



## **MODERN AWARDS REVIEW 2014**

**AM2014/270 - GENERAL RETAIL INDUSTRY AWARD 2010**

**AM2014/305 - PENALTY RATES**

**OBJECTIONS TO PROPOSED ORDERS REQUIRING  
PRODUCTION OF DOCUMENTS**

1. The Fair Work Commission (**FWC**) has directed that any objections to notices to produce are to be filed by 4.00pm on Friday 18 September 2015.
2. This outline of submissions is filed in relation to this matter on behalf of:
  - (a) the Australian Retailers Association (**ARA**);
  - (b) the National Retailers Association (**NRA**); and
  - (c) Masters Grocers Association (**MGA**).
3. The Shop, Distributive and Allied Employees Association (**SDA**) has filed Orders for Production in relation to the following witnesses:
  - (a) Adam Schoene
  - (b) Barry Barron
  - (c) Heath Goddard
  - (d) Jorge-Daniel LeRoy D'Oreli
  - (e) Belinda Daggett
  - (f) Chris Antonieff
  - (g) Graeme Gough
4. The FWC is empowered, under section 590(1) of the *Fair Work Act 2009* (Cth) (FW Act) to “*inform itself in relation to any matter before it in such manner as it considers appropriate*”. This includes, under section 590(2)(c) of the FW Act, “*requiring a person to provide copies of documents or records...*”.
5. The FWC, in determining whether to exercise its discretion under section 590 of the FW Act, will be guided by principles which apply in the Courts<sup>1</sup>. The key principles that apply are:
  - (a) the documents sought have an apparent relevance to the issue in the proceedings;
  - (b) confidentiality alone is not sufficient to cause the FWC not to exercise its discretion; and
  - (c) such an order must not be oppressive.
6. It is our submission that the FWC is required to consider these factors in exercising its discretion, and, in some circumstances, balance the utility of the documents sought with any oppressiveness attached to their production.
7. A further issue to be considered is that Orders for Production relate to documents that are in existence, and do not require the creation of a document to meet the description in the Order.
8. We now turn to the Orders sought against each of the witnesses.

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<sup>1</sup> *Clermont Coal Pty Ltd & Ors v Brown & Ors* [2015] FWCFB 2460

## Adam Schoene

9. In relation to Mr Schoene, the SDA seeks:

*“Without limiting the generality of the foregoing, the balance sheet and profit and loss statement prepared in respect of the businesses of Bakers Delight Bondi and Bakers Delight Balgowlah for the financial year ended 30 June 2015 (or the most recent financial year in respect of which such documents exist) and all financial documents evidencing the trading in that period for those businesses.”*

10. The basis upon which the SDA seeks these documents is set out in the Order as follows:

*As to paragraphs 12 and 13 of the witness statement of Adam Schoene, all documents in reliance upon which Mr Schoene asserts that:*

*“Sunday trading accounts for approximately 15% of Bakers Delight Bondi’s weekly trading”.*

*“On Sundays, we also see an increase of 10% in the average sale per customer.”*

*“Sunday trading accounts for approximately 17.5% of Bakers Delight Balgowlah’s weekly trading”.*

*“On Sundays, we also see an increase of 7-8% in the average sale per customer.”*

11. The balance sheet and profit and loss statement from the witness’ businesses, if such documents exist, can have no relevance to paragraphs 12 and 13 of the witness statement. Mr Schoene does not make assertions about either of the business’ profit and loss, income or expenses or anything of that nature.

12. In relation to the request for *“all financial documents evidencing the trading...”* this request lacks the requisite specifics to enable the witness to comply.

## Barry Barron

13. In relation to Mr Barron’s statement dated 11 August 2015 (**Barron Statement**), the SDA seeks:

1. *As to paragraph 6 of the witness statement of Barry Barron, all documents in reliance upon which Mr Barron asserts the matters there set out in relation to the number of staff employed, the number employed in retail positions and the gender and working status of employees.*
2. *As to paragraph 11 of the witness statement of Barry Barron, all documents documenting or evidencing the “percentage of retail sales” there referred to.*
3. *As to paragraph 13 of the witness statement of Barry Barron, all documents in reliance upon which Mr Barron asserts that: “The stores that do not trade on Sundays are closed because opening would result in a Sunday trading loss. Without limiting the generality of the foregoing, the balance sheet and profit and loss statement prepared in respect of the business (and each store there identified as not trading on Sundays) for the financial year ended 30 June 2015 (or the most recent financial year in respect of which such documents exist) and all financial documents evidencing Sunday trading for the business and each such store in that period.*

4. *As to paragraph 16 of the witness statement of Barry Barron, all documents in reliance upon which Mr Barron asserts the following facts or matters:*

*“Sunday trading accounts for approximately 10.5% and 11.75% respectively of Sussan and Sportsgirl weekly trading, taking only stores which trade Sundays into account.”*

*“With the average Sunday turnover per labour hour of \$254 and \$291 as compared to average weekly turnover excluding Sunday of \$167 and \$184 or labour hour for Sussan and Sportsgirl respectively...”*

5. *As to paragraph 21 of the witness statement of Barry Barron, all documents in connection with the “payroll information” there referred to in reliance upon which the attachments to the witness statement of Mr Barron were compiled.*

14. As to item 1 of the Order we object to the production of these documents on the grounds that they are not relevant to the issue in the proceedings, are oppressive and are likely to require the witness to create a document. It is difficult to identify how the composition of the business’ workforce has the requisite relevance to the issue in the proceedings. Further, the production of documents in relation to number of staff employed, number staff employed in retail positions and the gender and working status of employees would be oppressive as this goes beyond record keeping obligations and compliance would likely require either the creation of a document or require the business to trawl through an enormous number of documents to provide the information.

15. As to item 2 of the Order we object to the production of the documents referred to on the basis they are not relevant and do not exist. Paragraph 11 of the Barron Statement does not make any reference to documents, but merely provides background in relation to the way in which the business operates. Mr Barron, at paragraph 11 sets out the structure within which labour is allocated within the business.

16. As to item 3 of the Order, we object to the production of those documents on the grounds that there is a lack of specific detail meaning the witness cannot identify the scope of what is being sought, that their production would be oppressive and that those documents, overall, are not relevant to the issue in the proceedings. Mr Barron makes no comment about overall profitability of the business, and therefore the profitability of the business is not in issue. Further, the SDA is seeking profit and loss statements for each individual store within both Sussan and Sportsgirl. This amounts to 299 stores, and is simply oppressive. Equally, requiring the business to extract “all financial information” on Sunday trading, even if this requirement was crafted in such a way as to be readily understood, for the 260 stores which operate on Sundays would be oppressive and would require the business to create a document.

17. As to item 5 of the Order, we object to the production of these documents on the basis that their production is of little utility to the Commission and the requirement to produce them would be oppressive. The SDA is seeking raw payroll information from approximately 90 stores for two full twelve month periods.

#### **Heath Goddard**

18. In relation to Mr Goddard’s statement dated 10 August 2015 (**Goddard Statement**), the SDA seeks:

1. *As to paragraph 15 of the witness statement of Heath Goddard, produce the “sales figures” there referred to.*
  2. *As to paragraph 16 of the witness statement of Heath Goddard, produce the “Sample Data Set” there referred to.*
  3. *As to paragraph 22 of the witness statement of Heath Goddard, all documents in reliance upon which Mr Goddard asserts that “Regardless of these figures, the profitability of Sunday trade is marginal given the significantly higher wage costs.” Without limiting the generality of the foregoing, the balance sheet and profit and loss statements prepared in respect of the Pillow Talk business for the financial year ended 30 June 2015 (or the most recent financial year in respect of which such documents exist) and all financial documents evidencing the profitability or otherwise of Sunday trading.*
  4. *As to paragraph 25 of the witness statement of Heath Goddard, all documents documenting or evidencing the “cost base” of the business there referred to.*
19. As to item 1 of the Order the witness sets out within his witness statement, in the tables and narrative at paragraphs 19, 20 and 21, the sales figures. There does not appear to be anything else for the witness to produce in that regard.
20. As to item 3 of the Order we object to the production of the balance sheet and profit and loss statements for the business on the grounds of relevance. The witness makes no comment about the overall profitability of the business. The balance sheet of the business is not relevant to the performance of one trading day each week.
21. Further, as to item 3 of the Order the request for “*all financial documents evidencing the trading...*” lacks the requisite specifics to enable the witness to comply.
22. As to item 4 of the Order we object to the production of the documents on the basis of relevance and oppression. The “cost base” of a business will include every single cost the business incurs. Even if every cost was relevant to the issue in the proceedings, requiring the witness to identify every document evidencing every cost incurred by the business is oppressive.

**Jorge-Daniel LeRoy D’Oreli**

23. In relation to Mr LeRoy D’Oreli’s statement dated 10 August 2015 (**D’Oreli Statement**), the SDA seeks:
1. *As to paragraph 8 of the witness statement of Jorge – Daniel Leroy D’Oreli documents in reliance upon which Mr D’Oreli asserts that “Jeanswest Chadstone which traditionally has been one of our most high profile stores has struggled in recent years. In 2011, Chadstone had the 3rd highest sales in the company, compared to 2014 when they ranked 29th. From 2011 to 2014, Jeanswest has had an increase in company sales of 20%, whereas Jeanswest Chadstone has had a decrease in sales of 24%.” Without limiting the generality of the foregoing, the balance sheet and profit and loss statements prepared in respect of the Jeanswest business for the financial years ended 30 June 2011 to 30 June 2014 and all financial documents documenting or evidencing the company and individual store sales in that period.*

2. *As to paragraph 12 of the witness statement of Jorge – Daniel D’Oreli, produce the “lease agreements” there referred to.*
3. *As to paragraph 13 of the witness statement of Jorge – Daniel D’Oreli, all documents in reliance upon which Mr D’Oreli asserts –*

*“In 2009 Sunday trading accounted for 10.5% of the week’s sales compared with 12.4% in 2014”;*

*“The average age of employees working on Sunday has increased from 23 in 2009 to 28 in 2014.” 4.*

4. *As to paragraph 25 of the witness statement of Jorge – Daniel D’Oreli, all documents in reliance upon which Mr D’Oreli asserts –*

*“69% of employees working on Sundays are aged 30 and under, 18% between 31 and 40 and 12% are over 40”;*

*“Jeanswest has seen an increase in employees in the 40+ age bracket (from 4% in FY09/10)”.*

24. As to item 1 of the Order we object to the production of those documents on the grounds that there is a lack of specific detail meaning the witness cannot identify the scope of what is being sought, that their production would be oppressive and that those documents are not relevant to the issue in the proceedings. Mr D’Oreli makes no comment about overall profitability of the business, and therefore the profitability of the business is not in issue, nor is its balance sheet. Further, the SDA is seeking all documents documenting or evidencing the company and individual store sales for a three year period for 197 stores. On its face “all documents documenting or evidencing the company and individual stores sales” is oppressive. The Order requires the witness to produce every document evidencing every sale across every store. This is manifestly unreasonable.
25. As to item 2 of the Order there are significant confidentiality issues associated with the production of lease agreements. If the Commission is minded to require the witness to produce such documents we request that only the relevant component of the document be disclosed.
26. As to items 3 and 4 of the Order we object to the production of these documents on the grounds that there is a lack of specific detail, meaning the witness cannot possibly identify the scope of what is being sought, their production would be oppressive and they are not relevant to the issue in the proceedings. The combination of items 3 and 4 requires the witness to trawl through an enormous number of documents, considering it involved 197 stores and 1,154 employees.

**Belinda Daggett**

27. In relation to Ms Daggett’s statement dated 7 August 2015 (**Daggett Statement**), the SDA seeks:

*As to paragraph 13 of the witness statement of Belinda Daggett, all documents in reliance upon which Ms Daggett asserts that “Sunday trading currently accounts for approximately 10% of Bakers Delight Lavington’s weekly trading”.*

*Without limiting the generality of the foregoing, the balance sheet and profit and loss statement prepared in respect of the business for the financial year ended 30 June 2015 (or*

*the most recent financial year in respect of which such documents exist) and all financial documents evidencing the weekly trading in that period.*

28. The balance sheet and profit and loss statement from the witness' businesses, if such documents exist, are not referred to in and not relevant to paragraph 13 of the Daggett Statement. Ms Daggett does not make assertions about the business' profit and loss, income or expenses or anything of that nature.
29. Further, the request for "*all financial documents evidencing the weekly trading...*" lacks the requisite specifics to enable the witness to comply.

#### **Chris Antonieff**

30. In relation to Mr Antonieff's statement dated 10 August 2015 (**Antonieff Statement**), the SDA seeks:

1. *As to paragraph 7 of the witness statement of Chris Antonieff, documents in reliance upon which Mr Antonieff asserts that "Since this time [July 2013], Foodworks Oxley has experienced a significant decline in sales ..."*

*Without limiting the generality of the foregoing, the balance sheet and profit and loss statement prepared in respect of the business for the financial years ended 30 June 2014 and 30 June 2015 and all financial documents evidencing the significant decline in sales in this period.*

2. *As to paragraph 11 of the witness statement of Chris Antonieff, all documents in reliance upon which Mr Antonieff asserts the matters there set out.*
3. *As to paragraph 17 of the witness statement of Chris Antonieff, all documents in reliance upon which Mr Antonieff prepared the roster of hours worked there set out.*

31. As to item 1 of the Order, we object to the production of the balance sheet and profit and loss statements for the business on the grounds of relevance. The witness makes no comment about the overall profitability of the business. The balance sheet of the business is not relevant to the sales of the business. Further, the request for "*all financial documents evidencing the decline in sales...*" lacks the requisite specifics to enable the witness to comply.

32. As to item 2 of the Order, we object to the production of documents in reliance upon which Mr Antonieff asserts the matters in paragraph 11 of the Antonieff Statement would be onerous as compliance would likely require document creation.

33. As to item 3 of the Order, the documents relied upon to prepare the table at paragraph 17 of the Antonieff Statement are attached to the Antonieff Statement at CA3 and CA4.

#### **Graeme Gough**

34. In relation to Mr Gough's statement dated 10 August 2015 (**Gough Statement**), the SDA seeks:

1. *As to paragraph 9 of the witness statement of Graeme Gough, documents in reliance upon which Mr Gough asserts that "Currently, our store is not profitable". Without limiting the generality of the foregoing, the balance sheet and profit and loss statement prepared in*

*respect of the business for the financial year ended 30 June 2015 (or the most recent financial year in respect of which such documents exist) and all financial documents evidencing the profitability or otherwise of trading in that period.*

2. *As to paragraph 14 of the witness statement of Graeme Gough, all documents in reliance upon which Mr Gough asserts that "trading across all days of the week is reasonably even, with a variance of approximately \$110 sales per hour."*
  
35. As to item 1 of the Order, we object to the production of the balance sheet and profit and loss statement from the witness' businesses on the basis that, if such documents exist, the request is oppressive as compliance would likely require either the creation of a document or require the business to trawl through an enormous number of documents to provide the information.
  
36. As to item 2 of the Order, we object to the production of documents in reliance upon which Mr Gough asserts *"trading across all days of the week is reasonably even, with a variance of approximately \$110 sales per hour"* as the production would be onerous as compliance would likely require document creation.

18 September 2015