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17 September 2015

AI Group Workplace Lawyers
51 Walker Street
NORTH SYDNEY NSW 2060
Attention: Ms Leanne Cruden

Dear Ms Cruden,

Re: Fair Work Commision - Modern Awards Review - Penalty Rates - AM2014/035

We refer to your letter of 16 September 2015 inquiring as to whether the SDA objects to the admission into evidence of the Productivity Commission Interim Report (the **draft Report**).

We confirm that the SDA does object to the tender of the draft Report as evidence in the proceeding. The grounds of the objection, and their bases, are as follows:

(a) Relevance

The contents of the draft Report, including the opinions expressed in relation to penalty rates, are directed at matters foreign to the 4 yearly review of modern awards.

(b) Hearsay

The draft Report is properly characterised as a previous representation made “out of court” as it is not proposed that its author(s) be called to give evidence in the proceeding.

None of the exceptions to the exclusionary rule in s 59 of the Evidence Act (Cth) are engaged.

(c) Opinion

The draft Report is comprised of numerous opinions so as to fall within the exclusionary rule in s 76 of the Evidence Act 1995 (Cth).

It is not proposed to call an expert witness in relation to the draft Report so as to seek to engage the exception in s 79 of the Evidence Act 1995 (Cth).



(d) Admission unfairly prejudicial

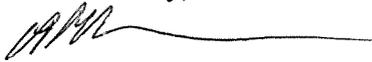
Even if otherwise admissible, the draft Report should not be admitted into evidence as its probative value is substantially outweighed by the danger that it may be unfairly prejudicial to the Union parties (see s 135(a) of the Evidence Act 1995 (Cth)). In particular:

- (i) As a draft report, it is of very little, if any, probative value;
- (ii) The Union parties have no capacity to test its contents.

As a final observation, we note that whilst all of the Employer parties have indicated that they will seek to tender the draft report, none of them including the AIG have set out the findings they seek based on the draft report were it to be admitted into evidence. This was the subject of express directions made on 7 August 2015. The objections set out above are advanced in the context that neither we nor the Commission are presently aware of what probative purpose is sought to be made of this proposed evidence.

We are sending a copy of this letter to the Commission to give notice of the SDA's position in respect of the admissibility of the draft Report.

Yours sincerely,



A J MACKEN & CO.