

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 EXPERTS RETAINED ON BEHALF OF THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION

1. Pursuant to an Order made 30 September 2015 by his Honour, President Ross, (the **Order**), expert witnesses proposed to be called by the Shop, Distributive and Allied Employees' Association (**SDA**) in Fair Work Commission Proceedings AM2014/305 have been ordered to produce various documents and categories of documents there set out.
2. The Order is relevantly identical to the order issued by Vice President Catanzariti on 22 September 2015 (and re-issued by his Honour on 30 September 2015) but, in contradistinction to the earlier order, is personally directed to the experts rather than the SDA. Save in respect of the submissions which follow, it is accordingly a matter for the experts to comply with the Order and/or to raise any relevant objection to production rather than for the SDA to do so.
3. To the limited extent that any production of documents by an expert might have the potential to waive privilege presently maintained by the SDA, the SDA formally objects to production and relies upon the submissions made in its own behalf in respect of the order for production made by VP Catanzariti requiring production of the same documents from the SDA.
4. Further to paragraph 3, the SDA objects to the production of any documents by the experts falling within the following categories of documents:

6, 12, 18, 23, 29, 35, 41, 47 and 53

to the extent in each case that such communications are the subject of a claim for privilege by the SDA which awaits determination by the Commission.
5. To avoid the risk of inadvertent disclosure by an expert of a document in respect of which the SDA claims, and is ultimately found to be entitled to claim, client legal privilege, the SDA submits that no documents falling within the category of documents set out in paragraph 4 should be permitted to be inspected by an opposing party without the SDA being afforded an opportunity to first review the proposed production by the expert to ascertain whether any claim for privilege should properly be maintained.

6. The SDA notes as a matter of practicality that it proposes to produce the documents set out in paragraph 4, divided as between documents in respect of which the SDA claims client legal privilege (and which the Commission will need to rule upon) and the documents in those categories in respect of which privilege is not claimed by the SDA.

Dated: 5 October 2015

A J MACKEN & CO.
Solicitors for the SDA