

IN THE FAIR WORK COMMISSION

Matter No: AM2014/305 – Penalty Rates

ACTU SUBMISSIONS IN RELATION TO ORDER TO PRODUCE

1. The ACTU refers to the Order to Produce dated 22 September 2015 (the Order) in respect to the report titled '*The continuing importance of penalty rates for weekend work: a review of evidence*' prepared by Professor Markey (the Markey Report).
2. The ACTU intend to adopt the same approach as the SDA (per their submissions filed 5 October 2015) with respect to the manner in which the documents will be produced to the Commission. As such, we will produce documents in a way that clearly divides the documents in respect of which the ACTU claim legal professional privilege (and which the Commission will determine) and the documents in which privilege is not claimed by the ACTU.
3. In relation to the categories of documents as sought pursuant to the Order, we submit as follows.

In respect to Category 1:

4. Nothing to Produce.

In respect to Category 2:

5. Professor Markey was formally retained by the ACTU on 14 May 2015 (the First Retainer). The report that relates to the First Retainer is incomplete, has not been filed, and nor is it relied on by any party in these proceedings. Notably, the First Retainer was intended to be relied on as common evidence in response to applications that are no longer pressed by the employer parties (refer to correspondence of the AFEI dated 26 June and 12 August).
6. Subsequently, the ACTU engaged Professor Markey, by way of separate verbal retainer, to draft a report in response to Chapter 3 of 'The Modern Face of Weekend Work' by L Pezzullo (the Second Retainer).
7. A copy of the email correspondence in respect to the Second Retainer has been produced in Category 3 (refer ACTU#28).
8. The ACTU submit that documents recording the First Retainer (ACTU#8, ACTU#11 and ACTU#12) are not captured by the Order and are therefore not producible. In the alternative we object to its production on the basis of relevance.

In respect to Category 3:

9. The Order requires that the ACTU produce "all documents recording instructions, assumptions, suggestions or information" in relation to the "preparation of the Markey Report".
10. The ACTU maintains its objection that the Order only captures communication with respect to Markey Report, and not the First Retainer.
11. The ACTU submits that in circumstances where the First Retainer is (a) not covered by the terms of the Order and (b) that the work which pertained to the First Retainer was never completed by Professor Markey, and nor is it filed or relied on by the parties, that legal professional privilege is not waived.

12. On that basis, the ACTU produce the correspondence identified as ACTU#28. The ACTU submit that, save for ACTU#28 which has been produced, there is no relevant documents that pertain to the preparation of the Markey Report.
13. If the Commission rejects that submission, then the following documents identified as ACTU#4, #5, #6 and #19 fall within Category 3.

In respect to **Categories 4 and 5:**

14. We note that the Order was not reissued by Justice Ross such that it is personally directed to Professor Markey. Nevertheless, and notwithstanding that these are not documents within the possession of the ACTU, the ACTU and Professor Markey do not press this point and agree to produce documents, subject to the production of any documents that has the potential to waive privilege maintained by the ACTU.
15. The ACTU supports the submissions of the SDA filed on 5 October 2015 that it would be appropriate for the ACTU to be afforded the opportunity to review any proposed production by the expert to ascertain whether any claim for privilege should be properly maintained.

In respect to **Category 6:**

16. The Order requires that:
 - (a) the ACTU provide all documents recording communications between Professor Markey and the ACTU 'relating to the preparation and content of the Markey Report'; and
 - (b) Professor Markey provide all documents recording communication between the ACTU and / or the Centre for Workplace Futures, Faculty of Business and Economics at Macquarie University.

In relation to (a):

17. The ACTU maintains its standing objection that the Order captures communication with respect to Markey Report, and not the First Retainer. On that basis, the ACTU produce the correspondence identified as ACTU#30.
18. If the Commission rejects that submission, in the alternative the ACTU claim legal professional privilege with respect to all communication between the ACTU and Professor Markey (save as otherwise noted in these submissions).
19. We submit that the documents (as identified below) do not influence the content of the Markey Report in any substantial sense and legal professional privilege has not been waived. We rely on the decision of Commissioner Johns dated 12 September 2015 ([2015] FWC 6385) in that regard.
20. We further submit that some of the correspondence (identified ACTU#13 to #23 not including #19) relate to work preparatory to the ACTU Outline of Expert Evidence as filed on 15 June 2015. The correspondence and provision of the draft reports was for the purpose of complying with the Commission's direction to file an outline of expert evidence, prior to the date on which those expert reports were to be filed by the parties. The ACTU should not be prejudiced by the Order to produce in circumstances where the communication (and provision of draft and incomplete reports from the expert) was requested from the expert in order to comply with a direction of the Commission.

21. With specific reference to ACTU#24, we further submit that this is not producible on the basis of relevance. This correspondence relates to matters dealing with the retainer and expert report of Dr Martin O'Brien. It has no relevance to either the First Retainer or the Markey Report.
22. The documents relevant to Category 6(a) include ACTU#2, 3, 6A, 6B, 6C, 7, 10, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27 and 29.
23. With specific reference to ACTU#6B, we note that the correspondence includes communication relevant to other Fair Work Commission proceedings and we submit that it is not relevant and should therefore be redacted in the event that the document is determined producible.

In relation to (b):

24. We note that the Order was not reissued by Justice Ross such that it is personally directed to Professor Markey. Nevertheless, and notwithstanding that these are not documents within the possession of the ACTU, the ACTU and Professor Markey do not press this point and agree to produce documents, subject to the production of any documents that has the potential to waive privilege maintained by the ACTU.
25. The ACTU supports the submissions of the SDA filed on 5 October 2015 that it would be appropriate for the ACTU to be afforded the opportunity to review any proposed production by the expert to ascertain whether any claim for privilege should be properly maintained.

ACTU