

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

s29(1) application for hearing of an industrial dispute

**The Australian Worker's Union
(T14533 of 2017)**

and

**Minister administering the State Service Act 2000
(Department of Primary Industry, Parks Water and Environment)**

PRESIDENT D BARCLAY

HOBART, 14 November 2018

Introduction

[1] This matter relates to whether employees who are required to undertake work related travel and who are required to remain away from home overnight are entitled to be paid allowances for meals and incidentals.

[2] By its amended Application the Applicant sought an order that "The employees provided with employer-provide accommodation on the Three Capes Track during the period 1 May 2017 to 11 May 2017 whose employment is regulated by the AWU Tasmanian State Sector Award, are to be paid the meal and incidental allowances specified in Part IV clause 3 of that award".

[3] The issue involves the construction of the AWU (Tasmanian State Sector) Award (the Award). The question is whether, on the facts of the present case an employee is entitled to be paid a meals and incidental allowance as defined by the Award or whether the camping allowance as defined applies.

[4] The Applicant contends that the employees are entitled to the meal allowance and incidentals allowance and the Respondent contends that the employees are entitled to be paid camping allowance.

[5] I note this decision does not affect employees carrying out Bush Fire Fighting activities.

Facts

[6] The parties filed a Statement of Agreed Facts. The employees, between 1 May 2017 and 11 May 2017 were conducting fuel reduction burns near the 'Three Peaks Track' situated in South East Tasmania and staying at the Surveyor and Retakunna sites (the Sites).

[7] I have been provided with photographs and a video of the Sites. Attached to this decision are a number of photographs of the accommodation at the Sites.

[8] I must decide whether, when staying at accommodation of the sort identified in the photographs a camping allowance is payable or a meal and incidental allowance is payable as defined by the Award.

[9] The resolution of that question turns on the construction of the relevant travel allowance provisions of the Award.

The Award

[10] The Award provides (so far as is relevant) in respect to camping allowance that:¹

(i) An employee who is required to camp overnight *in a tent of similar type of accommodation* in performing their duties is to be paid a camping allowance in accordance with this clause.

(ii) This allowance includes all special conditions such as the carrying of tents and equipment, travelling over rough terrain and for work performed in severe climatic conditions and Incidental Expenses Allowance.

(iii) The employer is to provide all meals either by direct payment or by reimbursement of expenses.

(iv) Where employees are camped, the employer as far as practicable shall provide adequate sleeping, ablution and messing facilities.

(v) An employee required to camp in huts, cubicles, or tents shall receive a payment of \$42.75 per working day, including employees engaged in Bush Fire Fighting who are required to stay at employer provided accommodation at no cost to the employee.

(vi) The allowance specified in this clause is drawn from Clause 3(d) Meal Allowances of this Part and is adjusted in sub-clause (v) with that rate being 80% of the aggregate of the meal rates of Clause 3(d).

(my emphasis)

[11] It can be seen that the circumstance or condition precedent to the entitlement to camping allowance is camping overnight "in a tent or similar type of accommodation". The Applicant submits that I must construe that phrase. The Applicant submits that the phrase in subclause (v) "huts, cubicles, or tents" should be read in conjunction with the phrase "tent of similar type of accommodation" so that "huts, cubicles, or tents" are an indicia of what is meant by "tent or similar type of accommodation".

[12] The Applicant contends that the clause points to "circumstances of temporary, basic and humble shelters designed to distinguish the treatment of employees such as track workers who are genuinely "camped" from circumstances of other employees within the department who travel away for work and are required to remain away from home overnight".²

¹ The Award, Part IV clause 1

² Applicants outline of submissions paragraph 17

[13] The Respondent submits that the camping allowance is applicable when an employee is required to stay in a tent, hut, cubicle or similar accommodation.³ This approach however conflates the condition precedent in clause 1(a)(i) and the descriptors referred to in clause 1(a)(v). The approach is more closely aligned to the camping allowance provision in the State Service Award which defines the condition precedent to the camping allowance as staying in a tent, hut or similar type of accommodation.⁴

[14] What is not to be overlooked is that an employee is entitled to the allowance when he or she is required to *camp* overnight. A camp is defined as a group of tents, caravans or temporary shelters⁵. The Shorter Oxford English Dictionary also defines camping as relating to temporary structures. It seems to me therefore that the reference to huts and cubicles in clause 1(a)(v) is to ensure that camping can include (in appropriate circumstances) more permanent structures such as huts. If those descriptors had not been included then any permanent structure might not equate to camping and the camping allowance may not be payable, even though the structures are rudimentary and similar in nature to a tent.

[15] It is also important to note that the descriptor in clause 1(a)(v) does not include the phrase "or similar type of accommodation". Accordingly clause 1(a)(v) deems staying in a hut or cubicle as equivalent to staying in a tent, so long as the hut or cubicle is consistent with the tenor of camping. That the hut or cubicle is to be the equivalent of a tent or other temporary structure (and thus of camping) is because the allowance is governed by the primary condition precedent of camping overnight in a tent of similar type of accommodation.

[16] In my opinion the construction of the Camping Allowance clause is that I must consider whether the accommodation at the Surveyor and Retakunna sites are equivalent to camping overnight in a tent or similar type of accommodation which (notwithstanding that camping connotes temporary structures) can include huts and cubicles of similar standard to a tent or other temporary structure.

[17] It is to be noted that this is an issue in respect of which like minds may differ. Having identified what is to be considered (at paragraph 15 above) it is a matter of judgment whether the accommodation is akin to camping in tent or similar or whether it is not.

[18] It is also to be acknowledged that the case is finely balanced. Ultimately, however I am of the opinion that the accommodation provided at Surveyor and Retakunna is not a tent or similar type of accommodation. It can be seen from the photographs that the accommodation is of a high standard. It bears little similarity to a tent or similar type of accommodation. It bears little similarity to a hut or cubicle of a similar standard to that of a tent.

³ Respondents outline of submissions paragraph 18

⁴ Part IV clause 3(b)(i). There are other differences between the two awards most notably that under the State Service Award an additional allowance is payable if the employee is required to carry a tent and equipment, whereas under the Award there is no additional allowance.

⁵ Macquarie Dictionary 6th Edition.

[19] I take account of the matters in paragraph 30 of the Statement of Agreed Facts. The communal kitchen and dining area, while communal is of a far higher standard than camping in a tent or similar accommodation. The bathrooms are basic but it is noted that employees had access to hot and cold running water and shower facilities.

[20] I do not overlook the issues of remoteness, that the employees took their own food and sleeping and personal supplies, nor that they were unable to readily leave, to access shops, restaurants and the like and were self-reliant in cooking meals. However, the focus of the Award is on whether the accommodation was a tent or similar accommodation.

[21] I regard the accommodation as being somewhere between commercial accommodation and camping. However, it is of a better standard than camping in a tent or similar accommodation, connoting as that does cooking over an open fire or using portable stoves, no access to running water and sleeping on the ground.

[22] The water tanks are however in a different category. In my opinion, had the employees been required to stay in the water tanks they would have been camping is a cubicle of an equivalent standard of a tent and the camping allowance would have been payable. However, the agreed facts disclose that those who stayed in the cubicles chose to do so and could have stayed in the main accommodation. Accordingly, these employees were not required to stay in a tent of similar type of accommodation⁶ being a cubicle of equivalent standard to a tent.

[23] Accordingly save as to incidental expenses with which I deal below, the employees are entitled to meal allowance in accordance with clause 3(a)(i)(1) of The Award.

[24] In respect to incidental expenses, I do not regard that component of the travel allowance is payable. The incidental expenses are paid to defray incidental expenses incurred by the travelling employee. As submitted in the Respondents Outline of Submissions such expenses are aimed at defraying costs incurred while away such as making telephone calls for which commercial accommodation imposes a charge, purchasing coffee, a snack, dry cleaning etc.⁷

[25] I have previously held⁸ that an expense must be incurred for the travel allowance to be payable. The Agreed Facts disclose that the employees have incurred expenses in purchasing food⁹ however, there is no evidence that incidental expenses were incurred. Accordingly, the incidental expense is not payable. The location of the accommodation is such that a particular employee is not in a position to incur incidental expenses. The reasoning behind the payment for incidental expenses is that it is accepted that incidental expenses will be incurred when travelling. However on the particular facts of this case, and noting the remoteness of the area, no such incidental expenses *could* be incurred. This finding is not to be seen as having any general application beyond that facts of this case. Where incidental expenses will ordinarily be incurred that allowance is payable (subject of course to the employee not camping) without the need to prove the actual

⁶ As is the condition precedent in sub-clause (i)

⁷ At paragraph 33

⁸ T14532 of 2017 Community and Public Sector Union v the Minister administering the State Service Act 2000/Department of Primary Industries, Parks, Water and Environment

⁹ Paragraph 15

incurring of an incidental expense it being notorious that an incidental expense will be incurred in the usual run of travelling.

[26] I therefore order the employees provided with employer-provided accommodation on the Three Capes Track during the period 1 May 2017 to 11 May 2017 whose employment is regulated by the AWU Tasmanian State Sector Award, are to be paid the meal allowance specified in Part IV clause 3 of that award



Appearances:

Mr R Flanagan for the Applicant

Ms C Collins for the Respondent

Date and place of hearing:

2017

4 October

Hobart

Retakunna Photographic Evidence



18/08/2017



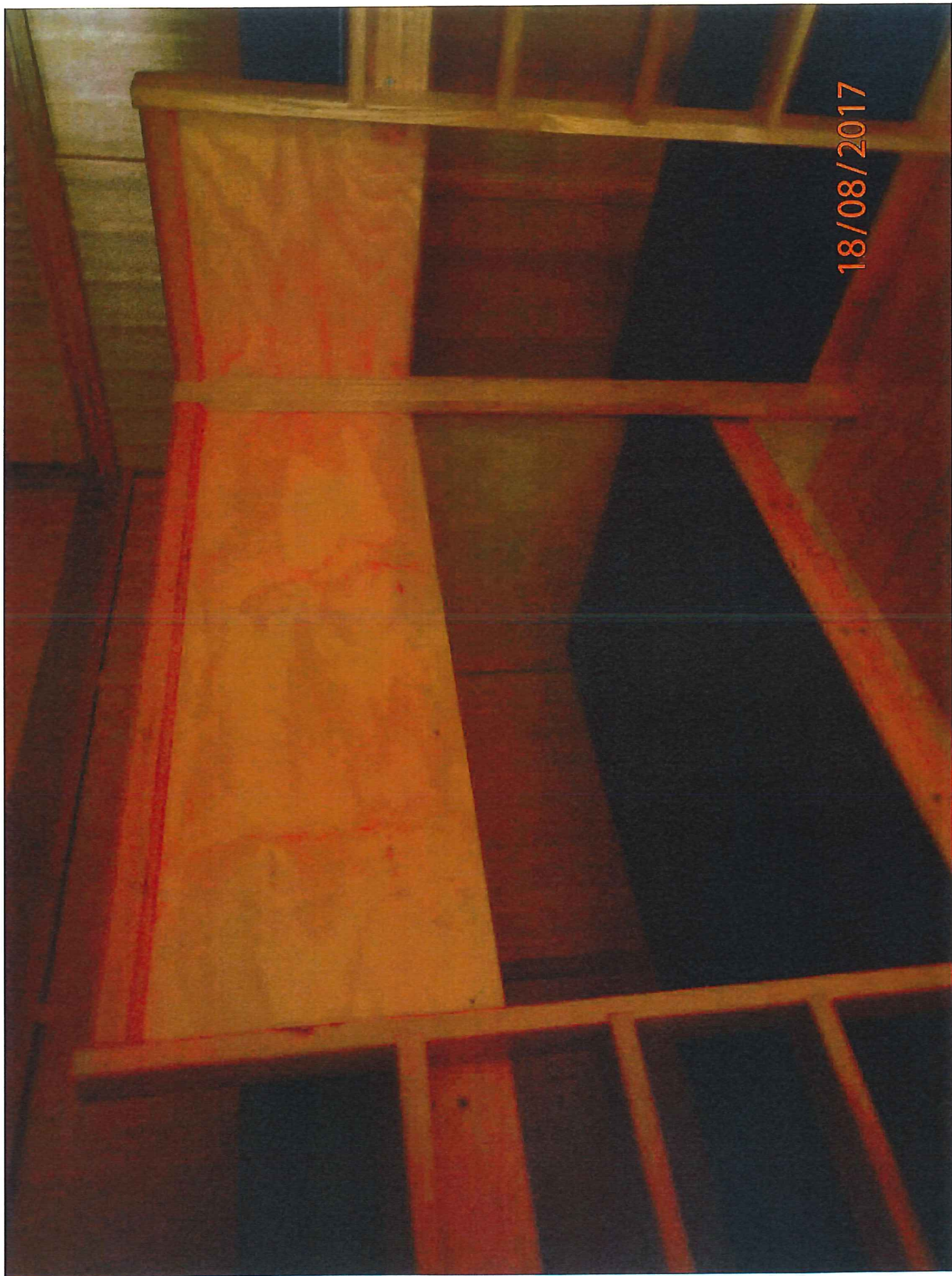
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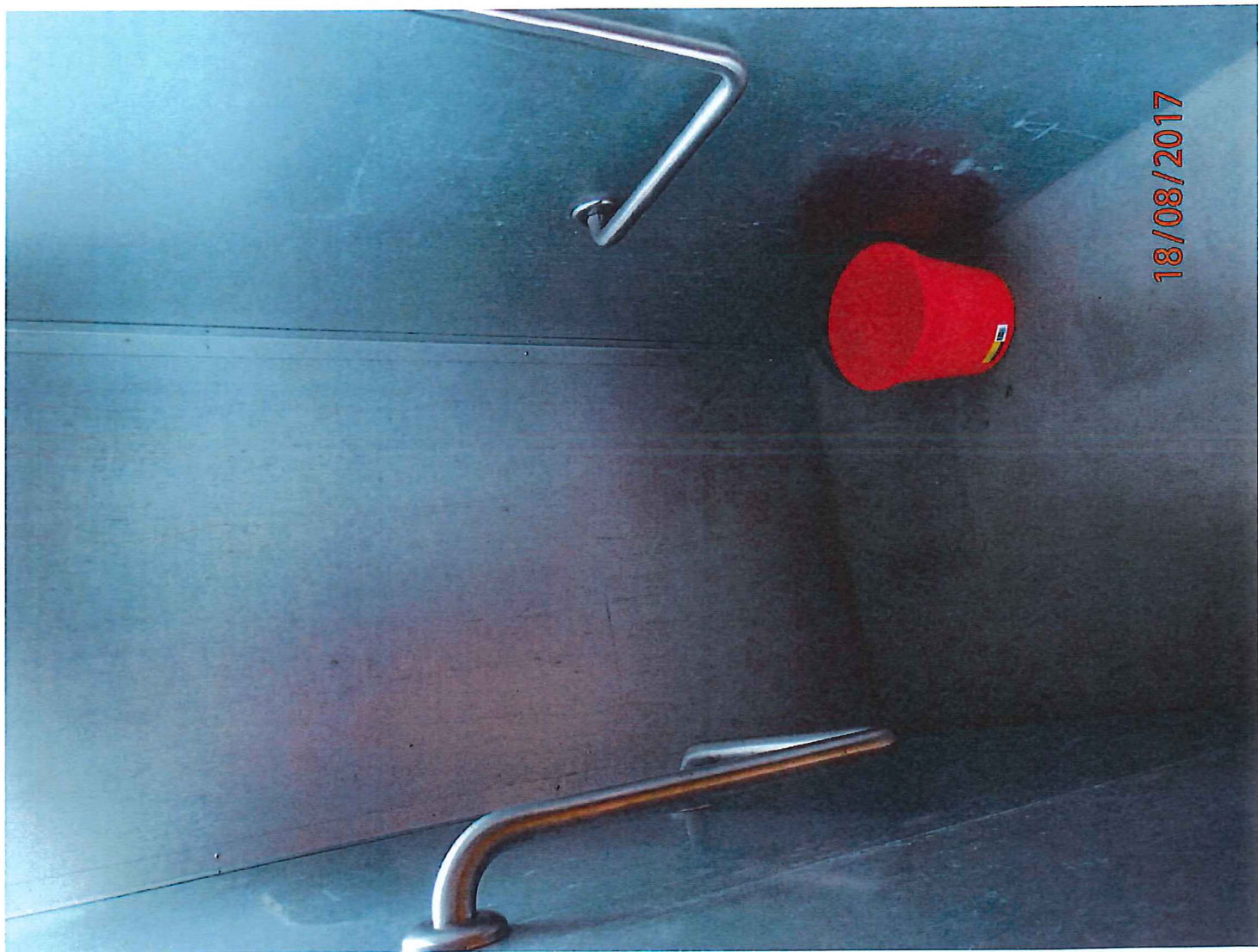




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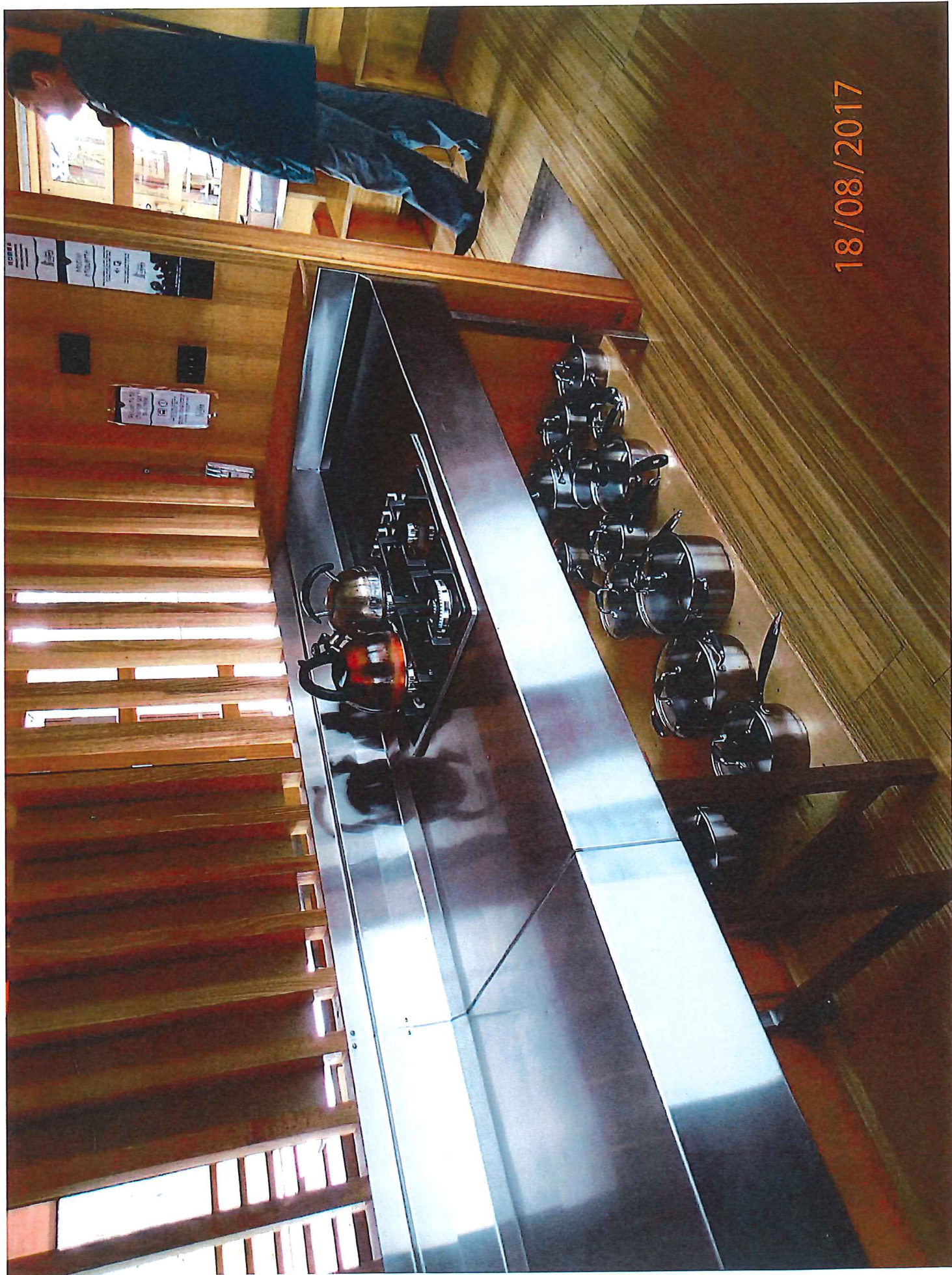
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Surveyors Photographic Evidence

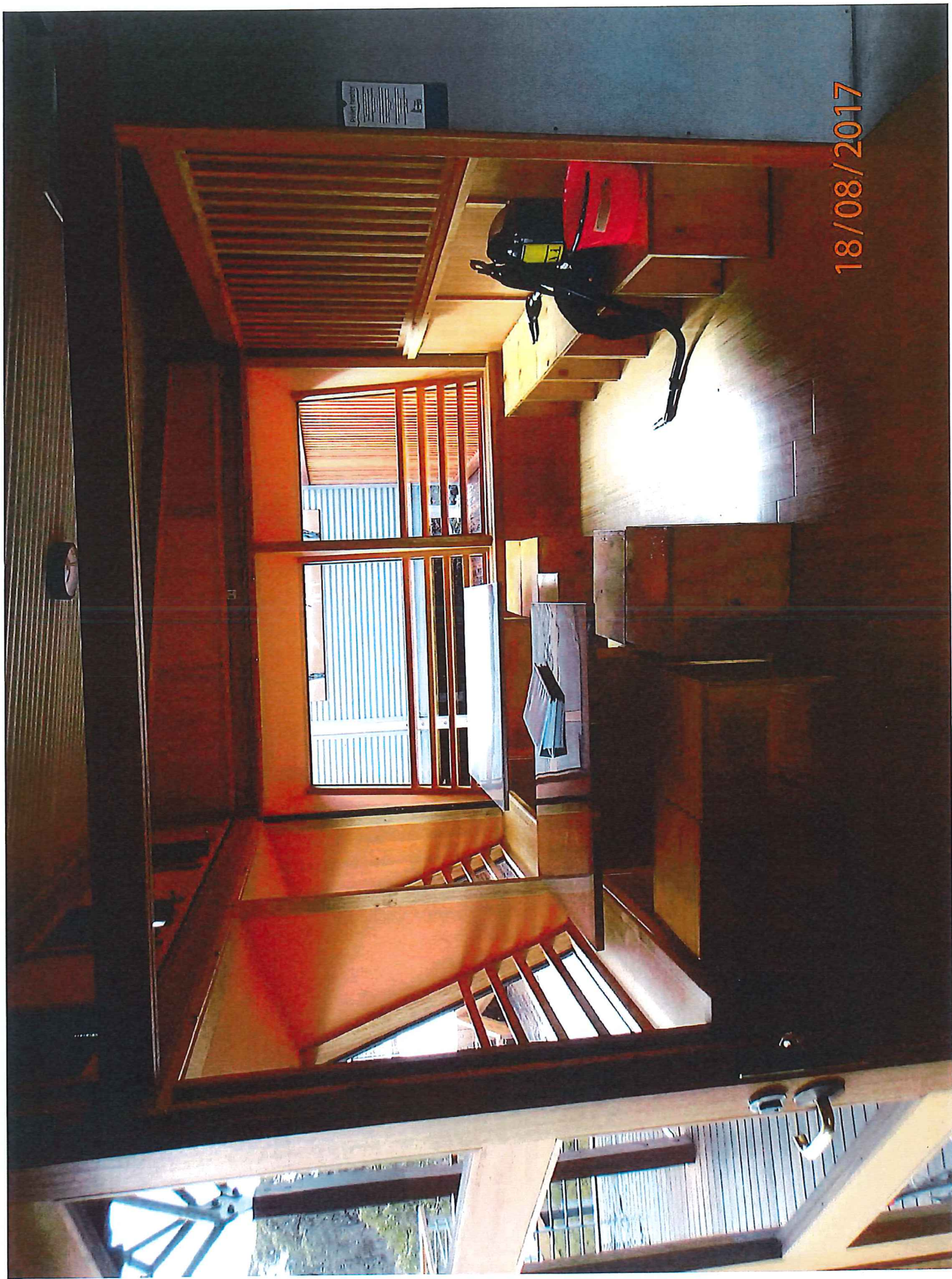




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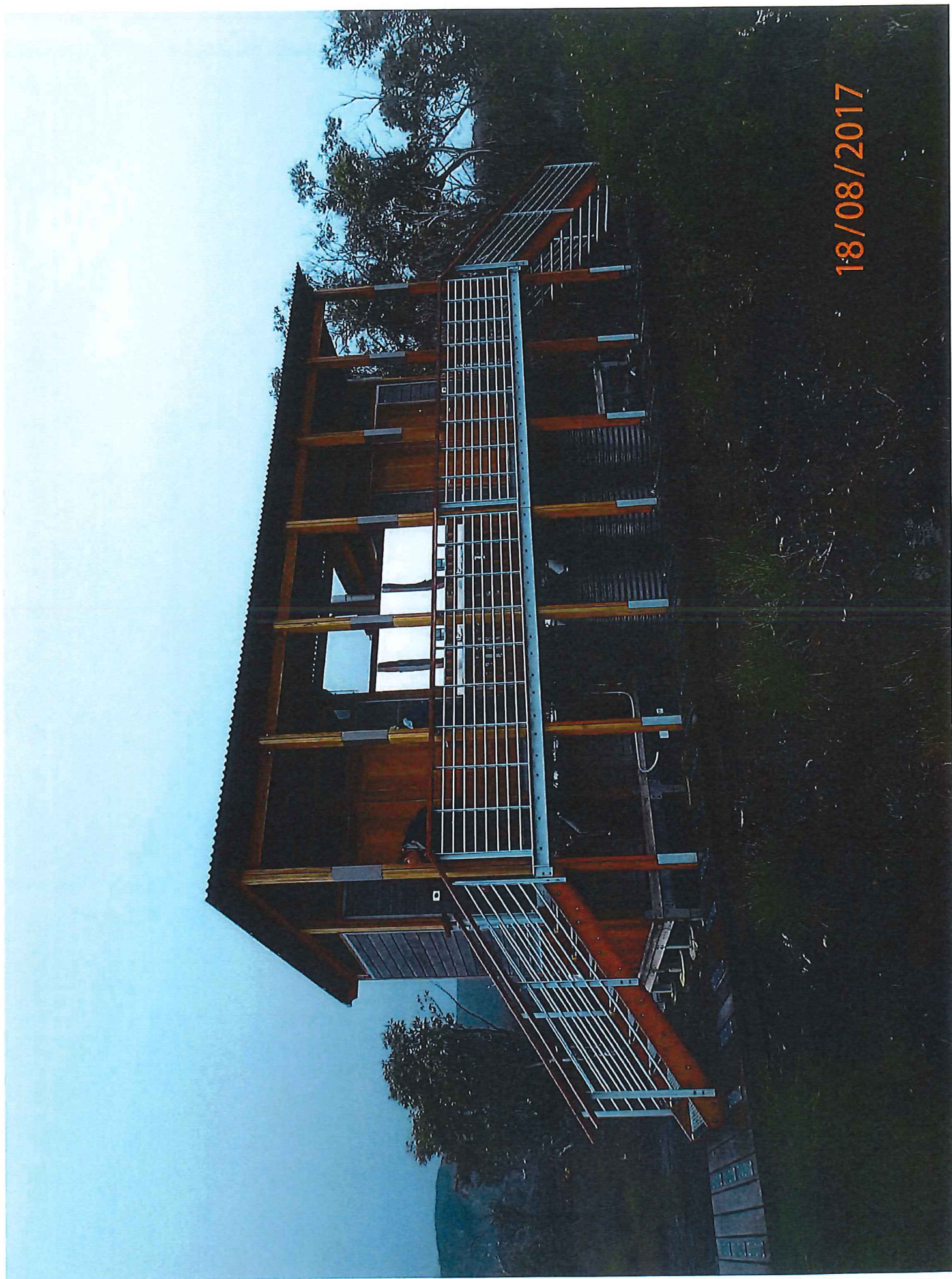
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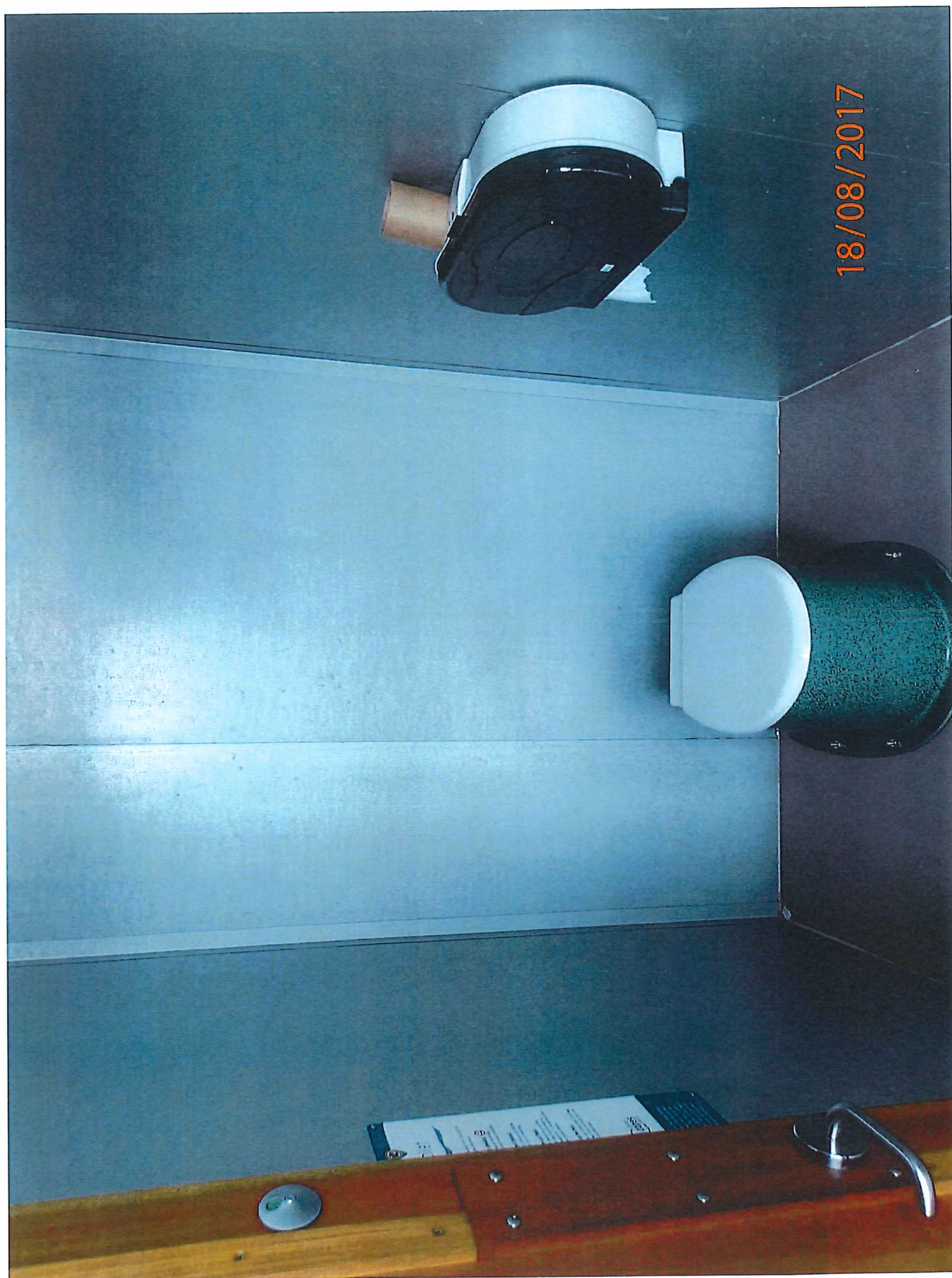
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**Surveyors – Converted Water Tank
Photographic Evidence**



18/08/2017

