme Court or the Court of Requests as to the ... their obligations as the Act requires that they have regard to your decision - the Commission's decision - in this matter.

PRESIDENT: Yes. But it may not help your members currently before us ...

MR O'BRIEN: Well, no ...

PRESIDENT: ... so far as retrospectivity is concerned.

MR O'BRIEN: ... that's a question which is able to be argued, one would have thought, although it would be a rather messy exercise for another court to seek to go through the same exercise, it having been determined. So there's a plus for retrospectivity in that regard because it ... what we're really saying is if the award meant what we say it meant today, then it meant it when it was made ...

PRESIDENT: Yes.

MR O'BRIEN: ... and that's the ... that order is capable of being made in these proceedings and that would then decide for us any question as to whether the award applied in the past. I think it's logical because, you know (I'm not aware of any change to the provisions of the Hairdressers Award in the recent ... in recent history), it's logical to make the assumption that, you know, if it means 'X' today, it meant that when it was made subject to any other extraneous factors which can be shown to have intruded into ... into that operation.

Dockside's operation are relevant in recent history. I think 1988 was a date mentioned in evidence. I could be wrong about a precise date. That will be ascertained from the transcript. These proceedings are to determine the application of the award for that operation, so in full extent it would only need to go back to the date of its commencement to resolve these proceedings totally in relation to the award. But as I said, if it means what we say it means today then it meant that when it was made.

PRESIDENT: Yes, thank you, Mr O'Brien.

MR O'BRIEN: If the Commission pleases.

PRESIDENT: Mr Evans?

MR EVANS: Mr President, firstly I'd like to address a point that Mr Stephens made in his evidence. It certainly didn't warrant cross-examination on the issue, whether I was going to be allowed or not. And that goes to advice that he was provided from the former Department of Labour and Industry in relation to the applicability of awards to his establishment.

It would be very foolish of me in the extreme to claim that conflicting advice doesn't come from an organisation from time to time that has in excess of 20 people dispensing advice Statewide. Be that as it may, it is the department's view that the appropriate award coverage for Dockside is hairdressers and, indeed, I would express the view that it would only be of recent time that there could be any confusion as to appropriate award coverage and that would stem from the making of the Health and Fitness Centre Award by Commissioner Gozzi in relation to scope alone.

And certainly, whilst I understand why that award was made in relation to scope only, and don't criticise the parties, or indeed the Commission for that, I guess this is an example of problems that can be created by making an award simply in relation to scope, albeit that it might only create confusion in the minds of some of the players in the industrial relations game.

In relation to ...

PRESIDENT: It's a fairly common practice developed of late anyway to, when making new awards, to do them in that form for ...

MR EVANS: I am aware of that. I ...

PRESIDENT: ... ease of establishing who should be involved.

MR EVANS: Certainly, and there are obviously there are pros and cons for it. I simply take the time to make the point

that it can, I guess, create problems and I believe, where possible, any potential problems ought to be attempted to be overcome.

Anyway, on the point of whether any confusion could have arisen, it may have been from the fact that that award was made in terms of scope only. It may have been that someone said, okay, there is an award covering these people, there are no rates of pay or conditions, therefore, whilst they're covered by an award in title only, there are no rates we can give to them.

I would reject that argument and put the view that notwithstanding an award exists in scope only, unless there is a body to the award, unless it contains rates of pay and conditions, to all intents and purposes the award doesn't exist. Certainly, prior to the Industrial Commission we considered similar questions and received advice on several occasions and I quote from part of that:

It is a settled rule of law that a preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.

Whilst that related to another matter and it goes back to the Industrial Relations Act '75 and it related to a determination of the Industrial Boards, as they were, I believe that relates equally to present awards and scope clauses.

In my department's view, Mr President, the appropriate award to be applied to Dockside Fitness Centre is the Hairdressers Award. Now, whilst in the scope, proprietor of a health and physical culture studio, leaves a very lot to be desired, I believe that it's sufficiently broad enough to encompass that business.

That decision was arrived at out of a desire to make commonsense of the words and, as well as that, in the back of our mind there always has to be that we have to be prepared and able to support any decision along those lines in a Court of Petty Sessions. So whilst I say making commonsense of the words allows that award to be applied, I also believe that if tested the literal interpretation of the words would allow the award to be applied as well.

I, like Mr O'Brien, looked at dictionary definitions of each of the relevant words and I also excluded 'proprietor'. I assumed there'd be no question of that. I looked at the Oxford and I also looked at the new Collins Concise English Dictionary and, generally, the definitions are pretty much the same. In the new Collins Concise, the definition of 'health' is 'the state of being bodily and mentally vigorous and free

from disease, the general condition of body and mind'. That pretty much accords with the Shorter Oxford.

I apologise that I haven't got photocopies of these extracts but if the Commission wishes, I will arrange for same.

PRESIDENT: I think if you just tell us what they are, those which you want drawn.

MR EVANS: Fine. I also did note, as a matter of interest, on that particular page it defined 'health centre' and in future proceedings in relation to the new award, I hope we're fairly descriptive of what we're talking about because 'health centre' is defined as 'surgery and offices of a group medical practice'. I hope in the making of the new award the definition of the establishment is ...

PRESIDENT: There might be a few more interventions.

MR EVANS: There could be. 'Physical', again, is pretty much the same - 'of or relating to the body as distinguished from mind or spirit'. 'Culture' - I think it's accepted that culture, as one meaning, is improvement by either mental or physical, in other words, training. The definition in the Collins is, 'the artistic and social pursuits, expression and taste, valued by a society or class, the enlightenment or refinement resulting from those pursuits'. I think that is capable of being applied to the activities carried on at an establishment like Dockside.

'Studio', again, is fairly much the same. It talks of a room in which an artist, photographer, et cetera performs certain functions. I think the important part to relate to there is the 'room' and really all we're talking about is a workshop or an area where the sorts of functions that we have spoken of are performed.

There's nothing much else that I'd like to add to the proceedings that have gone on before. I think what I've said pretty much sums up our position on the applicability of the award.

In relation to whether your order ought to be applied retrospectively or prospectively, I tend to agree with Mr O'Brien that the award hasn't changed. Whether it's appropriate for this organisation or not is another question, but the award hasn't changed since those words were first used and if they mean what you're going to say that they mean today, surely they meant that some time ago and, I agree, it would be an interesting question if we did have to go to the Court of Petty Sessions as to what view a magistrate would take in relation to when the award would be applied.

Clearly, it would have to be applied in the manner you indicate, from the date of your interpretation, of your declaration. What view he'd have prior to that, I guess is open to conjecture.

Basically, that's it, Mr President. In our view, the appropriate award for Dockside Fitness is the Hairdressers Award and they are brought in by the scope, 3, proprietor of a health and physical culture studio.

PRESIDENT: What do you have to say about the possibility of the secondary argument being necessary?

MR EVANS: It's one that I hadn't given a lot of consideration to. I guess it's certainly possible. I don't really think it becomes an issue though because in my view there's ...

PRESIDENT: There's only one answer.

MR EVANS: That's right.

PRESIDENT: Whilst the terminology used may be outdated, to say the least, and whilst we can argue as to whether the establishments call themselves studios now or not, it goes to what they actually do and I believe the sort of thing that Dockside has established ... the service that it's established to provide, can clearly fit within that title. So therefore the secondary argument, in my view, is unnecessary.

PRESIDENT: Thank you. And one further question, and people will probably object, do you know whether or not this award is being applied to other health and fitness centres in the State?

MR EVANS: As far as I'm aware, as I said, whilst I'd be foolish to say that conflicting advice doesn't arise from my organisation from time to time, as far as I'm aware, my officers should be providing advice to other establishments such as Theogenes, if they do enquire, that this is the appropriate award and in fact if we had an employee of these centres approach us, we would be looking to applying the wage rates and conditions under that award.

PRESIDENT: Yes, thank you. Mr Fitzgerald, do you have ...

MR FITZGERALD: I'd just like to make some brief comments and maybe, given the hour ...

PRESIDENT: I don't have any problem with the hour. If you're prepared to proceed ...

MR FITZGERALD: Well, I'm prepared to proceed but I am a little bit concerned by some of the statements made by Mr

Evans, particularly as to the nature of advice given by his department. It may in fact involve us producing further evidence which I hadn't expected but the advice, quite clearly, which we have from directors of the organisation, is that they made enquiries of Mr Evans's department and the advice given was that they are in fact award free.

Now, that's clearly a contested matter and it's a matter which we obviously must support by sworn evidence. Now, I hadn't intended to do that and I was unaware that Mr Evans would be here this morning until I saw him this morning, but it may be that we might need to adduce evidence from Mr Cheek, if he's available, who advised ...

PRESIDENT: Is it a matter of whether Mr Cheek, or anyone else from Dockside, got incorrect or conflicting or whatever advice? Does that help tremendously?

MR FITZGERALD: I think it does because Mr Evans, although not denying that conflicting advice has been given, I think is indicating in this instance that clear advice was the Hairdressers Award applied.

Now, I can say quite clearly he is wrong in respect of Theogenes, for instance, which he quoted as an example because that centre is, in fact, subject to a federal award known as the Squash Industry Award. So in that respect I think the point he made is just mere conjecture. It is not soundly based on fact. And in that regard I think we can't let the statements of the department go unchallenged because it has a lot ... not only deal with in terms of the interpretation but, as you'd be aware, Mr President, section 43 is completely discretionary. You 'may' make a declaration, not 'obliged' to.

Now, there are a number of factors including this centre's maintenance of good faith in following advice from the department which at that time indicated they were award free. Now, that's a fact and, I believe, is quite significant in terms of whether you should or should not make a declaration.

And in that regard I think the only alternative we have, although I regret this action, is to seek to adduce further evidence from Mr Cheek. As to his availability, that might be a bit questionable. We did, in fact, speak to him very briefly this morning. He did indicate that he was involved with personal appointments, and Mr Stephens may be able to assist, but I don't think he indicated what his commitments were this afternoon.

But this matter, Mr President, is in fact a doubtful matter. Even Mr O'Brien, in his submissions, indicated quite clearly - the transcript will show that he said it's reasonably clear. It's not so reasonably clear to the Miscellaneous Workers

Union who make an either/or application. So they're not sure whether the Hairdressers Award or the Miscellaneous Workers Award applies. So in that respect I think it's essential that the Commission should avail us every opportunity to put our particular case and answer evidence which has been put or submissions, I mean, which have been put by Mr Evans here, particularly, today.

MR O'BRIEN: Well, we have a view on the matter and frankly we called evidence and there was cross-examination of a witness who said that he'd received conflicting views but that he'd been told from DLI that Hairdressers did apply and then he got a conflicting view. Now, that evidence was known to Mr Fitzgerald and if he wished to take advantage of calling evidence on that point he had the opportunity. The matter is before the Commission in evidence that there is conflicting advice.

PRESIDENT: submitted by Mr Evans.

MR O'BRIEN: Yes. So to that extent we've already said that we're coming here because the employer won't agree; there's been some conflicting advice; we've now got a view by the department. That's all that's before the Commission at the moment and I would object to the matter being delayed. If Mr Cheek was to give evidence in this matter it's in evidence and Mr Fitzgerald knew that there was evidence about the DLI giving advice, at least in some cases, that the Hairdressers Award did apply. If he chose not to call that evidence, that's his problem.

PRESIDENT: Yes, and I take your point on that and I also have difficulty with it because I'm really being asked to determine what the words mean, not who was told what and why. So I wonder whether, you know, it really is a salient issue.

MR FITZGERALD: Well, it's only ... it's just that it questions the reliability of our evidence, I suppose. Mr Stephens has indicated he was told by a particular director that he'd received advice from the department indicating that they are award free.

PRESIDENT: Yes. Well, I don't think anybody's really casting any doubt or any form of ...

MR FITZGERALD: Well, if that's accepted without the need for evidence ...

PRESIDENT: ... imputation on Mr Stephens's evidence. That's Mr Stephens's knowledge and he's given us advice to that effect.

MR FITZGERALD: Well, I just have to ... and I know there is no strict rule which would prevent this happening, Mr

President, I would have to concede it is hearsay ... in the nature of hearsay evidence which this Commission is not necessarily bound to reject as a normal court would. But in terms of the strength of the evidence, I believe first-hand evidence from Mr Cheek would be better.

Now, we have mere submissions - and I mean that respectfully to Mr Evans - indicating that he believes consistent advice had been given in respect of the Hairdressers Award. Now, I've already indicated on record that that advice would be clearly wrong in respect of Theogenes, for instance. And I've already indicated that that simply wasn't the case to management of the centre which conflicting advice was given ... or certainly advice was given that they were award free.

PRESIDENT: I knew I shouldn't have asked the question. In fact, I made a preliminary comment before I did ask that question.

MR FITZGERALD: I'm happy just to see if we can get to a point, Mr President, to ... as long as the Commission accepts that Dockside were acting in good faith and that you accept that the advice they did receive from the department was that they were award free. But if it's not accepted, Mr President, despite what Mr O'Brien says about us knowing the extent of the conflicting evidence, we have here today the actual department saying that consistent advice was given.

Now, in that respect, that puts a totally different complexion on it and it may be necessary for us to call it but if you're happy to accept that point, we won't do so.

PRESIDENT: Well, Mr Evans wants to make a further comment

MR EVANS: Thank you, Mr President. I don't think there's any doubt that I've indicated that from time to time conflicting information is provided. And in this particular matter I wouldn't argue that managing directors of Dockside may have been informed that the establishment is award free. I don't really believe that anyone is in a position to say categorically anything to the contrary.

I used Theogenes as an example simply because it was a name that was thrown around here this morning. I had no knowledge one way or the other with any certainty as to whether it was subject to a State award or respondent to a federal award. It was simply a name picked out to use as an example.

In relation to Mr Fitzgerald's application, I really don't believe that it has any relevance at all. Let's just say for the sake of the exercise that conflicting advice was given. Where does that leave the application?

PRESIDENT: Yes, that's my view, Mr Evans.

MR EVANS: Simply because an organisation such as mine may have erred in providing advice, that doesn't take away from what basically we're talking about and that is whether the award applies to these particular people. In other words, their legal entitlement. Now, that's going to exist irrespective of whether one of my officers, or even I, provided incorrect information.

PRESIDENT: Yes, you're quite right.

MR EVANS: Thank you, sir.

PRESIDENT: Thank you. Well, were you happy with that ...

MR FITZGERALD: I'm happy with that ...

PRESIDENT: ... short summary there, Mr Fitzgerald?

MR FITZGERALD: took a while to get it, I'm sorry about that. But given the hour, I think ... and there are some points, particularly in respect to submissions made by Mr O'Brien in respect to what Mr Stephens said on transcript today, and also what Mr Risdon said. And certainly we're unable to find the passages where he referred in the United Kingdom to where it was a studio. In fact, quite the contrary. So we say that that submission is made without foundation.

So there are some points which we'll need to check during the luncheon adjournment and we're able to proceed this afternoon, and I think to finality without much problem.

PRESIDENT: Yes. Thank you, Mr Fitzgerald. Mr O'Brien, are you content if we adjourn till 2.15?

MR O'BRIEN: Yes, and I will provide Mr Fitzgerald with references, and also draw his attention to page 30 of the transcript.

MR FITZGERALD: The other point that I would like is that there was some indication of an exhibit produced by Mr O'Brien.

MR O'BRIEN: It was only a page out of the Yellow Pages. I've shown Mr Fitzgerald a copy of the page and it's marked where the term 'studio' is used, on page 308. But if he wants us to photocopy it, I will.

PRESIDENT: Well, I'll leave you to sort that one out with Mr Fitzgerald.

MR O'BRIEN: Right.

MR FITZGERALD: Okay.

PRESIDENT: And with that we'll adjourn till 2.15. Thank you.

LUNCHEON ADJOURNMENT

PRESIDENT: Mr Fitzgerald?

MR FITZGERALD: Thank you, Mr President. I will attempt to be brief and I don't think I will be overly long, Mr President. But I just open up, as I did during submissions prior to lunch, where Mr O'Brien, in submission, indicated the matter is reasonably clear. He used the word 'reasonably'. I would suggest, Mr President, that by using that word 'reasonably' he is himself in doubt as to which award applies, if in fact any awards whatsoever.

And again I think that doubt in Mr O'Brien's mind is reinforced by the nature of the application that's an either-or approach. Even though I would concede that, as you indicated on the last hearing, that Mr O'Brien is able to make an application in respect to two awards, the procedural fairness of that I have some question about. Nevertheless, we will respond to the applications as they currently stand.

First, and I think the simplest argument which we will reject is ... and it is in fact the first application in chronological order, is the application relating to the Miscellaneous Workers Award. The evidence, quite clearly, Mr President, clearly rejects the assertion of the FMWU that the classification of 'general attendant' as contained within the Miscellaneous Workers Award, in fact applies to the position of a gym instructor engaged at Dockside.

Clearly the evidence of the FMWU witnesses themselves supports the rejection of the FMWU assertion.

PRESIDENT: Does it totally reject it?

MR FITZGERALD: I believe so. Certainly we would concede, Mr President, that some of the functions are contained ... are contained within the definition of 'general attendant', but they are ancillary functions and it's quite clear in terms of the significance of the position that the prominent aspect of the job is in fact that of a gym instructor and fitness advisor rather than someone who's doing reception duties or some incidental - and they're very much incidental as indicated by Mr Stephens in evidence - cleaning functions and ... as opposed to cleaning functions performed by contract

cleaners or the like. Here it's simply wiping some perspiration off gym equipment and the like.

Despite Mr ... and I'm sure Mr Risdon didn't necessarily attempt to give it prominence by listing in terms of what he saw the functions that it's coincidental that he gave ... he listed the gym instruction under ... in his evidence as one of the ... as one of the last functions. And if I could go to that for a moment please.

At page 12 of the transcript, Mr Risdon in fact indicated the question ... in answer to questions from Mr O'Brien, and I quote:

Well, my responsibilities included opening and closing of the centre, general reception duties, which covered: cash handling, telephone work, selling memberships, general assistance of the members and, indeed, non-members using the centre. Instruction and supervision in the gymnasium and a varied ... varied cleaning and maintenance duties of the various equipment and facilities in the centre.

And you'll notice that the instruction and supervision in the gymnasium came well down the list, but I would submit that you should in fact reject that as giving any order in terms of importance, and the functions which he first mentions should have been mentioned last, in my view, because they are of ancillary or incidental duties rather than the primary duties.

At page 16 of the transcript Mr Risdon in fact conceded to me that his major function was a weight training instructor and that was towards the bottom of the page when I asked him: 'So what would you see as the major function you had while you were engaged at Dockside?'

And he said: 'I saw my major function as being a weight training instructor'.

And he was so qualified for that task as he indicated and clearly even though some of the duties, and only some, and for some of the time, not all of the time, we saw in evidence that he opened the centre some of the time but wasn't required to do it all ... in every shift he worked, clearly is not encompassed by that term 'general attendant' within the Miscellaneous Workers Award.

Indeed, Mr Thorn, not in cross-examination this time, but in examination-in-chief, and this is evidence led by Mr O'Brien, concedes that he was engaged as a gym instructor and at page 23 in answer to a question by Mr O'Brien, and I quote from the bottom ... the question put by Mr O'Brien was:

As an employee of Dockside Fitness Centre - we'll forget about the previous employer - as an employer of Dockside Fitness Centre can you tell us what your duties were?

And Mr Thorn answers:

Right. They were fairly varied. Basically I was employed as a gym instructor which is to assist and instruct members on the use of weight training equipment, and ... training equipment. That is also doing fitness assessments, and basic gym programs, and to assist in the techniques on the various equipment to make sure everyone was exercising safely and correctly. That was done week days only.

So he clearly acknowledges that his principal task was that of a gym instructor.

And the evidence of Mr Stephens this morning clearly supports the proposition that these employees were not engaged as general attendants or the like, they were engaged as gym instructors with specific skills and requirements of the job. And for that reason it's very difficult, in fact, drawing a very long bow ... indeed, drawing a very long bow, to suggest that they somehow come within the definition of general attendant within the Miscellaneous Workers Award.

Now ... and I just note the chronological sequence. I don't think we can ignore that, Mr President.

As you noted the initial application was made in June, I think it was, in respect to the Miscellaneous Workers Award. Then we had a purported revised application by letter to the Miscellaneous Workers Union, which sought to include the Hairdressers Award.

Now, I just dwell on this point being made by Mr O'Brien. Mr O'Brien says, and he's not sure, that it's reasonably clear-cut. Yet, in the first instance, when he made an application, he made an application in respect of the Miscellaneous Workers Award and then, obviously not as reasonably clear-cut as he thinks it is, he then makes an application in the alternative in respect to the Hairdressers Award. But the initial application was in respect to the Miscellaneous Workers Award.

So I believe quite clearly, Mr President, that the application in respect of the Miscellaneous Workers Award can be rejected out of hand by you. And I realise this is a secondary argument, as suggested by Mr O'Brien, but nevertheless it's an argument which he seeks to rely on.

It could be said, if you take his proposition through to its fullest, that every person who is engaged in whatever capacity, if they are performing some of those functions, and I suppose we all perform ... I myself have some responsibility in locking and closing my own offices. I have some basic responsibilities in ensuring that our kitchen and our office is cleaned. So if you take it through to its fullest extent, it could be said that we also should be classified as general attendants. My preference is not to be so. And I'm sure in most cases ... just simply because an employee does some of the peripheral duties in addition to the primary function of that job, does not necessarily make them subject to the Miscellaneous Workers Award.

And if you examine every employee's job and took Mr O'Brien's submission through to its fullest, the same assertion could be made in respect to many positions. And I think that's a ridiculous proposition.

Now, I now turn to the Hairdressers Award. And just to, in terms of giving you some guidance, Mr President, I will seek to tender three or four exhibits which clearly reject the Miscellaneous Workers Union contention that the activities or the industry of health and fitness centres is, in fact, in some way encompassed by the Hairdressers Award. I mean, it's an absurd proposition when you think of it in logical terms in any event.

From an equity point of view, and I will embellish this later, from an equity point of view if you ask the reasonable man in the street whether the Hairdressers Award should have some application to this sort of industry, it would be rejected out of hand. And hence the position which the principals of this business, and indeed every others ... because I can certainly quite clearly state that, and I have a knowledge of the industry representing the industry, that no others, in fact, as contrary to the suggestion made by Mr Evans, in fact observe the Hairdressers Award.

Now, that is why there have been specific negotiations raised by Mr O'Brien, might I add. The application was by Mr O'Brien to make a specific industry award.

Now, the merits of pursuing that application, and I know there's nothing legally to prevent this occurring, but certainly from an equity point of view, the merits of proceeding with that application - and it has been actively pursued - we've had negotiations, substantive negotiations, and at the same time seeking to impose some other award, is very questionable in my view.

I will foreshadow at this point in time, Mr President, that despite being able to quite clearly show to you that the term 'health and physical culture studio' is not one in common

English usage, and that's the test which we've got to apply, it's not whether it did apply or not, it's a test which we've got to apply and I'll present precedent to show you that they are the rules of interpretation which apply today.

It's not what could have applied in the past but what is actually used in terms of common English usage. I will also be foreshadowing in my submission that this Commission should exercise its discretion and refrain from making a declaration pursuant to section 43. Now, that is a secondary submission of mine. My principal submission is that I reject quite categorically not only the application in respect of Miscellaneous Workers Award but also that in respect to the Hairdressers Award.

I was pleased to learn from both Mr Evans and Mr O'Brien this morning that despite the all others classification which is quite clear and unambiguous in its nature, that it does include health and fitness centres, that's not the relevant criteria. I have a similar argument which applies, as you may be well aware, Mr President. This Commission is taking a much more professional approach to the proper legal application to awards and, unfortunately, some of the awards which have been made under the old Wages Board or Industrial Boards system, these days may be questionable whether they comply and I just take you to the tax industry case which has been before you and before the Commission in other instances, where despite the actual manifestation of a classification, I would say in that instance, that the award is not properly made in there because of a lack of ... a legal technicality in respect of master-servant relationship.

Now, I would say the same in this instance, that despite the classification appearing, which is unambiguous, I would concede, that classification is meaningless if in fact there is insufficient scope to provide for it. So in that respect, Mr President, I would urge you not in any way to consider it material the existence of that classification. The reason why we're here today is to determine whether the scope is sufficient to cover the industry which Mr O'Brien alleges in his application.

PRESIDENT: While we're on that point, Mr Fitzgerald, if you say the scope doesn't exist, how do you reconcile the fact that health and fitness centres have been inserted into the all other definition?

MR FITZGERALD: I can only speculate, Mr President, and I have done some research in terms of the nature of this award. I can only speculate that it occurred during the times of the Industrial Boards prior to the proclamation of this current Act and that for whatever reason, those involved in the Industrial Boards felt that it was appropriate that they be inserted. But it is clear, despite that, that there was

insufficient scope to allow for it in the first instance and that's what I'll be taking you to further in my submission, Mr President.

I did want to comment on that aspect because even though it's been conceded by both Mr O'Brien and Mr Evans, I don't think in your decision, Mr President, you should be influenced by the existence and I urge you not to be so influenced by the existence of such classification.

PRESIDENT: No doubt you will talk about it later, but I understand or there is one of the seven or so criteria which the Commission has set down to use in interpretations which goes to the question of considering these sorts of terms in the award as a whole and taking notice of the way the award's constructed in order to determine whether or not there's a particular meaning that should be applied.

MR FITZGERALD: I understand that rule and I'll be taking you to that later as well, Mr President.

That would ... that I believe would assist if the scope ... and we've got to put the scope clause in its context - the scope clause is probably the most critical clause of any award. It tells you whether an award applies or not.

Now, I don't believe it's permissible to reverse that rule to allow something which is provided like a classification of an award to determine whether the scope ... the scope in itself should be an autonomous and self-sufficient section.

Now, whatever is made and contained within the award should not be used to interpret it, but vice versa I think the reverse could occur. But in this instance it's not possible, or should not be possible for the Commission to be influenced by the existence of that particular classification.

Now, Mr O'Brien took you through some definitions, and I believe it's important that I do so also, but prior to doing that and examining the scope of the Hairdressers Award, if I could produce an exhibit which goes to the Industrial Board, or Wages Board in fact, back in 1974 which confirms that this clause was also existent at that time.

PRESIDENT: TCI.1.

MR FITZGERALD: If the Commission pleases. Mr President, this exhibit is, and I've only just taken the relevant part, but it's the first page of a determination of the Hairdressers Wages Board, dated 3 September 1974 and then we effectively go to the scope clause, although not so titled at that time, and on the second page and you'll notice effectively ... or in fact, not effectively, it is identical to the award as it currently stands.

Now, I'm not sure what the award-makers were attempting to cover with health and physical culture studios. Now, I've spoken at length to those in the industry and they can only speculate that maybe it was covering areas such as turkish baths with associated massage facilities and organisations of that kind, but I can say quite clearly, and it was brought out by the evidence of Mr Stephens, that the health and physical fitness centre industry as we know it today did not come into being ... well, it was not ... it didn't even exist at that time, so the industry as we know it today commenced with the - in its truest form in 1982 or round about that date - with the existence of centres such as Lifestyle, Vigour and the like.

PRESIDENT: You'll excuse my smiling at that point, but I'm simply recalling the fact that in the '60s when I was fairly fit and engaged in football I used to go to Cazaly's health studio or whatever it was, and there it had a turkish bath or if I really felt like it go and work out on the weights and do some skipping or ...

MR FITZGERALD: Yes.

PRESIDENT: ... rope work or ...

MR FITZGERALD: I'm not denying that organisations like that existed, but it's in the current form where we have health and fitness centres in the nature of Dockside as it is today. Theogenes in Launceston, they established ... they were established in the early '80s.

PRESIDENT: Would that be a sort of technological advancement?

MR FITZGERALD: I believe ... and also the offering of a range of facilities - swimming pools and the like. I'm not ... certainly not denying that Cazaly's and the like didn't exist prior to that time, but the real health and physical fitness industry was not really established until the '80s and just to prove that in terms of this jurisdiction, if I could produce a further exhibit.

PRESIDENT: TCI.2.

MR FITZGERALD: Mr President, as you can see, it's simply the cover page of an agreement between Lifestyle Health and Fitness Club and Cazaly Fitness Centre ... I'll just show that it's Fitness Centre and not studio or some other like word ... and the Theatrical, Amusement and Employees Association.

Now, I'll just make the point, that Lifestyle Health, although there was no continuity of operation, it operated in the same building that Dockside is currently in. This agreement, although I haven't produced the total agreement ... I don't

think it is necessary for me to do so, I'm just simply proving that in terms of proper industrial regulation for those organisations, and in fact there was a subsequent agreement which I couldn't locate in my office, which also applied to an organisation called 'Vigour'. It really wasn't properly regulated until 1982, which is the date of this agreement.

So I believe that even though there might have been, as you indicated, some isolated instances of gymnasiums and the like which were set up, the award-makers weren't, because of the lack of real existence of the industry at that time, were not trying to encapsulate the industry as we know it today.

I haven't been able to research any further back than that but it could have been that ... our records didn't go any further, but there could have been ... the Hairdressers Industrial Board could have inserted that clause some time earlier than that.

Now, the general rules relating to interpretations ... and as I said, I will present these later, indicate that where there is doubt, ambiguity or uncertainty in respect to the particular provision, it is possible to look at the intention of the award-maker or the law-maker, as the rules say.

So we can only speculate, and as Mr Evans has indicated, the terms are less than ideal in terms of its description of the particular industry. We can only speculate that the award-maker at that time, or the award-makers as it was the Wages Board system, were attempting to cover organisations more akin to hairdressers and beauty salons and one relating to more passive things such as turkish baths and, once again, we have no record to indicate what they were intending to encapsulate.

In terms of reading the provisions consistently with the trade of hairdresser and beauty salon, it more neatly fits than the health and fitness centres, which Mr O'Brien alleges today. As I indicated, it's an absurd proposition to ask the reasonable man in the street whether they think the Hairdressers Award would apply to an industry such as this.

PRESIDENT: If you ask the man in the street why the all other classification, and I know you say that it shouldn't be used, but if you asked the ordinary man in the street why the all other classification had the reference to health and fitness centres in it, what do you think the ordinary man in the street might say?

MR FITZGERALD: He'd possibly say the award could apply, yes. But I think, from a reasonable point of view, in terms of whether an award applies you look at the particular award which makes the award apply and that is the scope clause.

PRESIDENT: Then you'd go to the scope and have a look at that and it talks about health and physical culture studios. Couldn't the ordinary man in the street look at that and think, well, yes, I suspect that's really the old term for health and fitness centres.

MR FITZGERALD: Certainly, that could happen, I concede that, but once again I would stress that that's the situation in reverse.

PRESIDENT: Yes, I take your point. I understand your argument and that presupposes that there's absolutely no power in the scope to cover health and fitness centres.

MR FITZGERALD: In any event, despite your obvious concerns, Mr President, in respect to the existence of this classification, I will conclusively show you that particularly in terms of the word 'studio' that in any event if you take the scope and carefully examine it, it's insufficient or incapable of encompassing the industry which we have today.

If I could produce those rules of evidence, or rules of interpretation, which I referred to earlier. I will produce both at the same time.

Now, Mr President, before ... I am sorry, should I wait for identification?

PRESIDENT: Yes. Which one do you want to deal with first?

MR FITZGERALD: I think the first one should be, in fact, the ex-President Koerbin's rules, T.30 of 1986 should be the first one.

PRESIDENT: Yes, that's TCI.3.

MR FITZGERALD: If the Commission pleases.

PRESIDENT: And the Industrial Law Review extract, TCI.4.

MR FITZGERALD: If the Commission pleases. Mr President, you would be aware, I think, of the rules which the Commission has determined for itself. Once again, I suppose there is no statutory force to these rules, and it is obviously free for the Commission to take into account any consideration which is put before it, but in terms of providing some assistance to the parties in these matters the President, in fact, laid down his own ground rules (the ex-President, I beg your pardon).

They were very much adopted from the normal rules of interpretations which other courts, or courts in this country utilise, and they are based on strict legal principles, and if I can just take you to that one for a start - TCI.4, I beg your pardon.

PRESIDENT: TCI.4.

MR FITZGERALD: Yes. If I can just take you to that for a start - yes, thank you. And it is the subheading 'Judgment of Stanley J', and I will just skip the first four lines, but he states that the principles were as follows:

- (1) The intention must be gathered from the instrument itself.
- (2) The words of the instrument must be taken in their grammatical sense and ordinary usage.

And I just stress that point, because when we talk about physical culture studios I am certainly at a loss, and certainly those who instruct me in the industry are at a loss as to what that means in terms of the ordinary English usage.

And then the next rule is that:

The grammatical and ordinary sense will not be modified unless to avoid absurdity, repugnance or inconsistency.

(4) [And I think the one which you are referring to] The instrument must be construed as a whole. It follows that -

(5) A bare statement of intention wherever found cannot of itself govern the legal effect when the legal effect is ascertainable by the application of the rules of construction to the document itself.

Now, I stress particularly the ordinary English usage, because that is a term which ... and also the term 'studio' despite what I see as fairly much a long bow attempt by Mr O'Brien to somehow utilise the services of the compiler of the Yellow Pages to help in his case. Certainly in this authority, and in any other worthwhile authority, I would suggest that that sort of approach should be rejected out of hand.

PRESIDENT: I thought the telephone book was a very useful instrument in industrial relations.

MR FITZGERALD: It's an instrument in looking up telephone numbers, Mr President, but that's about all, and addresses, but in terms ...

PRESIDENT: Or respondencies, and what have you.

MR FITZGERALD: Well, it's one which is used by unions often, and not always a useful way of determining a respondency, I would suggest, Mr President.

PRESIDENT: Effective though.

MR FITZGERALD: It depends on which side of the fence you sit, Mr President.

PRESIDENT: Quite.

MR FITZGERALD: But the term `studio', and I'll come to the dictionary definition in a minute, because I think both Mr O'Brien and Mr Evans have extended that well past what the dictionary definition is, but it is not one which is commonly applied in the industry.

Now, we've had Mr Stevens give evidence on that this morning, and it's not one which is commonly understood to be described `a health and fitness centre'.

So we've got to relate that to the rules adopted by Stanley J., in the award interpretation matter before ... and also, reinforced by ex-President Koerbin's interpretation rules in matter T.30 of 1986. And those ... I won't take you specifically to those, but those rules are pretty much a mirror image of the legal principles used in interpreting awards.

So the word `studio', and that's the ... I think the key word in this whole exercise, and it's one which describes the particular industry, a health and ... sorry, a physical culture studio. Now, physical culture in themselves are terms which ... or particularly the term `culture' is not one which is used in the everyday English usage by any means, but `studio' is probably the most key word of the whole exercise.

And if I could take you to Mr O'Brien's definition of `studio'. I didn't number that one actually, I'm sorry, but ...

PRESIDENT: No, they weren't numbered. It was all ... they were all one.

MR FITZGERALD: Right. Thank you.

PRESIDENT: FMWU.2.

MR FITZGERALD: In fact I had an identical exhibit, so I didn't really need to produce it again. But I take you to the FMWU.2 exhibit. And it refers to, and I quote:

Working room of painter, sculptor, photographer et cetera, often with skylights or windows specifically designed to secure suitable light.

Now, Mr Evans attempted to say that a working room is simply any room for any purpose. Now, clearly in terms of this definition, it's restricted to a working room of a painter, sculptor and photographer or a like occupation. It's not one which could be extended to the health and fitness centre.

PRESIDENT: How do you ... yes. How do you think it got into the award to begin with?

MR FITZGERALD: I can only speculate. I believe, Mr President, that ...

PRESIDENT: I do know from experience that there used to be health studios.

MR FITZGERALD: Yes.

PRESIDENT: And that that's what they were called.

MR FITZGERALD: And I'm not sure what organisations they were.

PRESIDENT: Well, they were ... I think, in fact, Cazaly's was a studio. This is going back a long while. That's a vague recollection I have, and I might do some research on that in the time that it takes me ...

MR FITZGERALD: Certainly.

PRESIDENT: ... to respond to this.

MR FITZGERALD: But in any event, Mr President, I think ... I urge you to utilise the rules of interpretation to adopt the principle of common English usage. And physical culture studio is not one within the common English usage whatsoever, I would submit.

Now, I agree that there is some doubt, and Mr O'Brien says that he's reasonably sure or that it is reasonably clear-cut, but in this instance, and I'll tie this all together in terms of my secondary submissions, I believe where there is doubt ... or, firstly, the onus of proof is on the applicant to prove that the award applies. And as there is some doubt in terms of we acknowledge that there is a ... it's an old term, and Mr Stephens acknowledged that in evidence this morning. And he certainly didn't acknowledge, I would submit, and transcript will show, that it could apply to this particular industry.

I will also show you that Mr Risdon, in his evidence, didn't in any way refer to studios and like organisations in the U.K., but refers to health and fitness centres. And I'll take you to that shortly.

But I would simply say, Mr President, that where there is doubt, and given that the onus is on the applicant, that the doubt should be exercised in favour of the respondents to the application. And the application should either be dismissed or you should decline from making a declaration.

If I could take you to ...

PRESIDENT: Just before you do, you say that it's not in ... that the words 'physical culture studio' are not in general usage and no-one has yet been able to produce those words being used currently.

MR FITZGERALD: Yes.

PRESIDENT: What about the words 'health studio', as evidenced in Mr O'Brien's first exhibit this morning? I mean, that is being used generally, isn't it? Well, was it the first or second exhibit?

MR FITZGERALD: I'm afraid, Mr President, you've placed more importance on the first exhibit than I do.

PRESIDENT: The Yellow Pages.

MR FITZGERALD: I place no importance whatsoever on it. The term in this ... and I was going to address this aspect, I'm glad you brought it up as this time. The way it's expressed there could be expressed in many different ways, depending on the compiler of the list.

Now, just simply because the compiler ... it's a very subjective test, I would submit. Just simply because the compiler has indexed ... listed it that way it doesn't necessarily follow, Mr President, that it's generally accepted that that's the way the community perceive it to be. In fact, quite different ... you know, once again, the old reasonable man in the street test: if I asked that question to someone in the street, asked them whether health studio aptly describes a health and fitness centre, I would suggest quite strongly, Mr President, that that's not a term which they would utilise.

So simply because the compiler uses it in this instance it may be that I take a similar page out of an interstate phone book and it might show exactly the opposite. So I place no importance ... it really is quite a long bow Mr O'Brien is attempting to draw by producing such an index. All it does show is that the compiler in this instance believes ... and it may be that that's the way it could have been listed in the past. I'm not sure. But, the compiler believes that that's the appropriate way to index it. It doesn't in any way show that that's how the community perceive it to be.

PRESIDENT: The yellow page man would be most upset to hear that.

MR FITZGERALD: I'm not concerned by that. I don't think the Yellow Pages organisation is in any way associated with the TCI.

MR EVANS: They could be one day.

MR FITZGERALD: But, it simply is an index. It's for finding matters only. It is nothing more authoritative than that.

PRESIDENT: I wasn't attaching any great authority to it.

MR FITZGERALD: I'm glad about that, Mr President. If I could take you to an alternative dictionary definition of 'culture' because it is different to the one in the Oxford Dictionary.

Prior to that, Mr President, just to confirm ... as we're using a Collins Dictionary and maybe I should just present the forward to that dictionary just to indicate the way it approaches the definition of words.

PRESIDENT: Thank you. TCI.5.

MR FITZGERALD: Mr President, you'll see that this is really, if you like, the objective of this English ... this dictionary, sorry, the New Collins Concise English Dictionary. It's ... and I just take you down to the second paragraph.

The paperback version preserves the main features that have made its parents so successful.

- It gives priority to clarity of layout and clarity of definition.

- It enters as main entries in their alphabetical place compounds and derived forms that need defining.

- It places common current meanings first, before technical, rare, and older meanings.

So, I just stress that point and stress it in terms of the definitions which I am about to present to you. I need to go no further with that definition ... with that exhibit, sorry.

And if I could produce a ... I can assure you it does come from the same dictionary despite the size of the print. This, in fact, was done in earlier proceedings Mr O'Brien referred to.

PRESIDENT: TCI.6.

MR FITZGERALD: If the Commission pleases. And it's a definition of culture. If I could read it into transcript.

1. The total of the inherited ideas, beliefs, values, and knowledge, which constitute the shared bases of social action. 2. The total range of activities and ideas of a people. 3. A particular civilization at a particular period. 4. The artistic and social pursuits, expression, and tastes valued by a society or class. 5. The enlightenment or refinement resulting from these pursuits. 6. The cultivation of plants etc.

which is not ...

PRESIDENT: What does 7 go on to say?

MR FITZGERALD: Quote:

7. The rearing and breeding of ...

it just follows on.

7. The rearing and breeding of animals esp. with a view to improving the strain.

And then 8 as it is which are more culture in terms of micro-organisms.

PRESIDENT: I see. That's the way it carries on.

MR FITZGERALD: I'm sorry about the ...

PRESIDENT: I follow now, thanks.

MR FITZGERALD: You can see that that definition does differ quite markedly to the Oxford definition. There is no reference to any physical pursuits and, in that regard, it does ... particularly the Collins definition is one which is strong in terms of common English usage. That's a definition which reflects the understanding of what the word 'culture' means in this current day and age.

MR FITZGERALD: Now, in terms of studio, if I could produce a further exhibit just to reinforce the approach taken by the Collins Dictionary.

PRESIDENT: TCI.7.

MR FITZGERALD: If the Commission pleases, and if I could just read this into transcript, 'studio, a room in which an artist, photographer or musician works'. So contrast it to

some extent with the Oxford definition, it's very specific. It talks about a room in which an artist, photographer or musician works. It's not a room which is used for other purposes as suggested by Mr Evans. So I was quite surprised when Mr O'Brien in fact produced the Oxford definition of studio because in terms of that being the key word, it's one which in fact assisted ... it did not assist him in any shape or form and the definition goes on to include a room to record television or radio programs et cetera.

Again, in terms of this dictionary, the Collins Dictionary, it's very specific, that it can't be just simply a room for any purposes, particularly a room which can be better described as a health and fitness centre. So in terms of this application, and you must, in my submission, Mr President, look closely at what is commonly understood by those words and I can say quite categorically, and particularly after consulting with those in the industry, that the term 'health and physical culture' is not one which aptly describes the industry, nor is it one in common English usage in any way described in the industry.

PRESIDENT: Have you got any ideas as to what the words in the scope were intended to mean originally?

MR FITZGERALD: Once again, I can only speculate. But I would have to say, Mr President, it refers to something more analogous to the hairdressing and beautician area and I can only speculate that it in some ways ... I suppose only the record when the award was first established would show that.

But I can only speculate that it referred to ... and I'm thinking back a few years, organisations like ... I think it was called Normans, which had a turkish bath and massage facilities.

PRESIDENT: But they wouldn't meet your definition of a studio.

MR FITZGERALD: Well, despite the word 'studio' ...

PRESIDENT: That's my concern. What did they mean by studio? If your definition is the one that I must accept, what are the proprietor of a health and physical culture, photographer's room or artist's room? It doesn't seem to make sense.

MR FITZGERALD: Well, given that, if it doesn't seem to make sense, Mr President, then ...

PRESIDENT: There's some ambiguity in it.

MR FITZGERALD: Well, surely if there is any ambiguity in it, it's not open for you to make an authoritative interpretation

suggesting that this industry comes within it because I would concede that there is a very marked ambiguity in terms of this definition and it would be wrong, with respect, Mr President, for you to proceed to make a determination in the terms of the application given the extent of the ambiguity.

PRESIDENT: Did, in your TCI.3, the former President's set of rules, point 6 where genuine ambiguity exists, resort may be had to the judgment accompanying the award as an aid to discovering its true meaning.

MR FITZGERALD: Certainly, that's something which is open to the Commission, but against that, Mr President, and apart from the equity arguments which I'll present to you shortly, and I mean shortly ...

PRESIDENT: We've got all afternoon.

MR FITZGERALD: Well, it won't take all afternoon, I can assure you, depending on the response. Despite the equity arguments which I'll be presenting to you later, clearly, in terms of ... and I've just lost my train of thought for the moment ...

PRESIDENT: Sorry about that.

MR FITZGERALD: That's okay. But I will come back to that if I could, Mr President. Yes, it suddenly occurred to me. Certainly that's a rule which could be looked at with some authority. But in terms of the ordinary English usage, that's really the most prominent rule of interpretation. And it's not possible for this Commission to really determine what it could have been in the past. It's now which is the most important thing. And it talks about current ... if I take you back to Stanley J's, judgment. (If I can locate mine somewhere here. Excuse me for one moment.)

PRESIDENT: Yes, certainly.

MR FITZGERALD: It talks about grammatical sense and ordinary usage. Now, in terms of ordinary usage, Mr President, which is point 2, it must mean current ordinary usage, it can't mean past ordinary usage. It would be an absurdity.

Now, I mention that ... and you've also mentioned the rule about interpreting awards as a whole. And it would be my submission that the scope of the award as it currently stands, the trade of a hairdresser, barber and a wig maker; (2) the proprietor of a beauty salon; and (3) the proprietor of a health and physical culture studio, should really be read in conjunction with each other.

Now, a hairdresser and beauty salon are clearly, if you like, passive activities. There's no physical individual exertion

which would occur in a health and physical centre - health and fitness centre.

Now, in that respect, I can only speculate that health and physical culture studio meant something more akin to a hairdresser or a beauty salon. And from a logical point of view that would seem to make sense and that would include, maybe (once again I can't be certain because I wasn't there at the time) maybe something also passive in nature, such as, turkish baths, massage et cetera.

That's certainly something which is not in any way aligned to physical, personal exertion which occurs in a health and fitness centre as we know it today. And I note with interest, Mr President, your personal experience going back some years.

PRESIDENT: I didn't really want you to, but if you must you must.

MR FITZGERALD: But in terms of ... and it just does remind me, if the award-maker had been clear there, the term 'gymnasium' would have been one which would have been commonly understood. Now, if it was intended to include organisations such as Cazaly's, it would be reasonable to expect, Mr President, that the term 'gymnasium' could have been used in that award if it was intending to cover organisations such as Cazaly's at that time.

So for that reason, the reason why it is framed in such unclear and ambiguous terms, I can only surmise that they are trying to cover areas something more akin to hairdressing or a beauty salon.

Now, it may be that it covers, and once again I can only speculate, that it covers maybe weight loss centres and dietary advisory centres, which seem to exist both nationally and in this State which, again, involve more counselling and advisory services rather than active participation.

So I would submit that to ... and if it's a term which we're going back into the past, I reject that approach, it's not one which is open to this Commission. If it is ...

PRESIDENT: Did you say ... sorry, did you say it's not one?

MR FITZGERALD: I believe it's not one which is open to this Commission. But if the Commission feels inclined to use that approach, which I urge it not to, I would say that there would be better words to describe this particular industry at that time rather than health and physical culture studies. Now, I have already suggested one, that of a gymnasium, but that doesn't exist in this award.

So I don't think you can in any way reject the argument that even though centres existed prior to 1974, the industry as a whole really didn't get off the ground until the early '80s when an industrial agreement first regulated those in the industry.

Now, in that respect, clearly it was beyond the comprehension of the award-makers back in 1974 when at that time the same scope clauses existed to cover the health and fitness centre industry as we have today.

Now, I just want to take you to Mr Risdon's evidence where I think ... I have already rejected the contention of Mr O'Brien and Mr Stevens in some way conceded, and once again evidence will show, or transcript will show, that ... I'll just take you to Mr Risdon's evidence. I thought I'd marked it. Excuse me for one moment, Mr President.

Mr Risdon at page 14, he refers to on the third line 'chains of health and fitness centres'. The 'fitness workshops' he refers to.

PRESIDENT: That's two-thirds the way down the page.

MR FITZGERALD: Two-thirds the way down the page. Yes. Thank you. Sorry about this, Mr President, I thought I had marked it. I'll leave it at that, Mr President. But it does show that he himself indicates that that's a term which is used not only in this country, but also in the UK.

I have some further submissions to make in respect to the submissions made by Mr O'Brien.

Yes, I am sorry, I have now been pointed out that on page 12 further up on about a third of the way down Mr Risdon says: 'Yes. I've been working for a chain of very similar centres in London for 3 years before ... before I came to Australia, which was roughly one year prior to my starting work at Dockside.'

So again he refers to them as centres. Studio is not a term which is utilised, nor generally understood by those who work in the industry, as borne out by the evidence of Mr Risdon who was a witness of Mr O'Brien.

In terms of the merits of the advice provided by the then Department of Labour and Industry, there was some reference, and I am sure Mr O'Brien ... and he did draw my attention to it before where he refers to a Susan Carter who was previously the manager of the centre, actually indicating to Mr Thorn that the Hairdressers Award applies.

Well, we have taken instructions on that during the luncheon engagement, and Mr Cheek ... even though it is not necessary

and I think accepted by you that we need evidence on this point, and we're happy to present if necessary. When I put that question to him he indicated that certainly that was not the advice which Susan Carter indicated to him in terms of his enquiries and, in fact, he indicated that he enquired of the Department of Labour and Industry on at least two occasions to verify the award coverage, and it was indicated on both occasions that the employees were award free.

Now, given the extent of doubt, which I think even you in some of your questions have indicated, and the equity and merits of the case, where an employer does what is reasonably expected and rings a ... what it seems is an authoritative organisation to get advice, and is advised that, and acts on that advice accordingly in good faith, I would submit strongly, Mr President, that it's unreasonable for ... particularly given the involvement of the FMWU in specific industry negotiations, for them now to expect to enforce ... and that's all ... that's what this application is about - it's simply an enforcement exercise, no more than that. The declaration is going to serve no useful purpose once the Health and Fitness Centres Award is made, because it's a retrospective application simply to enforce an award which is totally inappropriate, in any event.

Now, Mr Stephens indicated to me during the luncheon engagement, if advice had been given that the Hairdressers Award applied, then certainly the range of services, the times on which services were offered, would have been quite markedly different to an award-free situation. And that's simply because of the penalties which are applied in the Hairdressers Award, appropriate to that industry - for hairdressing or beautician industry, but not to this industry, where activities in the main occur across the 7 days of the week.

So from an equity point of view, and I don't believe the Commission can reject this or ignore the equity arguments, it's unfair and unreasonable to expect an employer to apply an award which logically would have no application, but through some quirk has the potential, I suppose, but it's still very doubtful, could apply to the area.

Now, I believe that - I strongly say this, Mr President - that given the discretionary nature of section 43, it would serve no useful purpose whatsoever to make a declaration. What I urge you to do is, in fact, accept a declaration which would clearly show that the Hairdressers Award did not have specific application to this industry. And I think, as you have already indicated, that there is doubt about those words. It would be wrong, and in fact ...

PRESIDENT: I didn't really. I haven't indicated ... I hope I haven't indicated anything either way. Frankly, I've just been asking questions ...

MR FITZGERALD: I ... yes. I ...

PRESIDENT: ... to endeavour to get some elaboration on issues.

MR FITZGERALD: Okay, I would concede that, Mr President, I wasn't trying to pre-empt any decision.

PRESIDENT: Well, I didn't think you were ...

MR FITZGERALD: No.

PRESIDENT: ... but I just didn't want the record to read as though you might be.

MR FITZGERALD: No. I think I gleaned from your answers ... your questions which you asked, that there was ... particularly given the nature of these words, that there was some doubt.

Now, it would be, in my submission, most unfair for the award to be found to apply when the employers in this instance are acting in good faith in negotiations in respect to a specific industry award.

And the purpose of the application would simply be to ... in respect of these two employees, would have no other useful purpose. And the purpose is quite clearly designed to facilitate enforcement proceedings.

Now, I believe that the Commission would be wrong to ... well, firstly, I think the Commission should reject the application in terms of the words used - that they are ones which are not normal, common, ordinary usage - English usage.

The term 'studio' is quite clear that in terms of the dictionary definition ... and I can't surmise what the award-makers were intending to cover, but in terms of the dictionary definition, both the Oxford and the Collins dictionary confine it to particular occupations or pursuits.

You can't take the broad approach and simply say it's a room. That's not the case. And it is confined to those particular pursuits.

And for those reasons I would end at this time and just reiterate that the onus is on the applicant. The onus hasn't been discharged. There is severe doubt. They are not in common English usage. And given that situation, I believe the Commission should either reject the application or, as a secondary position as I indicated, because of the equity arguments which were presented to the Commission today, refrain from making a declaration - which is legally possible,

given the discretionary nature of section 43. If the Commission pleases.

PRESIDENT: Yes. Thank you, Mr Fitzgerald.

MR EVANS: Mr President, if I could have ...

PRESIDENT: Yes, Mr Evans.

MR EVANS: ... a first crack at this - for want of a better expression.

PRESIDENT: Well, you have got another opportunity, Mr Evans, to address material that ...

MR EVANS: Yes, Mr President, perhaps that's a better way of expressing it.

PRESIDENT: ... has only just fallen from Mr Fitzgerald.

MR EVANS: The first point I would like to make is Mr Fitzgerald has agreed that we're generally in agreement that the scope of an award can't be applied to a particular industry. The award itself, notwithstanding that it may have a relevant classification, can't be applied.

But the point that exercises my mind is, Mr Fitzgerald in one of his exhibits tendered the old Hairdressers Award which dates back to 1974, and is quite different in the list of classifications and pay rates to that that exists today.

What exercises my mind is when the award was altered and we simply had a rate for hairdresser taken out, three different classifications of rates for hairdressers inserted, a rate for beauty therapist and beautician and receptionist inserted and, indeed, an all others classification inserted, the fact that the definition of all others did include health and fitness centres to my mind says that the Hairdressers Industrial Board of the day felt that the Hairdressers was an appropriate award for a health and fitness centre, and I believe the inclusion of that all others classification and the inclusion of health and fitness centre in the definition of all others is evidence of that thinking.

Looking at the definition of the word 'studio', Mr Fitzgerald tendered an exhibit ...

Sorry, firstly, if I could look at TCI.6, the definition of 'culture'. In fact that was an exhibit that I spoke to without actually tendering from Collins and, in fact, I relied on that definition to make the point that I was making, and I read from it again: '4. The artistic and social pursuits, expression and taste value by society or class', and '5. The enlightenment or refinement resulting from those pursuits'.

I would put that the sorts of things that some of us do when we go to establishments like Dockside is, in fact, a social pursuit, and going there is, in fact, an enlightening or refinement resulting from those pursuits.

Turning to the word `studio', I indicated earlier that in my view a studio ... the main emphasis ought to be simply on what it is, the room, rather than who does what there.

Now, the little trip down memory lane that we've had in relation to you going to Cazaly's in the '60s jogged my memory as well, and in fact I was a member of Cazaly's when the new Cazaly's started, and whilst I wouldn't categorically state it, I am fairly sure that they regarded themselves as a health and fitness studio.

The mention of the studio `Norman's' again, from personal experience, I've been inside that establishment. I believe the word `studio' was used, certainly ...

MR FITZGERALD: Sorry to intervene at this time. I realise it's in response to some of my submissions, but it's certainly in the nature of new material, one of which I'm not going to be able to respond to, and particularly as it's ...

MR EVANS: I accept that, Mr President, and I withdraw and apologise for entering those.

If I could get back on track. Back to the word `studio'. I'm heartened by the fact that Mr Fitzgerald relies on Collins as providing an appropriate definition to the word `studio'. In fact, I find Collins a very enlightening document. Also Collins Thesaurus is a very enlightening document. If we rely on what, we've used the expression here today, the ordinary, common English usage. Well, if I may, whilst I realise this may be termed `introduction of new evidence', it is in response specifically to an exhibit of Mr Fitzgerald.

In the forward to the thesaurus it indicates:

The name thesaurus comes from a Greek word meaning treasure, treasury or store house, and the thesaurus is so named because it is a treasury or store house of words. Its purpose is to provide lists of words which mean the same, or almost the same as the word which the user of the book has in mind.

MR FITZGERALD: Well, Mr President, I'd have to take similar objection to what I took just previously. Certainly if Mr Evans wished to present this in his primary submission he had an opportunity to do so. To introduce in rebuttal at this

time should be ignored and rejected by you, Mr President, in my submission.

PRESIDENT: I'm prepared to listen to it. I'd be interested in what the thesaurus says, Mr Evans.

MR EVANS: I do take on board ...

PRESIDENT: I don't think it's challenging your submission, rather it's a response, isn't it?

MR EVANS: I believe so. I believe we've had much debate on what the word `studio' means. In my initial submission, without referring to the thesaurus as such, I indicated that I regard a studio to be simply a place where various functions are performed. Indeed, I used the word `workshop'. Now, the thesaurus, when we look up the word `studio', indeed, specifically mentions the word `workshop'.

PRESIDENT: Thank you.

MR EVANS: I'll leave that there, Mr President. Finally, without dwelling on it, we have spoken about the fact that perhaps incorrect information has been provided and that the employer has acted on that incorrect information. And Mr Fitzgerald is arguing that, in equity, the employer ought not be disadvantaged or prejudiced against because he's acted in good faith on that information. Now, whilst not going into any greater detail, whether or not that did occur, and I've already indicated on record that I'd be foolish to say that it doesn't occur from time to time, I believe the employee has just as much a claim to equity as the employer.

In my view, the employee equity argument is that he was entitled to an award rate of pay at the time of his employment. Now, if the award exists, he's entitled to it. Thank you, Mr President.

PRESIDENT: Thank you, Mr Evans.

MR FITZGERALD: Before Mr O'Brien ...

PRESIDENT: Yes, Mr Fitzgerald?

MR FITZGERALD: ... rises, Mr President, I just urge you to consider that I should have some ... even though you may not consider it relevant, but if I could have some opportunity to address Mr Evans's reference to the thesaurus and the term `workshop'. I believe it's in the nature of new evidence in any event ...

PRESIDENT: Yes. I don't want to limit the submissions.

MR FITZGERALD: It would only be very brief.

PRESIDENT: Yes, go ahead.

MR FITZGERALD: Simply, if it does include workshop then how in any way can you align that to a health and fitness centre? A workshop is something which is not in any way ... it's drawing a long bow to suggest that it is a health and fitness centre. I would submit that despite what it says, it has no relevance to these proceedings.

PRESIDENT: Thank you. Mr O'Brien?

MR O'BRIEN: Thank you, Mr President. There are a number of things I think I should expand on and basically my response will be brief.

Going to Mr Fitzgerald's submissions, he dealt first with our alternative argument, and so I'll deal with his submissions first.

He referred you to Mr Risdon's evidence on page 16 where he said: 'I saw my major function as being a weight training instructor'.

Mr Fitzgerald relied on that to say that that was his primary function. But then when you go to page 17 he said ... a question from Mr Fitzgerald. 'Well, take from the time spent for a start. How is it spent?'

Answer:

For the time spent, the reception work and other activities were ahead of the weight instructions.

In terms of the importance of the position, how would you assess it there?

Well, I assessed the gym instruction as being more important, but the inevitable conclusion was that the directors of Dockside considered the other duties to be more important.

Question:

How did you ascertain that that was their view?

Answer:

Simply because of the amount of time I was obliged to stay on the reception desk because there was no covering staff for me to be in the gym assisting people there.

So that although Mr Fitzgerald attempts to downgrade the duties which we say fall within the definition of a general attendant, the fact is that the evidence from Mr Risdon is that that was a substantial part of his working time. And, I guess, one would have to look at that evidence and say, 'Well, Mr Risdon no doubt saw himself as a more valuable employee as a weight training instructor but that the amount of time performed in that duty was not in keeping with his of it in terms of its value to him.

Similarly, the evidence of Mr Thorn was referred to on page 23 and the fact that he had put first the question of ... that he was employed as a gym instructor which is to assist and instruct members on the use of weight training equipment and training equipment and any detailed number of other duties. But, on pages 24 and 25 I asked: 'Did you ever work behind that reception desk?'

Answer:

Yes, I spent quite a lot of time there actually. That's where we greet the members when they come into the centre, hand out locker keys, assist them in any way that is necessary. Answering phones to give details on membership, so just answering general questions, and just giving directions to any members or casual visitors. Also handling the till, so when we take in casual visitors we quickly tour them around the centre, and, you know, assist them in whatever way they might need.

Question:

You have given us a long list of duties. How much of your time would have been spent in that reception area? Of your working time, how much of your time?

Answer:

It's quite difficult to say. As far as the gym instruction that we do is done on a booking basis, so if there is no bookings on a particular day then I may be asked to watch reception while other people can go about doing various other duties. Definitely any time working on weekends, which I did quite a lot of weekend work, the whole time was spent on reception. Also in the evenings, the last hour or two at night would be spent solely on reception because I would be there by myself, and early in the morning when I began at 6 o'clock in the morning until 9.00 would be solely spent on the desk, and also during the day, you know, you'd probably put in quite a bit of time.

So, again, you'd have to qualify the passage Mr Fitzgerald refers to with that evidence to get a balance on what those witnesses were actually saying and not draw a conclusion simply on what we would consider to be parts of that evidence which, in the context of the whole evidence, don't mean what they're suggested to say.

Now, if we want to get into the flippant I could deal with Mr Fitzgerald's submission about whether the general attendant classification applies to his duties. I didn't hear whether he was employed to generally assist the public in the use of the building and facilities in which he works. I don't think that's what his job is. And I would concede, so far as it is relevant to this application, that that classification does not apply to him whether he wants it to or not. But the important thing is whether he wants it to or not is irrelevant in this exercise and would be irrelevant in any exercise of this nature.

The question you asked was of interest and that was why has the term 'health and fitness centres' been inserted into the award. We've always had a problem with the way that this sort of matter has been interpreted in the past. Indeed, it was interpreted the way the President interpreted the application of the classifications for ... I'm trying to think of the term. It was the interpretation of the Restaurant Keepers Award in '87 when the President found that because a classification existed in an award at the time that there was ... the transitional provisions of the current Act came into effect, that classification applied irrespective of the scope of that award. And in that case we argued that the scope was deficient as to certain industrial catering applications.

And the President held a contrary view that the classification existed at the time the award was handed over between the two Acts and, therefore, the transitional provisions meant that the classification applied, irrespective of any deficiency in the scope clause.

Now, we did argue in that case that the scope clause was deficient. The classification did not, in fact, at law, exist. So, we've got ...

PRESIDENT: The boot's on the other foot.

MR O'BRIEN: In fact, it wasn't Mr Fitzgerald, it was one of his colleagues who argued that matter, and argued a different proposition.

I would think that if this matter is determined in the way the parties suggest, that precedent will be, in effect, overturned, but I guess for completeness' sake I ought to draw that to the attention of the Commission. If that test

were followed we wouldn't be looking at the scope clause at all, and there would be no doubt that the Hairdressers Award apply.

So I guess organisations from time to time argue different things to suit particular cases. We are seeking to be consistent in this matter.

In other words, we argued in that case that the scope clause determined the matter and not the classifications. We are arguing the same here. Now, the ...

PRESIDENT: That's on all fours with the employer?

MR O'BRIEN: Oh, yes. We've not put the argument; I've not gone to that particular decision, and I only do so for completeness in reply ... upon your comment, Mr President, as to the relevance of that classification.

The only other thing one can draw is that this isn't a parallel to that case precisely, in that it was fairly clear that the scope clause in that other matter was significantly removed from the classifications which existed in the award, and here I believe there is a connection between a health and physical culture studio and the term 'health and fitness centre'. However, that's a different test.

I don't believe - when we get on to Mr Fitzgerald's attempt to rebut our primary argument - that he has, in fact, made out a case.

Running through the exhibits, the suggestion that he says arises from Exhibit TCI.1 is that health and physical culture meant something to do with steam baths and the like, and it had nothing to do with centres which were the yesteryear equivalent of the current health and fitness centre.

I don't believe that that submission is borne out. I think your comments, Mr President, are supportive of that in the sense that it is generally known that there were centres operating providing a physical fitness service as well as other personal services around that sort of industry, which were known as studios of some sort of other.

He then followed with TCI.2, and suggested that because the term 'centre' appeared there and not 'studio' that somehow that was conclusive proof that these places were not studios within the meaning of the scope clause.

I don't really think that that's a reasonable conclusion. Indeed, one wonders about the agreement being reached. An equally compelling conclusion might be drawn, as whilst the agreement was reached to establish rates of pay and conditions between certain centres which might otherwise have been bound

by the Hairdressers Award and an employee organisation, that was not on the Industrial Board which applied to the industry.

I can't say that that is true either, but it is an equally open conclusion to be drawn when one looks at the parties to the industrial agreement at that time. The Commission ... As I say, nothing compelling can be drawn from TCI.2.

TCI.3 and 4 are helpful in the sense that they spell out some tests to be applied in the case of award interpretation and, indeed, TCI.4 is useful in testing the submission that we should give the word `studio' the meaning that's precisely laid down in their dictionaries, and I think your comments have hit that nail right on the head.

If you replace the word `studio' in the scope clause with the term `painter's workroom' or `photographer's workroom' or `musician's workroom' or `sculptor's workroom', how does that give any sense to the passage `health and physical culture studio' within the award?

Now, in TCI.4 the judgment of Stanley J in point 3 said: `The grammatical and ordinary sense will not be modified unless to avoid absurdity, repugnance or consistency'.

It is a clear absurdity to say that the term `studio' in that context was supposed to mean a painter's workshop, or a sculptor's workshop, for that matter. It has nothing to do whatsoever with the terminology of the award.

The only way that the instrument can be properly construed is to look at some of the uses to which the word `studio' is put, notwithstanding the fact that certain dictionaries have decided to describe a studio in the way it saw it. I think that is a very, very old description ... meaning of the word.

We've seen within the Yellow Pages a use where a health studio is equated to a health and fitness centre. Now, that's not for no reason.

I would suggest that what that tends to show is that the term `studio' has been ... or, in particular, health studio or health and physical culture studio, equally in my submission, has in the past been used to describe a yesteryear equivalent of the type of operation carried out by Dockside Fitness today.

It would be clearly a nonsense to find that this award, the Hairdressers Award, was set up to deal with painter's or sculptor's workrooms. That is the implication of Mr Fitzgerald's submission and I don't think it's one which the Commission would find itself comfortable with.

Mr Fitzgerald seemed surprised that I produced the definition of a studio. Well, I produced it for completeness, and I guess I lay myself open to criticism on that ground.

Mr Risdon did refer to the word 'studio' in the passage on page 14 to which Mr Fitzgerald referred us. He just stopped too soon in his reference to it. He said, in the second sentence in that question which, I think, you've probably seen, Mr President, about the fitness workshop, that is, the business: 'They boasted similar facilities to Dockside: gymnasiums, aerobic studios, saunas, spas, again aiming at a wide cross-section of interests'.

That's where ... as I've said ...

PRESIDENT: Where was that again?

MR O'BRIEN: Page 14.

PRESIDENT: Page 14.

MR O'BRIEN: It's the ... two-thirds of the way down the page. Answer: 'MR RISDON: It was a chain called ... [etc]'. The second sentence in that answer. Then we come to the submission which Mr Fitzgerald puts about your discretion, that is, that you should use your discretion and decline to interpret the award.

And he relies, I think, upon factors such as what an ordinary man might interpret the Hairdressers Award to mean, and also on there being in existence, proceedings in another matter going to the creation of an award to cover the industry.

In the first place, if there were ambiguity in an award, or if an award had an incorrect or inappropriate title but had clear legal operation, it would be unjust to refuse to interpret an award simply on that ground, and all that that would invite is to send the parties off and seek redress through the judicial rather than the arbitration process where there was a dispute about the meaning of an award.

Now that would, in my submission, be not appropriate in the context of the authority given by the Act to the Commission through the President to interpret the award.

It is a way in which parties can access a process to have matters determined without running the high financial risk of being involved in proceedings before a magistrates court.

So on that ground I don't think one can simply say, well, if there are words that haven't been picked up by employers for whatever reason, that it's unjust that there be an interpretation and the Commission ought to refrain from making a declaration.

The second ground is rather more complex and it is to do with the existence of other proceedings. And those proceedings are ... have been somewhat protracted. I think one ought to put this in context in relation to this application.

Transcript in those proceedings reveal that the application, or potential application of the Hairdressers Award was within the consideration of the parties in July 1987. And in that context, I don't really think that it is open to Mr Fitzgerald to say of you, 'Well, we have another application which is supposed to be determined in this matter and there's been confusion about the application of awards, but you should simply say, well, there's another set of proceedings going on. If you do this it will be in a sense determining the retrospective position and not the futuristic position.'

Well, there are good reasons for determining this. Firstly, as I indicated, and it hasn't been addressed by Mr Fitzgerald, the question of the application of the first award principles bears upon this question. If the Hairdressers Award applies and if the parties are agreed that it ought to be replaced by an award which clearly identifies the industry in modern terminology, and after all isn't that consistent with the current wage fixing system anyway, why shouldn't ... if there is obvious argument about whether there is existing legal application of an award, why shouldn't that be clarified? Because if there is, and we suggest there is, then steps will have to be taken concurrent with the making of one award for the change of another award - the alteration of another award. So that's one good reason for determining the matter - or two in fact, being rolled up in one.

Further on that point, of course, we've got the evidence of Mr Thorn, which Mr Fitzgerald referred to. He says that Mr Cheek has told him that he was told by DLI a certain thing. Well, be that as it may, the evidence on the record, and it's hearsay, I guess, to the same extent as Mr Stephens's evidence is hearsay, that someone connected with the management had told an employee that the Hairdressers Award apply. I don't really think that any more turns on it, but that it's an unsatisfactory situation which ought to be corrected.

Now, to the extent that the application of the Hairdressers Award was in consideration in 1987 in those other proceedings, and to the extent that there's been evidence, certain people in management had one view and certain people in management another, perhaps, and that certain people in DLI have one view and certain people in DLI had another - all that that would seem to indicate is that it is more important to get a declaration and to have this matter determined than simply to leave that situation exist, where there is continuing argument and there is uncertainty about whether the award apply or not.

And for those reasons we would simply reassert our view that there ought to be a declaration. It ought to be the declaration suggested in our primary submission. It ought to apply ... we're not, I guess, hung up about operative date, but I think there may be good reasons to have it applying from the date in June, rather than later. And there are even other reasons to suggest that it ought to apply from the December '87 date, which I glean from the transcript as the date when Dockside commenced to operate, as this application goes to the question of Dockside.

Having said that, that matter I think is in your hands, Mr President, and I would simply indicate that we would obviously bow to your judgment on the matter. And I would hope in due course to see a decision supporting the view that we take. If the Commission pleases.

PRESIDENT: Yes, thank you, Mr O'Brien. No further comments or submissions?

Thank you very much for your work in the presentation of all that material. Naturally I will reserve decision. The matter is concluded.

HEARING CONCLUDED