

**From:** Dominic Macken [<mailto:djmacken@macken.com.au>]

**Sent:** Wednesday, 9 September 2015 11:22 AM

**To:** Chambers - Johns C

**Subject:** Fair Work Commission - Modern Awards Review - Penalty Rates - AM2014/305

Dear Associate,

We understand that Commissioner Johns has been delegated by the Full Bench the task of determining objections to Notices to Produce issued to various employer organisation experts on behalf of our client, the Shop, Distributive and Allied Employees' Association and United Voice.

We understand that the Commissioner is sitting in Melbourne for that purpose this afternoon at 4.30pm

As a courtesy to the Commissioner, we enclose a copy of the submissions filed on behalf of the SDAEA responding to the submissions made on behalf of the employer organisations (and Deloitte) objecting to production.

If you have any queries in relation to the above matter, please do not hesitate to contact Mr Dominic Macken on (03) 9614 4899.

Yours faithfully,

A J MACKEN & CO.

**Award Review 2014**

**PENALTY RATES**

**AM2014/305**

**Shop Distributive and Allied Employees' Association**

**SUBMISSIONS IN REPLY - ORDERS TO PRODUCE**

**(EXPERT DOCUMENTS)**

**7 September 2015**

## Background

1. The Shop Distributive and Allied Employees' Association (**SDA**) files these submissions in reply to the objections made by the employer organisations to the orders for production with respect to expert evidence.
2. On 31 August 2015, the Commission issued orders for the production of documents to:
  - (a) Professor Phil Lewis;
  - (b) Professor John Rose;
  - (c) Ms Lynne Pezzullo (in relation to whom two orders were issued); and
  - (d) Dr Sean Sands,(collectively, "the **employer experts**").
3. The orders for production were issued pursuant to s 590(2) of the *Fair Work Act 2009* (**FW Act**). Sub-para (c) provides that the Commission "*may inform itself ... by requiring a person to provide copies of documents or records, or to provide any other information*". This power is expressed in very broad terms: see *Clermont Coal Pty Ltd & Ors v Brown & Ors* [2015] FWCFB 2460 (*Clermont Coal*) at [21].
4. Employer organisations have filed expert reports authored by each of the employer experts in the proceeding. The SDA has given notice that each of the employer experts are required for cross examination in respect of their expert reports.
5. The orders for production in respect of each of the expert witnesses are in materially the same terms as requests for production previously made by the SDA in correspondence with employer organisations. These requests were made more than a month ago.<sup>1</sup>
6. As outlined further below, some documentation has been provided in response to the above requests. Objection has however been taken to the production of certain categories of documents by some of the employer experts, principally on the basis of legal professional privilege, considered below. Further, in relation to categories of

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<sup>1</sup> In relation to Ms Pezzullo, on 31 July 2015; Dr Sands, on 3 August 2015; and Professors Lewis & Rose, on 27 July 2015.

documents that are not the subject of objection, no indication has been given that all of the documents in the relevant category have been produced.

### **Legal professional privilege**

7. Notwithstanding that the Commission is not bound by the rules of evidence,<sup>2</sup> legal professional privilege has application in proceedings before the Commission as a substantive doctrine of the common law: *Kirkman v DP World Melbourne Limited (Kirkman)*.<sup>3</sup> In *Kirkman*, the Full Bench applied s 119 of the *Evidence Act 1995* on the basis that it codified litigation privilege. The same approach should be adopted in the present matter.

8. Section 119 relevantly provides:

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

9. Section 122 relevantly provides:

- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

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<sup>2</sup> Section 591 of the FW Act.

<sup>3</sup> [2015] FWCFB 3995.

- (3) Without limiting subsection (2), a client or party is taken to have so acted if:
- (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
  - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (4) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.
- (5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:
- (a) the substance of the evidence has been disclosed:
    - (i) in the course of making a confidential communication or preparing a confidential document; or
    - (ii) as a result of duress or deception; or
    - (iii) under compulsion of law; or
    - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law--to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or
  - (b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
  - (c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

10. Section 126 provides:

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the

contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

11. A party claiming privilege bears the onus of establishing the requisite dominant purpose. It is incumbent on such a party to adduce “*focused and specific evidence*” in respect of each document over which a claim for privilege is asserted.<sup>4</sup> Generalized assertion and verbal formulae will not suffice.<sup>5</sup>

### **Dr Sean Sands**

12. No objection to the order for production issued to Dr Sands has been made. Further, no confirmation has been provided that the documents provided to date in respect of Dr Sands’ expert report are all of the documents in each category the subject of request.
13. It may be appropriate for the order for production to be amended so as to exclude documents already provided by employer representatives or Dr Sands.

### **Professors Lewis & Rose**

14. The categories of documents referred to in the order for production issued to Professors Lewis and Rose are set out in the following tables.

#### *Professor Lewis*

<b>Category</b>	<b>Description</b>
1	All documents recording the request or requests of Professor Lewis for the preparation of the report by Professor Lewis titled <i>Penalty Rates and the Retail, Café and Restaurant, and Hairdressing and Beauty Industry (the Lewis Report)</i> dated 3 July 2015
2	All documents recording the retainer of Professor Lewis to give evidence in the Proceeding and any subsequent variations or amendments thereto
3	All documents recording instructions, assumptions, suggestions or information given or made to Professor Lewis in relation to the preparation of the Lewis Report
4	All documents produced or generated by Professor Lewis in the production of the Lewis Report, including working notes and drafts of the Lewis Report (or parts thereof) (excluding those documents annexed

<sup>4</sup> *Barnes v Commissioner of Taxation* [2007] FCAFC 88 (**Barnes**) at [18].

<sup>5</sup> *Kennedy v Wallace* [2004] FCAFC 337; (2004) 142 FCR 185 at 189 (Black CJ and Emmett J).

	to the Lewis Report)
5	All documents to which Professor Lewis had regard in producing the Lewis Report
6	All documents, including notes and emails, recording communications between Professor Lewis and the Australian Chamber of Commerce and Industry, the Hair and Beauty Industry Association, Australian Business Industrial, the New South Wales Business Chamber and/or Australian Business Lawyers and Advisors ( <b>ABLA</b> ) relating to the preparation and content of the Lewis Report

*Professor Rose*

Category	Description
1	All documents recording the request or requests of Professor Rose, Ms Gail Bradford, Mr Jun Zhang and/or Stable Research for the preparation of the report by Professor Rose titled <i>Value of Time and Value of Work Time during Public Holidays (the Rose Report)</i> dated 3 July 2015
2	All documents recording the retainer of Professor Rose, Ms Bradford, Mr Zhang and Stable Research to give evidence in the Proceeding and any subsequent variations or amendments thereto
3	All documents recording instructions, assumptions, suggestions or information given or made to Professor Rose, Ms Bradford, Mr Zhang and Stable Research in relation to the preparation of the Rose Report
4	All documents produced or generated by Professor Rose, Ms Bradford, Mr Zhang and Stable Research in the production of the Rose Report, including working notes and drafts of the Rose Report (or parts thereof) (excluding those documents annexed to the Rose Report)
5	All documents to which Professor Rose, Ms Bradford, Mr Zhang and Stable Research had regard in producing the Rose Report. Without limiting the generality of the above, this includes: <ul style="list-style-type: none"> <li>i. all documents relating to the pilot study undertaken during the week of 8 April 2015, moderated by Professor Stephen Holden, including the findings of the two focus groups, the original survey questions and the introduction to the survey provided by Australian Business Lawyers &amp; Advisors; and</li> <li>ii. all documents produced or generated which relate to, or otherwise evidence, the way in which surveyed respondents were chosen or not chosen for the study which commenced on 20 May 2015</li> </ul>
6	All documents, including notes and emails, recording communications between Professor Rose, Ms Bradford, Mr Zhang and Stable Research and the Australian Chamber of Commerce and Industry, Australian Business Industrial and the New South Wales Business Chamber and/or

	Australian Business Lawyers and Advisors relating to the preparation and content of the Rose Report
7	The curricula vitae of Ms Bradford and Mr Zhang

15. The SDA disputes the claim by ABLA that documents have been produced in response to all categories of production sought in respect of Professors Lewis and Rose.<sup>6</sup> The documents which have been produced to date in respect of Professors Lewis and Rose and the categories to which they relate are set out in the following tables.

<b>Documents Produced – Professor Lewis</b>	<b>Category</b>
Retainer Letter from AB Lawyers & Advisors to Professor Lewis - 27 April 2015	1 & 2
Draft Reports – ‘Penalty Rates and the retail, café and restaurant; and hairdressing and beauty industries’ (x 2) – Undated	4
‘Employment effects’ document – Undated	4
‘Elasticities calculations’ document – Undated	4
‘Statistics’ document – Undated	4
‘Website References’ document – Undated	4
Ibis World Industry Report – Café and Coffee Shops in Australia – April 2015	5
Ibis World Industry Report – Hairdressing and Beauty Services in Australia – March 2015	5
Ibis World Industry Report – Restaurants in Australia – March 2015	5
Fair Work Ombudsman Pay Guide for the <i>Restaurant Industry Award 2010</i> – 31 July 2014	5
‘Paying the Penalty? The High Price of Penalty Rates in Australian Restaurants’ – Undated	5

16. As to the production summarised above in relation to Professor Lewis:

- (a) No documents have been produced which relate to categories 3 and 6. Those categories are subject to objection, considered below.
- (b) In respect of the other categories (1, 2, 4 and 5), no confirmation has been provided that the documents provided to date are all of the documents in existence within each of these categories.

<b>Documents Produced – Professor Rose</b>	<b>Category</b>
Scope of Works - 27 February 2015 (Stage 1 Approval) and 14 May 2015 (Stage 2 Approval)	2
‘Value of Working Time Scoping Study’ (x 2) – Undated	2
Draft Reports – ‘Value of Time and Value of Work Time during Public Holidays’ – 1	4

<sup>6</sup> ABLA Submissions, [2.2].

July 2015	
'Focus Group Sessions' document - Undated	4
'Value of Time and Value of Work Time during Public Holidays – Pilot Report' – 24 April 2015	4 & 5
Email chain between Mr Dick Grozier and Mr John Rose – 15 July 2014	5 & 6
Email from Mr Dick Grozier to Mt John Rose attaching <i>Evenings, nights and weekends: Working unsocial hours and penalty rates</i> (Tony Daly) and <i>The Persistent Challenge: Living, Working and Caring in Australia in 2014</i> (Natalie Skinner and Barbara Pocock) – 3 February 2015	5 & 6
'Table 1: Service Industry awards facing penalty rates claims' document – Undated	5
Email chain between Pip Hopper, Stable Research, and Gail Bradford, Uni SA – 4, 5, 11 and 13 May 2015	5(ii)
Email chain between Lyn Parkes, Stable Research, Pip Hooper, Stable Research, Fiona Corbett, NSWBC and Gail Bradford, Uni SA – 27 and 28 April and 4 May 2015	5(ii)
Email chain between Gail Bradford, Uni SA and Lyn Parkes, Stable Research – 24 March 2015	5(ii)
Curriculum Vitae of Ms Bradford - Undated	7
Curriculum Vitae of Mr Zhang – Undated	7

17. As to the production summarised above in relation to Professor Rose:

- (a) No documents have been produced which relate to categories 1 and 3.
- (b) In respect of the remaining categories, no confirmation has been provided that the documents provided to date are all of the documents in existence within each of these categories.

18. Further, as to the production in relation to both Professors Lewis and Rose, despite the assurance that 2 further folders of materials relating to all of the categories for documents would be produced by 3 September 2015,<sup>7</sup> no such documents have been provided.

Objection to production - waiver

19. ABLA objects to producing five “email chains” between Luis Izzo and various persons (in relation to Professor Rose) and three “email chains” between Professor Lewis and Mr Luis Izzo (the **disputed email chains**).<sup>8</sup>

20. These emails are said to “*contain comments, discussions and/or enquiries between ABLA and the relevant experts in relation to their draft expert reports*”.<sup>9</sup>

<sup>7</sup> Statement of Emily Baxter dated 2 September 2015 (**Baxter**), [5].

<sup>8</sup> As set out in [9] of Baxter.

21. The ABLA asserts that these emails are subject to a claim for legal professional privilege and in particular “litigation privilege” at common law and pursuant to s 119 of the *Evidence Act 1995*.
22. On the assumption that the disputed email chains are properly the subject of a claim for legal professional privilege, the SDA submits that any such privilege has been impliedly waived by the filing of expert reports by Professors Lewis and Rose.
23. This submission engages the following principle stated by Lindgren J in *ASIC v Southcorp Ltd*<sup>10</sup> relied on by ABLA:

Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents ...

24. The leading authority cited by Lindgren J in the above extract is *Attorney General (NT) v Maurice (Maurice)*.<sup>11</sup> It is important to refer to the relevant judgments of the High Court in that case as they clearly state the relevant test for implied waiver.

- (a) Gibbs CJ referred to:<sup>12</sup>

... the rule that in a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production.

- (b) Mason and Brennan JJ stated (footnotes omitted):<sup>13</sup>

An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication.

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<sup>9</sup> Baxter, [7].  
<sup>10</sup> (2003) 46 ACSR 438 at [21].  
<sup>11</sup> (1986) 161 CLR 475.  
<sup>12</sup> At 481.  
<sup>13</sup> At 487-488.

Professor Wigmore explains:

“[W]hen his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. ...”

In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject-matter:...

(c) To the same effect, Deane J reasoned:<sup>14</sup>

Waiver of legal professional privilege by imputation or implication of law is based on notions of fairness. It occurs in circumstances where a person has used privileged material in such a way that it would be unfair for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege.

25. The question of fairness to another party is accordingly central to determining whether, having waived privilege in respect of certain documents (ie; an expert report), a party must be taken to have impliedly waived privilege in associated documents (ie; here, the disputed email chains). As expressed by Young J in a detailed consideration of the authorities, including *Maurice*:<sup>15</sup>

The test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter.

26. These principles have guided the resolution of questions of implied waiver in the context of expert evidence in numerous authorities.

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<sup>14</sup> At 492-493.

<sup>15</sup> *AWB Ltd v Cole (No. 5) (AWB)* (2006) 234 ALR 651 at [164].

- (a) In *Cobram Laundry Services Pty Ltd v Murray Goulburn Co-Operative Co Ltd (Cobram)*,<sup>16</sup> Warren J (as she then was) stated that, “as a fundamental principle” (emphasis added):

... when a witness is called in order to provide expert opinion evidence all of the facts and instructions upon which that witness bases the expert opinion are admissible and subject to production: ... Furthermore, under the doctrine of fairness that applies to the claim for legal professional privilege with respect to a document, where it is fair so that the relevant evidence may be tested, a claim for legal professional privilege ceases to apply; it is taken to have been waived: Attorney-General (Northern Territory) v Maurice (1986) 161 CLR 475; ...

- (b) To the same effect, in *Temwell Pty Ltd v DKGR Holdings Pty Ltd (Temwell)*, Ryan J referred to Maurice and stated (emphasis added):<sup>17</sup>

... it would be unfair for the claim of privilege to be sustained in respect of documents which record instructions, suggestions or information given or made to an expert witness or successive draft reports from which the development of his or her expert opinion can otherwise be inferred.

- (c) These authorities were applied by Vickery J in *Roads Corporation v Love (Love)*<sup>18</sup> who concluded (emphasis added):

Further it would be both unfair to the applicant, and contrary to the interests of justice, to insulate the relevant witnesses from a full examination of all of the information which they took into account and the various influences to which they were exposed in the preparation of their [expert] evidence.

- (d) In *Shea v TruEnergy Services Pty Ltd (No 5) (Shea)*,<sup>19</sup> Dodds-Streeeton J referred to the decision of White J in *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd (New Cap)* [2007] NSWSC 258 and stated that the critical question is whether the communications “*may have influenced the*

<sup>16</sup> [2000] VSC 353 at [58] (omitting citations).

<sup>17</sup> [2003] FCA 985 at [24].

<sup>18</sup> [2010] VSC 253 at [26].

<sup>19</sup> [2013] 303 ALR 230 at [60].

*content of the final report in a substantial sense*” such that there would be inconsistency (informed by notions of fairness) in withholding the documents or communications while relying on the report.

- (e) It may also be noted that, although no submission to the contrary appears to be put, if there was a waiver, it occurred upon the filing of the relevant expert report: see for example *Prince Removal & Storage Pty Ltd v Roads Corporation*.<sup>20</sup>

27. Applying these principles, the objection to production of the disputed email chains should be dismissed for the following reasons:

- (a) ABLA itself characterises these communications as containing “*comments, discussions and/or enquiries*” about the draft expert reports prepared by Professors Lewis and Rose.
- (b) No basis is provided for the assertion that the disputed email chains “*do not impact the substantive findings of the reports*”. For example, it is not said that the effect of the communications was confined to the form of the reports as filed.
- (c) The claim that the disputed email chains “*do not impact the substantive findings of the reports*” is itself ambiguous. What are the “*substantive*” findings of the reports as distinct from the findings *per se*?
- (d) Applying the approach of Young J in *AWB*, by withholding communications constituting comments, discussions and enquiries about the expert reports filed, it is apparent that ABLA’s clients have not released the whole of the material relevant to the same issue or subject matter, namely, the reports to be relied upon.
- (e) Considered objectively, communications in the nature of comments, discussions and enquiries about the expert reports filed are communications of a type which

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<sup>20</sup> [2012] VSC 245 at [13] (per Emerton J).

“may have influenced the content of the final reports in a substantial sense” (per *Shea*).

- (f) It is incumbent on the Commission to ensure that the union parties in this proceeding are not misled by an “*inaccurate perception*” of a disclosed communication (per *Maurice*). Communications constituting comments, discussions and enquiries about the expert reports are rationally able to bear upon the union parties’ perception of the expert reports which have been filed.
- (g) Fairness dictates that the disputed email chains be provided because this is a case where the expert evidence to be tendered will be tested. The unions are entitled, for example, to examine “*suggestions or information given or made to an expert witness*” and successive draft reports from which experts opinions may be inferred (per *Temwell*). Comments, discussions and enquiries between various persons and the experts are rationally and reasonably able to bear upon these matters. Otherwise, the experts will be insulated “*from a full examination of all of the information which they took into account and the various influences*” on their expert reports (per *Love*).

### Ms Lynne Pezzullo

- Two orders for production were issued to Lynne Pezzullo. One relates to the report prepared by her entitled *The Modern Face of Weekend Work* (the **Retail Report**); the other to her report entitled *The Effect of the Pharmacy Industry Award 2010 on Community Pharmacy in Australia* (the **Pharmacy Report**). The categories of documents referred to in the orders for production issued to Lynne Pezzullo relating to both these reports are set out in the following tables.

#### *Retail Report*

Category	Description
1	All documents recording the request or requests of Ms Pezzullo and Deloitte Access Economics for the preparation of the report titled <i>The Modern Face of Weekend Work</i> (the <b>Pezzullo Report</b> ) dated 26 June 2015
3	All documents recording the retainer of Ms Pezzullo to give evidence in the Proceeding and any subsequent variations or amendments thereto

4	All documents recording instructions, assumptions, suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pezzullo report
5	All documents produced or generated by Ms Pezzullo in the production of the Pezzullo Report, including working notes and drafts of the Pezzullo Report (or parts thereof) (excluding those documents annexed to the Pezzullo Report)
6	All documents to which Ms Pezzullo had regard in producing the Pezzullo Report. Without limiting the generality of the above, this includes all internal documents, such as memoranda or briefing notes, prepared by other Deloitte Access Economics staff
7	All documents, including notes and emails, recording communications between Ms Pezzullo and Deloitte Access Economics and the Australian Hotels Association, the Pharmacy Guild of Australia, the Australian Chamber of Commerce and Industry, the Australian Retailers Association, the National Retail Association, Queensland Tourism Industry Council and Meridian Lawyers relating to the preparation and content of the Pezzullo Report

*Pharmacy Report*

<b>Category</b>	<b>Description</b>
1	All documents recording the request or requests of Ms Pezzullo and Deloitte Access Economics for the preparation of the Pharmacy Report
2	All documents recording the retainer of Ms Pezzullo to give evidence in the Proceeding and any subsequent variations or amendments thereto
3	All documents recording instructions, assumptions, suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pharmacy report
4	All documents produced or generated by Ms Pezzullo in the production of the Pharmacy Report, including working notes and drafts of the Pharmacy Report (or parts thereof) (excluding those documents annexed to the Pezzullo Report). For the avoidance of doubt, this includes the report prepared by Deloitte Access Economics titled <i>The Effect of the Pharmacy Industry Award 2010 on community pharmacy in Australia</i> dated 2 September 2014
5	All documents to which Ms Pezzullo had regard in producing the Pharmacy Report. Without limiting the generality of the above, this includes all internal documents, such as memoranda or briefing notes, prepared by other Deloitte Access Economics staff
6	All documents, including notes and emails, recording communications between Ms Pezzullo and Deloitte Access Economics and the Pharmacy Guild of Australia and Meridian Lawyers relating to the preparation and content of the Pharmacy Report

2. Notwithstanding that requests for production of documents (in the same terms as set out above in respect of both Pezzullo reports) were made on 31 July 2015,<sup>21</sup> very few documents have been produced to date by Ms Pezzullo or the employer representatives who propose to call her as an expert witness. The documents which have been produced are set out in the following tables.

*Retail Report*

<b>Documents Provided</b>	<b>Category</b>
• Draft Reports – ‘The modern face of weekend work: survey results and analysis’ (x 3) – 23 January 2015, 22 April 2015 and 27 May 2015	5
• Letter from Ms Lynne Pezzullo to Ms Marion Whalan, Pharmacy Guild of Australia – 20 August 2014	2
• Responses to the i-Link survey	6

Objections to Production – Retail Report & Pharmacy

3. Objection is taken to the production of documents within:
- (a) categories 1, 3, 4, 5 (in part) and 7 relating to the Retail Report; and
  - (b) categories 1, 2, 3, 4 (in part) and 6 relating to the Pharmacy Report.
4. The substance of the objections taken to categories relating to the Retail Report and Pharmacy Report are the same and accordingly are dealt with jointly below.

*Categories 1 & 3 Retail Report/Categories 1 & 2 Pharmacy Report*

5. Objection is made on the basis that these categories of documents are protected by legal professional privilege. The categories concern the requests made of Ms Pezzullo and Deloitte to prepare the Retail Report and associated retainer(s).
6. Although it may be accepted from the nature of the documents in these categories that some or all would attract privilege, no evidence has been provided in support of any such claim. As such, it is not conceded that they are properly the subject of a claim for privilege.
7. In any event however, in accordance with the principles outlined above, once the Retail Report was filed, any privilege in these documents was waived. Plainly, documents

<sup>21</sup> See Annexure A.

requesting an expert report and detailing an expert retainer would substantially influence or inform the contents of an expert report. Further, these documents would be caught by the associated communications and documents exception in s 126, and thus privilege would not apply.

*Category 4 Retail Report/Category 3 Pharmacy Report (instructions, assumptions, suggestions, information provided)*

8. The first ground of objection (vagueness, insufficient precision) is without foundation. The category specifically describes which documents are to be produced. There is no requirement to specify a date range or persons who provided the documents to Ms Pezzullo because the order is directed (only) to documents relating to the preparation of the report. In any event, a date range is not known by the SDA.
9. It is secondly contended that this category is oppressive. Without conceding the validity of this complaint, the SDA has no objection to this category being limited to all documents of the type described provided by employees or representatives of any of the following: the Australian Hotels Association; the Pharmacy Guild of Australia; the Australian Chamber of Commerce and Industry; the Australian Retailers Association; the National Retail Association; Queensland Tourism Industry Council; and Meridian Lawyers.
10. The third complaint is that production of documents in this category serves no legitimate forensic purpose. The objection is without merit. Documents recording instructions, assumptions, suggestions or information given to Ms Pezzullo in preparing the Retail Report constitute the foundation upon which the report was prepared and are accordingly critical to any meaningful evaluation of it. It is a “*fundamental principle [that] when a witness is called in order to provide expert opinion evidence all of the facts and instructions upon which that witness bases the expert opinion are admissible and subject to production*”: *Cobram* (per Warren J, as her Honour then was).<sup>22</sup> It is sufficient that documents have an apparent relevance such that their production serves a legitimate forensic purpose: see *Trade Practices Commission v Arnotts Limited (No 2)* (1989) 88 ALR 90 at 103, cited with approval in *Clermont Coal* at [19].

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<sup>22</sup> [2000] VSC 353.

11. Fourthly, legal professional privilege is asserted over these documents. No evidence is provided in support of that claim. However, for the reasons already give, any such privilege was waived upon the filing of the Retail Report.

*Category 5 Retail Report/Category 4 Pharmacy Report*

12. Partial objection, on the grounds of relevance and privilege, is taken to this category insofar as it refers to “draft reports”.
13. As to relevance, the draft reports are relevant because they disclose the evolution of the Retail Report. That evolution has forensic significance, particularly for cross-examination, where it may be shown that a draft differed from the final report because the author was motivated by a desire to improve the retaining party’s case.<sup>23</sup> That proposition ought be able to be tested<sup>24</sup> and will be informed by surrounding evidence.
14. As to privilege, in *Ryder v Frohlich* [2005] NSWSC 1342, Barrett J (quoting in part Thomas J in *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 1)* [1999] 1 Qd R 141) stated as follows in relation to draft expert reports.<sup>25</sup>

The point made here is that privilege can only attach to documents which embody communication between the expert and the litigant by whom the expert is retained (or the litigant’s lawyer). A draft report prepared by the expert is not, of its nature, such a communication. It may be that the draft report is, in fact, given or sent by the expert to the litigant or the litigant’s lawyer, but that does not change its character as something prepared by the expert which is not intended to be a means of communication with the litigant or lawyer.”

15. A draft report will only be protected by privilege if it satisfies the requirements of s 119 of the *Evidence Act 1995*. The onus is on Deloitte to establish that privilege attaches to these draft reports. Where an expert witness has prepared a draft for his or her own use, as opposed to the purpose being provision to the lawyers, it will not be protected because the report was not prepared for the dominant purpose of providing professional

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<sup>23</sup> *Mathews v SPI Electricity Pty Ltd (Mathews) (No 10)* [2014] VSC 44 at [22] (per Derham AJ).

<sup>24</sup> *New Cap* at [48].

<sup>25</sup> At [11] and [12].

legal services.<sup>26</sup> No evidence has been provided in support of the claim for privilege. The objection is not made out.

16. Deloitte's submission goes only as high as asserting privilege "*insofar as those draft reports are created to communicate the report to the legal adviser and are commented on by the legal adviser*". Implicit in that submission is an acceptance that not all of the draft reports will be protected by privilege. In any event, however, and as set out above, absent any evidence as to the purpose of the creation of the draft reports, this objection fails.
17. Further, privilege will be waived if the draft report influenced the content of the final report.<sup>27</sup>
18. Finally, any privilege has in any event been waived by the provision by Meridian Lawyers of three of Ms Pezzullo's draft reports.

*Category 7 Retail Report/Category 6 Pharmacy Report*

19. No evidence has been provided in support of the claim that the documents in category 7 are privileged. The onus is on Deloitte to establish the claim for privilege, and specific and focussed evidence is required. Absent evidence of the dominant purpose for the creation of each of these documents privilege is not made out.
20. Further, even if the claim for privilege was established in relation to some or all of these documents, privilege would be waived by application of the principles discussed earlier in these submissions in respect of the disputed email chains involving Professors Lewis and Rose.

Costs

21. There is no basis for Deloitte to be awarded its costs in responding to the production orders.
22. In the absence of a specific provision in the FW Act dealing with the payment of costs in relation to an application for production of documents, the issue falls to be

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<sup>26</sup> *New Cap* at [29]-[30]; *Shea* at [57].

<sup>27</sup> *Matthews* at [22].

determined under s 611 which provides that “*A person must bear the person’s own costs in relation to a matter before the FWC*”. The reference to “person” suggests that the general rule expressed by the section is not confined to “parties” to proceedings. Deloitte do not contend that any of the exceptions in s 611 are here engaged.

Timing of production

23. As noted earlier in this submission, the documents the subject of the order for production were requested, by correspondence to Ms Sharlene Wellard of Meridian Lawyers, on 31 July 2015. Some (limited) documents were produced in response to that request on 14 August 2015. There is accordingly no proper basis for Deloitte to be afforded further time to produce documents. The provision of further time for the production of documents will prejudice the SDA in the conduct of its case in relation tot the evidence to be given by Ms Pezzullo as currently scheduled.

**Steven Moore QC**

**Anna Forsyth**

Counsel for the Shop, Distributive and Allied Employees’ Association

# A. J. MACKEN & CO.

AUSTRALIAN LAWYERS

ABN 34 068 587 818  
11<sup>th</sup> Floor, 53 Queen Street  
Melbourne Vic 3000  
Australia

Annexure "A"

Ausdoc: 447 Melbourne  
Webpage:  
www.macken.com.au  
E-mail:  
ajmacken@macken.com.au

Telephone: (03) 9614 4899  
[+61 3 9614 4899]  
Fax: (03) 9629 3542  
[+61 3 9629 3542]

Level 5, BMA House  
135 Macquarie Street  
Sydney, NSW 2000  
Australia.

31 July 2015

Meridian Lawyers  
225 George St  
Sydney NSW 2000

Attention: Sharlene Wellard

Dear Practitioners,

**Re: Fair Work Commission – Modern Award Review – Penalty Rates - AM2014/305  
(the “Proceeding”)**

As you may be aware, we act on behalf of the Shop, Distributive & Allied Employees’ Association in the above matter. We understand that Meridian Lawyers act on behalf of the Australian Hotels Association, the Pharmacy Guild of Australia, the Australian Chamber of Commerce and Industry, the Australian Retailers Association, the National Retail Association and the Queensland Tourism Industry Council.

We refer to the directions of the Fair Work Commission dated 3 March 2015 and to your letter dated 20 April 2015. Your letter then foreshadowed the filing of an expert report prepared for you by Ms Lynn Pezzullo entitled “The Modern Face of Weekend Work” (**the Pezzullo Report**). We understand that this expert material was subsequently filed with AMOD on 29 June 2015.

In relation to the expert report which has been filed, we write to request the production by your clients of copies of the following categories of documents:

- a) All documents recording the request or requests of Ms Pezzullo and Deloitte Access Economics for the preparation of the Pezzullo Report.
- b) All documents recording the retainer of Ms Pezzullo to give evidence in the Proceeding and any subsequent variations or amendments thereto.
- c) All documents recording instructions, assumptions, suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pezzullo Report.
- d) All documents produced or generated by Ms Pezzullo in the production of the Pezzullo Report, including working notes and drafts of the Pezzullo Report (or parts thereof) (excluding those documents annexed to the Pezzullo Report).
- e) All documents to which Ms Pezzullo had regard in producing the Pezzullo Report. Without limiting the generality of the above, we request:



Industrial & Employment Law  
- Industrial Advising  
- Executive Contracts & Advice  
- Career Planning & Placement

Superannuation Law  
Taxation Law  
Administrative Law  
Australian Polish Relations

Mediation  
Human Resources  
Media & Publications  
Sports Law & Contracts

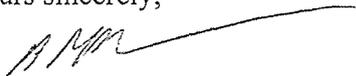
- i. All documents relating to each of the two online surveys developed by Deloitte Access Economics and facilitated using i-Link Research Solutions' sample population, including the full findings of the two surveyed groups and any drafts of the survey questions; and
  - ii. All internal documents, such as memoranda or briefing notes, prepared by other Deloitte Access Economics staff.
- f) All documents produced or generated which relate to, or otherwise evidence, the way in which surveyed respondents were chosen or not chosen, or otherwise excluded from consideration, for each of the two online surveys.
- g) All documents, including notes and emails, recording communications between Ms Pezzullo and Deloitte Access Economics and your clients, the Australian Hotels Association, the Pharmacy Guild of Australia, the Australian Chamber of Commerce and Industry, the Australian Retailers Association, the National Retail Association and the Queensland Tourism Industry Council, and your firm relating to the preparation and content of the Pezzullo Report.

We would be grateful for the provision to us of copies of the relevant documents at your earliest convenience but in any event within 10 days of the date of this correspondence.

We assume that there is no objection to providing us with the documents we have requested. If there is an objection to doing so, however, could you please let us know by return correspondence and identify the basis for your clients' objection. The purpose of this correspondence is to avoid the need for a formal order for production from the Commission.

If you have any questions please contact Mr Dominic Macken of this office on (03) 9614 4899.

Yours sincerely,



**A.J.MACKEN & CO.**

# A. J. MACKEN & CO.

AUSTRALIAN LAWYERS

ABN 34 068 587 818  
11<sup>th</sup> Floor, 53 Queen Street  
Melbourne Vic 3000  
Australia

Ausdoc: 447 Melbourne  
Webpage:  
www.macken.com.au  
E-mail:  
ajmacken@macken.com.au

Telephone: (03) 9614 4899  
[+61 3 9614 4899]  
Fax: (03) 9629 3542  
[+61 3 9629 3542]

Also at:  
Level 5, BMA House  
135 Macquarie Street  
Sydney, NSW 2000  
Australia.

31 July 2015

Meridian Lawyers  
225 George St  
Sydney NSW 2000

**Attention: Sharlene Wellard**

Dear Practitioners,

**Re: Fair Work Commission – Modern Award Review – Penalty Rates - AM2014/305  
(the “Proceeding”)**

As you may be aware, we act on behalf of the Shop, Distributive & Allied Employees’ Association in the above matter. We understand that Meridian Lawyers act on behalf of the Pharmacy Guild of Australia.

We refer to the directions of the Fair Work Commission dated 3 March 2015 and to your letter dated 20 April 2015. Your letter then foreshadowed the filing of an expert report prepared for you by Ms Lynn Pezzullo entitled “The effect of Pharmacy Industry Award on community pharmacy in Australia” (the **Pharmacy Report**). We understand that this expert material was subsequently filed with AMOD on 29 June 2015.

In relation to the expert report which has been filed, we write to request the production by your client of copies of the following categories of documents:

- a) All documents recording the request or requests of Ms Pezzullo and Deloitte Access Economics for the preparation of the Pharmacy Report.
- b) All documents recording the retainer of Ms Pezzullo to give evidence in the Proceeding and any subsequent variations or amendments thereto.
- c) All documents recording instructions, assumptions, suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pharmacy Report.
- d) All documents produced or generated by Ms Pezzullo in the production of the Pharmacy Report, including working notes and drafts of the Pharmacy Report (or parts thereof) (excluding those documents annexed to the Pharmacy Report). For the avoidance of doubt, we require the production of the report prepared by Deloitte Access Economics titled: “The Effect of the Pharmacy Industry Award 2010 on community pharmacy in Australia”, dated 2 September 2014.



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Industrial & Employment Law  
- Industrial Advisings  
- Executive Contracts & Advice  
- Career Planning & Placement

Superannuation Law  
Taxation Law  
Administrative Law  
Australian Polish Relations

Mediation  
Human Resources  
Media & Publications  
Sports Law & Contracts

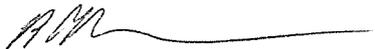
- e) All documents to which Ms Pezzullo had regard in producing the Pharmacy Report. Without limiting the generality of the above, we request:
- i. All documents relating to the source material described as “data from PGA, 2002 to 2013, analysis by Deloitte Access Economics 2014”, as referred to on pages 16,17 and 18 of the Pharmacy Report;
  - ii. All documents relating to the Pharmacy Industry Award survey conducted during July and August 2014 (the PIA survey) including the full findings of the PIA Survey and all drafts of the survey questions. We note that Appendix A of the Pharmacy Report was not included with the Pharmacy Report or filed; and
  - iii. All internal documents, such as memoranda or briefing notes prepared by other Deloitte Access Economics staff.
- f) All documents, including notes and emails, recording communications between Ms Pezzullo and Deloitte Access Economics and your client, the Pharmacy Guild of Australia, or your firm relating to the preparation and content of the Pharmacy Report.

We would be grateful for the provision to us of copies of the relevant documents at your earliest convenience but in any event within 10 days of the date of this correspondence.

We assume that there is no objection to providing us with the documents we have requested. If there is an objection to doing so, however, could you please let us know by return correspondence and identify the basis for your clients' objection. The purpose of this correspondence is to avoid the need for a formal order for production from the Commission.

If you have any questions please contact Mr Dominic Macken of this office on (03) 9614 4899.

Yours sincerely,



**A.J.MACKEN & CO.**