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PRIVATE AND CONFIDENTIAL

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Dear Sir/Madam

AM2015/305 - 4 YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES CASE

We refer to the above proceedings and the directions issued by his Honour President Ross regarding the Orders for Production issued to union expert witnesses in these proceedings.

There are several grounds of objections that have been raised in relation to the Orders for Production, many of which rely upon claims of legal professional privilege.

In order to address these objections we outline below:

1. The general principles applicable to claims for legal professional privilege.
2. Our clients' response to the submissions of the SDA.
3. Our clients' response to the submissions of the ACTU.
4. Our clients' response to the correspondence filed by Professor Sara Charlesworth and Dr Fiona Macdonald.

1. GENERAL PRINCIPLES PERTAINING TO CLAIMS FOR PRIVILEGE

Evidence Act test for privilege

1.1 Section 119 of the *Evidence Act 1995 (Evidence Act)* provides as follows:

"Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party."

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1.2 It does not appear to be in dispute between the parties that this is the relevant test applicable for determining whether correspondence exchanged between:

- (a) union staff and the relevant experts; or
 - (b) union legal representatives and the relevant experts,
- are privileged.

Establishing privilege - evidence required

1.3 The onus of establishing that a communication is privileged falls upon the party who claims privilege over the relevant communication.

1.4 The Full Court of the Federal Court of Australia has held that “*focused and specific evidence*” is required in respect of each document over which privilege is claimed:

*“18 The authorities emphasise the need for **focused and specific evidence** in order to ground a claim for legal professional privilege. In *Kennedy v Wallace* [2004] FCAFC 337; (2004) 142 FCR 185 at 189, Black CJ and Emmett J reiterated the principles that **verbal formulae and bare conclusory assertions of purpose are not sufficient to make out a claim for privilege...** Where possible the Court should be assisted by evidence of the thought processes behind, or the nature and purpose of advice being sought in respect of, each particular document. The fact that generalised evidence is not challenged in cross-examination does not mean that such evidence must be accepted, particularly when it is as manifestly inadequate as it is in this case. As in *Kennedy v Wallace*, mere general assertions of the purpose of creation of the documents are insufficient to discharge this onus.” (*Barnes v Commissioner of Taxation* [2007] FCAFC 88 at [18]) (emphasis added)*

1.5 Both the SDA and United Voice have cited this authority in their own submissions filed in these proceedings on 7 September 2015, with the United Voice expressly noting that focused and specific evidence is required in respect of “*each document*” over which privilege is claimed.¹

Waiver of privilege

1.6 A waiver of privilege occurs pursuant to section 122(2) of the Evidence Act where a party acts in a manner inconsistent with the maintenance of confidentiality over the relevant communications.²

1.7 In *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 at [21] (**ASIC v Southcorp**), Lindgren J explained the application of the principles of legal professional privilege and waiver of privilege to communications regarding expert reports:

“1. Ordinarily the confidential briefing or instructing by a prospective litigant’s lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege...”

¹ See paragraph 2.15 of the United Voice Submissions dated 7 September 2015

² *Mann v Carnell* (1999) 201 CLR 1 at [28] and [29]

2. Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege...

3. Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications...

4. Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents...

5. Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents..."

- 1.8 ASIC v SouthCorp was applied by White J in *New Cap Reinsurance Corporation Ltd (in Liq) & 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258, where White J emphasised:

"The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials, such as, where it would be unfair for the party to rely on the report without disclosure of those materials. Where an expert's report is submitted to a party's legal advisers so as to be put into a form which will ensure that it is admissible, it can be said that the privileged communications between the expert and the lawyers have influenced the content of the report, in the sense of its form, although not in the sense of the formulation of the substantive opinions expressed by the expert." (at [53]).

- 1.9 Referring to these authorities, Dodds-Streeton J held in *Shea v TruEnergy Services Pty Ltd (No 5)* [2013] 303 ALR 230 that the critical question is whether the communications "*may have influenced the content of the final report in a substantial sense*" such that there would be inconsistency in withholding the relevant communications whilst simultaneously relying upon the relevant expert report.³

2. OBJECTIONS BY SDA

- 2.1 The SDA opposes the production of certain documents by:

- (a) the SDA;
- (b) Professor Altman;

³ At [19]



- (c) Ms Bartley;
- (d) Dr O'Brien;
- (e) Mr Kirchner;
- (f) Professor Peetz;
- (g) Dr Watson; and
- (h) Professor Charlesworth and Dr MacDonald,

on the grounds that such documents are protected by legal professional privilege.

- 2.2 In support of this claim, the SDA has filed an affidavit of Dominic James Macken (**Macken Affidavit**).
- 2.3 In its present form, the Macken Affidavit does not provide focused and specific evidence in relation to each communication over which privilege is claimed. This much is demonstrated by the fact that the Macken Affidavit does not identify each communication over which privilege is claimed but instead refers to the communications only in the most general way.
- 2.4 Notwithstanding such concerns, and in the interests of efficiently addressing this matter, our clients are willing to presently assume that the documents are *prima facie* privileged.
- 2.5 The principal concern which remains is whether privilege has been waived by the filing of the relevant expert reports to which the communications relate. It is respectfully submitted that the matter should accordingly be relisted before a single member of the Commission in order for the documents to be inspected so that the question of waiver can be determined.

3. OBJECTIONS BY THE ACTU

- 3.1 The ACTU also opposes the production of certain documents in its submission filed on 6 October 2015 (**ACTU Submission**).
- 3.2 We respond to each of the objections raised by the ACTU as follows:
 - (a) With respect to paragraphs 5-8 of the ACTU Submission, our clients do not press the production of documents pertaining to the "*First Retainer*" referred to in the ACTU Submission.
 - (b) With respect to paragraphs 9-13 of the ACTU Submission, our clients do not press the production of documents ACTU#4,#5, #6 and #19 on the understanding that these documents also pertain to the First Retainer. If these documents do not pertain to the First Retainer, then our clients press for the production of these documents.
 - (c) With respect to paragraphs 14-15 of the ACTU Submission, our clients propose a course of action at paragraph 3.3 further below.
 - (d) With respect to paragraphs 16-19 of the ACTU Submission, our clients do not press the production of documents on the understanding that ACTU objection relates to

documents pertaining to the First Retainer. If these documents do not pertain to the First Retainer, then our clients press for the production of these documents.

- (e) With respect to paragraphs 20-21 of the ACTU Submission, our clients press the production of the documents as they fall within Category 6 of the Order for Production served on the ACTU. To the extent that the ACTU claims it suffers prejudice as a result of the production of documents that were created for the purposes of complying with Orders for the Commission, our clients submit that:
 - (i) this does not form a valid basis to object to complying with an Order for Production; and
 - (ii) our clients have themselves previously produced documents that were generated in order to comply with the Fair Work Commission's orders to prepare an Outline of Expert Evidence. It is accordingly difficult to understand how the ACTU suffers any particular prejudice in relation to producing the documents referred to at paragraph 20 of the ACTU Submission.
- (f) With respect to paragraph 23 of the ACTU Submission, our clients press for the production of the document. Whilst part of the document might relate to other proceedings, unless there is information recorded in the document that is of a privileged or commercially sensitive nature, it is not clear why there is any justification for the document to be redacted.

Privilege claims

- 3.3 Paragraphs 14-15 and 24-25 of the ACTU Submission relate to documents that the ACTU considers might be privileged. However, the ACTU has not yet reviewed the documents in order to determine whether to make a claim for privilege.
- 3.4 In relation to these documents, our clients submit that:
 - (a) a short timeframe should be provided for the ACTU to review the documents and file any affidavit evidence in support of its privilege claim; and
 - (b) if privilege is validly claimed, the matter should be referred to a single member of the Commission (together with the SDA privilege claims) in order for the Commission to determine whether privilege over the documents has been waived by reason of the filing of the Professor Markey expert report.

4. OBJECTIONS BY PROFESSOR CHARLESWORTH AND DR MACDONALD

- 4.1 The correspondence from Professor Charlesworth and Dr MacDonald also identifies some communications over which privileged may be claimed by the SDA. Our submissions at section 2 above apply in relation to those communications.
- 4.2 With respect to paragraph 40(a) of the Order to Produce, our clients no longer press production of documents with respect to that category.

- 4.3 With respect to paragraph 40(b) of the Order to Produce, our clients press for the production of all documents produced or generated which relate to the interviews with 25 AWALI 2014 survey respondents (as described at page 13 of the Charlesworth and Macdonald Report). In support of our client's position, we note that Professor Charlesworth and Dr MacDonald's correspondence of 6 October 2015 indicates that survey participants were told that their information could be disclosed where "*required by law*". Compliance with an Order for Production issued by the Fair Work Commission under the provisions of the *Fair Work Act 2009* constitutes a circumstance where disclosure would be "*required by law*".
- 4.4 To the extent that Professor Charlesworth and Dr Macdonald have concerns about maintaining privacy/confidentiality of survey participants, we consider that appropriate arrangements could be made to ensure the confidentiality of participant identities is maintained. For instance:
- (a) names and addresses of participants can be redacted;
 - (b) the interview transcripts can be provided directly to employer parties (as opposed to being published on the Fair Work Commission website); and
 - (c) undertakings can be given by employer parties to ensure that the content of the interviews is not disclosed outside of the proceedings.

Any queries in relation to these submissions should be directed to Luis Izzo, who can be contacted on the number listed below.

Yours faithfully



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