

From: Luis Izzo [mailto:Luis.Izzo@ablawyers.com.au]
Sent: Tuesday, 8 September 2015 3:44 PM
To: AMOD
Cc: Chambers - Johns C; 'craigdowling@vicbar.com.au'; 'Kate Burke'; 'Stephen Bull'; 'ajmacken@macken.com.au'; Emily Baxter
Subject: AM 2014/305 - Penalty Rates Proceedings

Dear Sir/Madam

In accordance with directions given by his Honour President Ross in today's proceedings, we **attach** for filing, a short submission in relation to our clients' claim for legal professional privilege with respect to certain documents sought by the United Voice and SDA.

We also attach to this email an Affidavit sworn by Ms Emily Baxter, who will be able to attend the proceedings by video-link from Canberra tomorrow (if required).

Should you have any queries in relation to this correspondence, please do not hesitate to contact me.

Yours faithfully

Luis Izzo

Director
Australian Business Lawyers & Advisors

140 Arthur Street North Sydney NSW 2060
Dir: +612 9458 7640 | Fax: +612 9954 5029 | Mob: 0408 109 622
Tel: +612 9458 7005 | Web: www.ablawyers.com.au

IN THE FAIR WORK COMMISSION

AM2014/305

**4 YEARLY REVIEW OF MODERN AWARDS
PENALTY RATES**

**ADDITIONAL SUBMISSIONS FILED ON BEHALF OF
NSWBC AND ABI REGARDING ORDERS FOR
PRODUCTION WITH RESPECT TO EXPERT
EVIDENCE**

Filed on behalf of NSWBC/ABI by

Australian Business Lawyers & Advisors

Level 10, 140 Arthur Street

NORTH SYDNEY 2060

(02) 9458 7005



AUSTRALIAN BUSINESS
Lawyers & Advisors

A. INTRODUCTION

1. BACKGROUND

- 1.1 On 31 August 2015, the following Orders for Production were issued by the Fair Work Commission:
- (a) Order Requiring the Production of Documents addressed to Professor Rose (**Rose Order**).
 - (b) Order Requiring the Production of Documents addressed to Professor Lewis (**Lewis Order**).
- 1.2 Professor Rose and Professor Lewis are experts that have been engaged on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) to provide expert reports in these proceedings.

2. OBJECTIONS TO ORDERS FOR PRODUCTION

- 2.1 The NSWBC and ABI do not object to any of the categories of documents that have been sought for production in the Rose and Lewis Orders.
- 2.2 NSWBC and ABI do, however, object to producing 7 confidential email communications on the basis that the communications are protected by legal professional privilege.

3. DOCUMENTS FILED TO DATE

- 3.1 In support of the claim for privilege, NSWBC and ABI have filed the following documents to date:
- (a) Submissions on 2 September 2015 (**Previous Submissions**); and
 - (b) an Amended Statement from Ms Baxter dated 7 September 2015.
- 3.2 We understand that copies of these documents have been forwarded to the chambers of Commissioner Johns.
- 3.3 At the hearing of these proceedings today, his Honour President Ross requested that the parties file a further short submission identifying the basis for privilege being claimed over each relevant communication.
- 3.4 This submission responds to his Honour's request, whilst relying upon the matters already advanced in the Previous Submissions.

4. DOCUMENT FILED WITH THESE SUBMISSIONS

- 4.1 As NSWBC and ABI have now further refined their privilege claim, we **attach** for the purposes of use in the hearing before Commissioner Johns tomorrow an Affidavit of Ms Emily Baxter, sworn on 8 September 2015.
- 4.2 We have also urgently couriered to the Commissioner's chambers a confidential bundle, containing the documents over which privilege is claimed. We respectfully request that the bundle is not opened by the Commission, given that it contains privileged communications.
- 4.3 If the Commissioner forms a view that the Commissioner needs to view the documents in order to determine the privilege claim, the Commissioner will naturally be in a position to open the bundle at the relevant time.

B. PRIVILEGE CLAIM FOR EACH COMMUNICATION

5. ONUS OF ESTABLISHING PRIVILEGE/WAIVER

- 5.1 NSWBC and ABI acknowledge that the onus of establishing privilege attaching to a communication rests with the party asserting privilege.
- 5.2 However, the onus of establishing a waiver of privilege rests with the party asserting that a waiver has taken place (see *Sharjade Pty Ltd v RAAF Landings* [2008] NSWSC 151 at [3]).

6. ROSE EMAIL (A) - CHAIN BETWEEN LUIS IZZO AND GAIL BRADFORD

- 6.1 The relevant communication is a confidential communication that has been prepared by Australian Business Lawyers and Advisors (**ABLA**) as part of the professional legal services ABLA is providing to its clients. Specifically, the document has been created to assist with the preparation of evidence for the hearing of the proceedings. As such, the document attracts 'litigation privilege'.¹
- 6.2 Given that the document involves an isolated stylistic change to the language used in the report and that the change suggested relates to the 'background' of the report, it is difficult to envisage how the document has had any substantive affect upon the reasoning, methodology or findings made in the expert report. It is also unlikely that the document is required to understand the report.
- 6.3 For these reasons, ABI and NSWBC maintain that privilege has not been waived over the documents.

7. ROSE EMAIL (B) - CHAIN BETWEEN PROFESSOR ROSE, LUIS IZZO, NIGEL WARD AND FIONA CORBETT

- 7.1 As the communications form part of the professional legal services ABLA is providing to its clients (namely, the preparation of evidence for hearing), privilege attaches to the documents.
- 7.2 The Affidavit of Ms Baxter establishes that the changes proposed by way of these communications relate to the format and presentation of the expert report. Based on the authority outlined in *New Cap Reinsurance Corporation Ltd (in Liq) & 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 (**New Cap**) at [53], communications such as these which go only to the form of a report, as opposed to the substantive findings of the report, are not likely to result in a waiver of privilege.

8. ROSE EMAIL (C) - CHAIN BETWEEN LUIS IZZO AND PROFESSOR ROSE CONTAINING QUERIES ABOUT THE DRAFT REPORT AND A RESPONSE TO THOSE QUERIES

- 8.1 For the reasons previously outlined at paragraphs 6.1 and 7.1, it is submitted that privilege attaches to these communications.
- 8.2 In circumstances where the communications contain queries by a lawyer and a response to those queries by the expert, it is difficult to envisage how either communication has given rise to substantive changes in the expert report.

¹ The Previous Submissions outline in detail the categories of privilege that can be claimed by parties and the elements required to establish the existence of each category of privilege

- 8.3 The Affidavit of Ms Baxter does not state that any change has been suggested to the substance of the expert report or earlier drafts.
- 8.4 In such circumstances, it cannot be maintained that the queries had an influence over the findings contained in the report, such that it would be unfair on the NSWBC and ABI to rely upon the report without disclosing the queries communicated to the expert.
- 9. ROSE EMAIL (D) AND LEWIS EMAIL S (A), (B) AND (C)**
- 9.1 These last four email communications involve:
- (a) the circulation of draft expert reports for comment; and
 - (b) communications summarising changes made to the expert reports.
- 9.2 In these cases, privilege attaches to the communications because the emails have been prepared by the experts for the purposes of being reviewed by ABLA and for the purposes of receiving feedback from ABLA. Accordingly, in each case, the communications are prepared for the purpose of enabling the firm to provide its professional legal services by reviewing the updated reports and providing any feedback as necessary.
- 9.3 The communications do not contain any suggested changes to the expert reports by ABLA. Rather, they seek to update ABLA as to the status of the expert reports. The communications could not be said to constitute documents that have in any way interfered with the content of the report or substantively affected the report findings.
- 9.4 These communications are the very type of documents that were held to not give rise to a waiver of privilege in *New Cap* at [31] and [35].



Luis Izzo

Director

Australian Business Lawyers & Advisors Pty Ltd

(02) 9458 7640

luis.izzo@ablawyers.com.au

8 September 2015

Affidavit

**FAIR WORK COMMISSION
4 Yearly Review of Modern Awards
Common Issue: Penalty Rates**

Applicant: Australian Business Industrial and NSW Business Chamber Ltd
Matter: AM2014/305

Affidavit of: **Emily Baxter**
Address: 140 Arthur Street North Sydney, New South Wales
Occupation: Solicitor
Date: 8 September 2015

I, Emily Baxter of 140 Arthur Street North Sydney, New South Wales, Solicitor say on oath affirm:

1. I am employed by Australian Business Lawyers and Advisors ('ABLA') in the position of Lawyer.
2. I have been employed in that role since approximately August 2013.

PRODUCTION OF DOCUMENTS TO DATE

3. I have been responsible, under the supervision of Luis Izzo, Director, for collating the documents exchanged between ABLA, ABI and two experts briefed by ABLA to provide evidence in these proceedings. The relevant experts are Professor John Rose and Professor Phil Lewis.
4. On 21 August 2015, ABLA produced to each of the United Voice and the Shop Distributive and Allied Employees Association (SDA) 2 folders of materials which contain documents falling within:
 - (a) Paragraphs 1 to 6 of the Order for Production Issued to Professor Lewis on 28 August 2015 (**Lewis Order**); and

Filed on behalf of (name & role of party)	<u>Australian Business Industrial and the NSW Business Chamber Ltd</u>
Prepared by (name of person/lawyer)	<u>Luis Izzo</u>
Law firm (if applicable)	<u>Australian Business Lawyers & Advisors</u>
Tel	<u>(02) 9458 7005</u>
Fax	<u>(02) 9954 5029</u>
Email	<u>Luis.izzo@ablawyers.com.au</u>
Address for service (include state and postcode)	<u>140 Arthur Street, North Sydney, NSW, 2060</u>

- (b) Paragraphs 1 to 7 of the Order for Production Issued to Professor Rose on 28 August 2015 (**Rose Order**).
5. By 3 September 2015, ABLA will have produced 2 further folders of materials which contain documents falling within the categories identified immediately above.

CLAIM FOR LEGAL PROFESSIONAL PRIVILEGE

6. ABLA has, however, identified certain confidential communications exchanged between ABLA and Professor Rose or Professor Lewis which are subject to claims for legal professional privilege.
7. These communications contain comments, discussions and/or enquiries between ABLA and the relevant experts in relation to their draft expert reports.
8. Given that the draft expert reports were prepared in order to support the ABI and NSWBC claims in these proceedings, the position of ABI and NSWBC is that the communications regarding the expert reports were created for the dominant purpose of preparing for existing litigation. As such, the communications are subject to 'litigation privilege' at common law.
9. The relevant communications over which privilege have been claimed are as follows:

Professor Rose

- (a) Email chain between Luis Izzo and Gail Bradford dated 20 April 2015 suggesting a single stylistic change to the language used in the background of the expert report. The comment regarding the language used does not have any bearing on the reasoning or findings made by the expert.
- (b) Email chain between Professor Rose, Luis Izzo, Nigel Ward, and Fiona Corbett dated 24 June 2015 to 29 June 2015 containing the following:
- (i) comments by Nigel Ward for consideration by the expert in relation to the format and presentation of the draft report;
 - (ii) two responses by the expert in relation to the recommended format and presentation changes with a view to seeking further feedback from ABLA.
- (c) Email chain between Luis Izzo and Professor Rose dated 2 July 2015 containing queries about the draft report, and a response to those queries by Professor Rose.



- (d) Email chain between Professor Rose and Luis Izzo dated 3 July 2015 attaching draft report for purposes of comment and summary of changes for consideration by ABLA.

Professor Lewis

- (a) Email chain between Professor Lewis and Luis Izzo dated 26 May 2015 to 3 June 2015 attaching draft report for purposes of comment.
- (b) Email chain between Professor Lewis and Luis Izzo dated 4 June 2015 to 16 June 2015 attaching draft report for purposes of comment, together with a summary of changes made to the report for consideration by ABLA.
- (c) Email chain between Professor Lewis and Luis Izzo dated 2 July 2015 attaching draft report for purposes of comment.

WAIVER

- 10. The above communications:
 - (a) do not provide new briefing materials, new information or terms of reference for the reports;
 - (b) do not impact the substantive findings of the reports; and
 - (c) do not involve any requests by ABLA or its clients for the relevant experts to conduct any additional or different:
 - (i) process of reasoning;
 - (ii) methodology; or
 - (iii) research,
 - (iv) in relation to the content of the expert reports.
- 11. For this reason, ABLA maintains that there has been no waiver of the privilege attaching to the above communications.



Sworn by the deponent
at North Sydney
in New South Wales
on 8 September 2014
Before me:

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Signature of deponent



Signature of witness

Luis Izzo, Solicitor
