

**In the matter of:**

**Fair Work Act 2009**

**s.156 4 yearly review of modern awards**

**Penalty Rates – AM2014/305**

**General Retail Industry Award 2010 and Ors**

**SUBMISSIONS IN RELATION TO ORDER TO PRODUCE DOCUMENTS DIRECTED TO  
THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION**

1. Pursuant to an Order made 22 September 2015 (as subsequently amended and re-issued on 30 September 2015) by Vice President Catanzariti, (the **Order**), the Shop, Distributive and Allied Employees' Association (**SDA**) in Fair Work Commission Proceedings AM2014/305 has been ordered to produce various documents and categories of documents there set out.
2. To the extent that the Order requires the production of documents not in the possession of the SDA, there are necessarily no documents which the SDA can produce. Using the same numbering as set out in the Order (as amended), the SDA identifies as follows those categories of documents which seek the production of documents which are not in the possession of the SDA and which cannot be produced by it:  
  
4-5, 10-11, 16-17, 22, 27-28, 33-34, 39-40, 45-46, 51-52
3. Subject to the submissions in respect of waiver which follow, client legal privilege is otherwise claimed in respect of the categories of documents set out below in reliance upon the Affidavit of Dominic James Macken sworn 25 September 2015 annexed to these submissions.  
  
1-3, 6-9, 12-15, 18-21, 23-26, 29-32, 35-38, 41-44, 47-50, 53.
4. The SDA accepts that, in circumstances where the SDA has filed in this proceeding and intends that the Commission receive into evidence, and rely upon, the O'Brien Report, the Watson Report, the Kirchner Report, the Bartley Report, the Yu Report, the Altman Report, the Charlesworth and MacDonald Report, the Charlesworth Report and the Peetz and Watson Report (as each of those reports are relevantly defined by the terms of the Order), client legal privilege is relevantly waived in relation to the following categories of document:  
  
1-3, 7-9, 13-15, 19-21, 24-26, 30-32, 36-38, 42-44, 48-50
5. As to the following categories of documents:  
  
6, 12, 18, 23, 29, 35, 41, 47 and 53

The request for production in each case is made in respect of communications between the expert or experts there identified on the one hand and the SDA or its legal advisers on the other hand “relating to the preparation and the content of the [respective] report”.

The SDA claims client legal privilege to the extent that such communications fall outside the categories of documents identified in paragraph 4 hereof (where client legal privilege is agreed to have been waived) and where the relevant communications have not influenced the contents of the respective reports in such a way that it would be unfair for the SDA to rely upon the relevant report without disclosing the documents: Decision of Johns C, 12 September 2015, paras. [16]-[19] and the authorities there cited and applied.

6. The claim for client legal privilege made by the SDA in respect of the categories of documents set out in paragraph 5 should most appropriately be tested by a member of the Commission other than a presiding member of the Full Bench sitting in proceedings AM2014/305 for the same reason that that submission was made on behalf of employer parties, and accepted by the Full Bench, in respect of the orders for production directed to employer party experts

Dated: 5 October 2015

A J MACKEN & CO.  
Solicitors for the SDA

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

**IN THE FAIR WORK COMMISSION  
4 YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES**

**GENERAL RETAIL INDUSTRY AWARD 2010 AND OTHERS**

**MATTER NO: AM 2014/305**

**AFFIDAVIT OF DOMINIC JAMES MACKEN**

I, **DOMINIC JAMES MACKEN**, of 11<sup>th</sup> Floor, 53 Queen Street, Melbourne, in the State of Victoria, Solicitor, **MAKE OATH AND SAY** as follows:

1. I am a solicitor employed by Antony John McDermott Macken, who practises as a solicitor under the firm name, A J Macken & Co ("**Mackens**"). I make this affidavit from my own knowledge except as otherwise indicated by me. Where I depose to matters from information and belief, I believe those matters to be true and I indicate the source of the information and belief.
2. In or about May 2014, Mackens was engaged by the Shop, Distributive and Allied Employees Association ("**SDA**") in relation to the Fair Work Commission ("**Commission**") review of modern awards – penalty rates case ("**the Proceedings**").
3. Under the supervision of my Principal, I have the care and conduct of this Proceedings on behalf of the SDA.

**Engagement of Experts**

4. I had preliminary discussions with the SDA in or about May 2014 with regard to retaining experts to conduct research into matters pertaining to the foreshadowed Modern Awards Review in relation to penalty rates with a view to their potentially giving evidence in the Proceedings on behalf of the SDA. Throughout the period from June 2014 to July 2015, I have had discussions from time to time with counsel retained on behalf of the SDA as to whether or not particular experts should be retained for the purposes of the Proceedings and the SDA has had advice from counsel in relation to that issue.

Date of Document:  
Prepared by: A. J. Macken & Co.  
11<sup>th</sup> Floor, 53 Queen Street  
Melbourne Vic 3000  
DX 447 Melbourne

25 September 2015  
Solicitors Code: 771  
Tel: 9614 4899  
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Ref: Dominic Macken



5. At various times from approximately June 2014 to July 2015, either I or officers of the SDA, or counsel have had communications with, amongst others, the following experts (“the experts”) in respect of their retainer to prepare expert reports and provide expert evidence to the Commission in connection with the Proceedings:
- a. Professor Morris Altman, Dean and Head of School, Newcastle Business School;
  - b. Ms Helen Bartley, Bartley Consulting Pty Ltd;
  - c. Professor Sara Charlesworth and Dr Fiona McDonald, School of Management, RMIT University;
  - d. Mr Kevin Kirchner, Principal, Fulcrum Economics Australia;
  - e. Dr Martin O’Brien, Faculty of Business, University of Wollongong;
  - f. Professor David Peetz, Centre for Work, Organisation and Wellbeing, Griffith University;
  - g. Dr Ian Watson, Macquarie University and Social Policy Research Centre, University of New South Wales;
  - h. Ms Serena Yu, Centre for Health, Economics Research and Evaluation, University of Technology, Sydney (formerly associated with the Workplace Research Centre at the University of Sydney).
6. I have exchanged correspondence and had other communications with each of the above experts and, where appropriate, provided them with information regarding their retainer, the role of experts in the Commission and the process of adducing evidence in the Commission. On each occasion, the purpose of my communication was in connection with Mackens’ retainer to act on behalf of the SDA in and for the purposes of the Proceedings.

#### **Order to Produce Documents**

7. On 22 September 2015, Vice President Catanzariti made an order requiring that the SDA produce various categories of documents by 4:00pm on Friday 25 September 2015.
8. I have reviewed the various categories of document which the SDA has been ordered to produce.
9. I say that in each case, the categories of document sought to be produced are documents which are confidential documents prepared by the SDA, its legal advisers or other persons, in each case for the dominant purpose of Mackens or counsel retained on behalf of the SDA, providing legal advice to the SDA or otherwise for the purposes of



the SDA being provided with professional legal services in connection with the Proceedings.

SWORN by **DOMINIC JAMES MACKEN**  
at Melbourne on the 25<sup>th</sup> day of September 2015

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Before me: *JAMES LIORIEL TIERNEY*

  
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AN AUSTRALIAN LEGAL PRACTITIONER  
WITHIN THE MEANING OF THE  
LEGAL PROFESSION UNIFORM LAW (VICTORIA)  
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