

**From:** Hirst, Briar (AU - Sydney) [mailto:[bhirst@deloitte.com.au](mailto:bhirst@deloitte.com.au)]

**Sent:** Friday, 4 September 2015 9:49 AM

**To:** AMOD

**Cc:** Hill, Amy (AU - Sydney)

**Subject:** RE: AM2014/305: Objections to Notice to Produce

Dear Madam/Sir,

Please find attached amended objections in matter number AM2014/305.

I note that the reference to “one thousand hours” on page 6 of the original objections should read “one hundred hours”.

Kind regards,

**Briar Hirst**

Legal Counsel | Legal

Deloitte Touche Tohmatsu

225 George Street, Sydney NSW 2000, Australia

Tel/Direct: +61 2 9322 3018

[bhirst@deloitte.com.au](mailto:bhirst@deloitte.com.au) | [www.deloitte.com.au](http://www.deloitte.com.au)

# BEFORE THE FAIR WORK COMMISSION

Matter number: AM2014/305

Filed: 2 September 2015

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## OUTLINE OF OBJECTIONS BY DELOITTE ACCESS ECONOMICS TO PROPOSED ORDERS REQUIRING PRODUCTION OF DOCUMENTS BY LYNNE PEZZULLO

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These objections are filed in accordance with the directions issued on 27 August 2015.

The objections adopt the numbering in the Production Orders issued on 31 August 2015.

Order for production dated 31 August 2015– Lynne Pezzullo – The Modern Face Of Weekend Work Report ('The Retail Report')

1. Solicitors for Pharmacy Guild of Australia and the Australian Hotels Association have advised that they object to Deloitte Access Economics ('Deloitte') producing this category of documents on the basis that it is protected by legal professional privilege belonging to their clients including the Australian Hotels Association, the Australian Chamber of Commerce and Industry, the Australian Retailers Association, the National Retailers Association and the Queensland Tourism Industry.
3. Repeat as for 1 above.
4. Objection. There are three bases of objection. Firstly, the category of documents is vague and not identified with sufficient precision to enable Deloitte to identify

what documents are required to be produced. For example, there is no mention of who is said to have provided this category of documents to Ms Pezzullo and there is no specified date period over which the documents are sought. Such a vaguely described category of documents will unfairly require Deloitte to decide what documents are relevant (*Air Pacific Ltd v Transport Workers Union of Australia* (1993) 40 FCR 1). Secondly, the category imposes oppressive requirements upon Deloitte. The request to produce "all documents" in respect of an engagement to prepare a report that was commenced on or about 20 August 2014 and served on or about 29 June 2015, will require Deloitte's staff to conduct an extensive search of thousands of hard copy and electronic records in respect of more than 9 Deloitte employees and as such, is likely to be oppressive. Thirdly, there is no discernable, legitimate forensic purpose for the production of this category of documents. A party is not entitled to gain access to documents to merely see whether they contain relevant material (*Attorney-General for New South Wales v Stuart* (1994) 34 NSWLR 667 at 681-682.) To gain access to documents in an order for production the party who issued the subpoena must show that it is 'on the cards' that the documents will contain material that has "apparent potential relevance" to the matters in issue (per French J (as he was then) *Australian Gas Light Co v Australian Competition and Consumer Commission* [2003] ATPR 41-956). The category as a whole is akin to fishing and without further definition would seem to overlap with the documents sought by categories 1, 2, 5 and 6.

Finally, in so far as this category may include correspondence between Deloitte and solicitors for the Pharmacy Guild of Australia, Deloitte has been advised that

the solicitors object to Deloitte producing documents on the basis that the documents are protected by legal professional privilege belonging to their client.

5. Partial objection. Deloitte consents to the production of the “working notes” produced or generated by Ms Pezzullo in the production of the report, on the basis that the report has been filed and served in the proceedings and any privileged that once existed in respect of those working notes is now waived (per Thomas J in *Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Old) Pty Ltd (No 1)* [1999] 1 Qd R 162). Deloitte objects to the production of the “draft reports” referred to in category 4 on the basis that they are not relevant and insofar as those draft reports are created to communicate the report to the legal adviser and are commented on by the legal adviser, they are privileged, (per White J *New Cap Reinsurance Corporation (in liq) v Renaissance Reinsurance* [2007] NSWSC 258 at [30]. In *Linter Group Ltd (in liq) v Price Waterhouse (a firm)* [1999] VSC 245 at [16] Harper J stated:

“As [a draft report] it would only be of relevance to the first defendant if it could be shown that it differed from Mr Spencer’s witness statement, not because Mr Spencer had had a genuine change of opinion, but because he was motivated by a desire to simply improve the plaintiff’s case. Such, would of course be entirely improper; but an expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted. Just as a judge ought never to allow publication of a draft judgment, in part because it is necessary to preserve freedom to change his or her mind on further reflection about the case, so experts should not be inhibited by fear of exposure of a draft from changing their minds when such a change is warranted by the material before the expert”.

This decision has been followed in *Filpowski v Island Maritime Ltd* [2002] NSWLEC 177 for policy reasons and also *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [22]. Deloitte has been advised by the solicitors for Pharmacy Guild of Australia and the Australian Hotels Association that they object to producing these documents on the basis that they are protected by legal professional privilege.

6. No objection.

7. Repeat as for 1 above.

Order for production dated 31 August 2015 – Lynne Pezzullo – The Effect of the Pharmacy Industry Award 2010 on community pharmacy in Australia (‘The Pharmacy Report’)

1. Solicitors for Pharmacy Guild of Australia have advised Deloitte that they object to Deloitte producing this category of documents on the basis that it is protected by legal professional privilege belonging to their client.
2. Repeat as 1 above.
3. Objection. Repeat and rely on submissions made in respect of the Category 4 documents for the Retail Report above, save that the relevant date period is 15 May 2014 – 19 June 2015.
4. Partial objection. Deloitte consents to the production of the “working notes” produced or generated by Ms Pezzullo in the production of the report, on the basis that the report has been filed and served in the proceedings and any privileged that once existed in respect of those working notes is now waived (per Thomas J in *Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 162). Deloitte objects to the production of

the "draft reports" referred to in category 4 on the basis that they are not relevant and insofar as those draft reports are created to communicate the report to the legal adviser and are commented on by the legal adviser, they are privileged (per *White J New Cap Reinsurance Corporation (in liq) v Renaissance Reinsurance* [2007] NSWSC 258 at [30]. In *Linter Group Ltd (in liq) v Price Waterhouse (a firm)* [1999] VSC 245 at [16] Harper J stated:

"As [a draft report] it would only be of relevance to the first defendant if it could be shown that it differed from Mr Spencer's witness statement, not because Mr Spencer had had a genuine change of opinion, but because he was motivated by a desire to simply improve the plaintiff's case. Such, would of course be entirely improper; but an expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted. Just as a judge ought never to allow publication of a draft judgment, in part because it is necessary to preserve freedom to change his or her mind on further reflection about the case, so experts should not be inhibited by fear of exposure of a draft from changing their minds when such a change is warranted by the material before the expert".

This decision has been followed in *Filpowski v Island Maritime Ltd* [2002] NSWLEC 177 for policy reasons and also *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [22]. Deloitte has been advised by the solicitors for Pharmacy Guild of Australia that they object to producing these documents on the basis that they are protected by legal professional privilege.

5. No objection.

6. Solicitors for Pharmacy Guild of Australia have advised Deloitte that they object to Deloitte producing this category of documents on the basis that it is protected by legal professional privilege belonging to their client.

#### Costs

Deloitte seeks its costs in respect of responding to the production orders.

Deloitte estimates that the above production orders will require the review of at least two thousand electronic and hard copy documents over a period from May 2014 to 29 June 2015 in order to identify and produce the documents sought by the production orders.

The documents will be reviewed by members of Deloitte's in-house legal and risk teams. It is estimated that the review will take approximately one ~~thousand~~ hundred hours.

Deloitte has obtained legal advice and representation in respect of its obligations pursuant to the production orders and has incurred and will continue to incur legal costs, including in respect of the preparation of these objections and appearances before the Fair Work Commission on 8 September 2015.

Notwithstanding the absence of an express provision in the relevant rules (outside of s.611 Fair Work Act 2009 (Cth)) to order the payment of costs in respect of orders for production, Australian courts and tribunals have consistently found that they do have the power to order a party who issues a production notice to pay the reasonable costs of the producing party (*Danieletto v Khera* (1995) 35 NSWLR 684 per Bryson J).

## Timing of Production

We note that the materials are required to be produced electronically by 4pm Thursday, 10 September 2015. Having regard to the volume of materials and the absence of some staff members on leave, it will not be possible to produce all the documents by that date.

Due to email size limits it is not practical to send the produced documents by email.

The documents can be produced saved onto a USB

For and on behalf of Deloitte Access Economics / Margaret Lynn Pezzullo

Deloitte Legal

2 September 2015