

BEFORE THE FAIR WORK COMMISSION

Matter number: AM2014/305

Filed: 9 September 2015

SUPPLEMENTARY SUBMISSIONS OF DELOITTE ACCESS ECONOMICS ('DELOITTE') IN RESPECT OF ITS OBJECTIONS TO PROPOSED ORDERS REQUIRING PRODUCTION OF DOCUMENTS BY LYNNE PEZZULLO

1. These submissions are prepared in respect of the Amended Objections filed by Deloitte on 3 September 2015 in response to the Orders for Production served on Lynne Pezzullo on 1 September 2015.

Introduction

2. Ms Pezzullo has prepared two (2) reports in these proceedings.
3. The first report was prepared pursuant to the engagement letter dated 15 May 2014. Deloitte was engaged by the Pharmacy Guild of Australia (**PGA**) to provide a report outlining the current state of community pharmacies in Australia and the effect that the Pharmacy Industry Award 2010 has had on community pharmacies. That report was filed with the Commission on 29 June 2015 (**the Pharmacy Report**).
The second report was prepared pursuant to the engagement letter dated 20 August 2014. Deloitte was engaged by PGA and the Australian Hotels Association (through Meridian Lawyers, their legal representatives (**Meridian**)) to provide a report that researches consumer activity during 'atypical hours' and employee preferences regarding hours of work and to draw conclusions regarding the necessity of regulating penalty rates premiums. That report was filed with the Commission on 29 June 2015 (**the Retail Report**).

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The Production Orders

4. The Production Orders seek several categories of documents from Deloitte.
5. Deloitte objects to the production of **two categories of documents** set out in the Orders for Production. Those categories of documents are:
 - a. The instruction and assumption documents given to Ms Pezzullo¹:
“All documents recording instructions, assumptions, suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pezzullo report”
 - b. The working notes and drafts produced by Ms Pezzullo²:
“All documents produced or generated by Ms Pezzullo in the production of the Pezzullo Report, including workings notes and drafts of the Pezzullo Report (or parts thereof) (excluding those documents annexed to the Pezzullo Report).
6. Submissions in respect of each category of documents will be set out below.

Client Legal Privilege

7. Deloitte does not raise objections on the basis of client legal privilege in respect of any category of documents captured by the Orders for Production. If claims for privilege exist in respect of the documents that are the subject of the Production Orders, it is for the Pharmacy Guild of Australia ('PGA') and the Australian Hotel's Association ('AHA') to make those objections as the privilege belongs to those organisations and not to Deloitte.

Objection - The instruction and assumption documents given to Ms Pezzullo

8. The Orders for Produce require Deloitte to produce:
“All documents recording instructions, assumptions, suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pezzullo report”.
9. Deloitte objects to these categories of documents being produced on the following 3 bases:
 - a. Vagueness of the category;
 - b. Relevance and lack of legitimate forensic purpose;

¹ Category 3 documents in the Order for Production – Pezzullo Pharmacy Industry Report; Category 4 documents in the Order for Production – Pezzullo Weekend Report.

² Category 4 documents in the Order for Production – Pezzullo Pharmacy Industry Report; Category 5 documents in the Order for Production – Pezzullo Weekend Report.

c. Oppression.

Basis of Objection No 1 – the category is vague

10. The documents sought are vague and are not identified with “reasonable particularity” (per Jordan CJ *The Commissioner for Railway v Small* (1938) SR (NSW) 546 at 574-575, cited with approval in *Australian Nurses Union v Victorian Hospitals Industrial Association* [2011] FWA 8756 and *Coates Hire v Australian Metal Workers Union* [2013] FWC 1585 at [19])).
11. It is unclear whether the documents sought by this category are internal Deloitte documents that reflect communications within Ms Pezzullo’s internal team as to the preparation of the report or whether the category seeks documents and correspondence provided to Ms Pezzullo by her instructors, including AHA, PGA and its lawyers.
12. Further, the category is not referable to a time period or to people or organisations in connection with these proceedings. As such, production of these documents will unfairly require Deloitte to decide what documents are relevant to the category (*Air Pacific Ltd v Transport Workers Union of Australia* (1993) 40 FCR 1).

Basis of Objection No 2 - Oppression

13. The vagueness of the category means that it is also oppressive (*Hamilton v Oades* [1989] HCA 21). Without any clear limits on the scope of the category, it requires Deloitte to conduct an extensive search of thousands of electronic and hard copy documents in respect of more than 9 Deloitte employees and external parties in an attempt to identify which documents fall within the category. The documents that may fall within this category potentially cover a period from the commencement of the engagement (May 2014) to service of the report (late June 2015). The Order for Production requires the documents to be identified, reviewed and produced by 10 September 2015. This is an enormous exercise.
14. The Affidavit of Ms Hirst of Deloitte filed on 8 September 2015 at paragraphs 17 – 22 evidences the large number of documents that have been identified as potentially falling within this and the other category of documents.

15. In *Dorajay Pty Limited v Aristocrat Leisure Limited* [2005] FCA 588, Stone J noted at [17] that whether subpoenas are oppressive or an abusive process depends on whether “*it is reasonably likely to add, in the end, in some way or another, to the relevant evidence in the case*”. No submissions have been advanced by United Voice as to the relevance of this category of documents other than they “underpin or influence the report” [at 4.6].
16. If the category of documents was limited to *instructions, assumptions, suggestions or information given to Ms Pezzullo in relation to the preparation of the Pezzullo Report by a party external to Deloitte*, the relevance of the documents is identifiable. However, as currently drafted the category may extend beyond this and it is not possible to identify how internal Deloitte discussions, suggestions or information *given or made to Ms Pezzullo* that were not at the instigation of the party or parties that instructed the expert could be of any relevance to the proceedings and could serve a forensic purpose in the context of the cross examination of Ms Pezzullo or otherwise.

Basis of Objection No 3 - Fishing and Relevance

17. The party seeking the production of documents bears the onus of identifying the relevance of the documents by reference to a legitimate forensic purpose (*Commissioner For Railways v Small* (1938) 38 SR 564 at 575).
18. A demonstration of general relevance, namely that “*documents necessarily underpin or inform the report*” [United Voice at 4.7] is not enough (*Carroll v Attorney General of New South Wales* (1993) 70 A Crim R 162). United Voice as the party seeking the production of the documents must demonstrate that the documents if produced are reasonably likely to add to the relevant evidence of the case (*Dorajay Pty Limited v Aristocrat* [2005] FCA 588 per Stone J). Ms Pezzullo has set out in her report the documents upon which she has relied in the preparation of her report. Deloitte will produce these documents. But as currently drafted this category extends beyond these documents and as such cannot be relevant.

19. The principles that are to be applied to s.590 orders for production were recently considered by the Fair Work Commission in *Australian Nursing Federation v Victorian Hospitals Industrial Association* [2011] FWA 8756. In that case Commissioner Jones noted that the power to require provision of documents is a broad discretionary power to be exercised in accordance with the principles applied by the courts. Those principles were outlined by Munro J in Clerk (Alcoa of Australia – Mining and Refining) Consolidated Award 1985 Print H2892 at p2:

“...the documents sought must be of a nature capable of being relevant to an issue which might legitimately arise on the hearing of the matters in dispute....A party will not be required to produce documents where to do so would be oppressive; or where the demand for production is a mere ‘fishing expedition’ in the sense that it is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all.”

20. In circumstances where the category of documents is so broadly expressed that it does not even identify whether the documents sought are those internal to Deloitte or from its clients or their lawyers, it is open to conclude that the demand for production is an attempt to cast a wide net in an attempt to locate something of possible relevance rather than seeking production of a specific class of documents that is capable of being relevant.

21. In *McIlwain v Ramsey Food Packaging Pty Ltd & Ors* (2005) 221 ALR 785 Justice Greenwood summarised the principles which govern courts in relation to discovery and subpoenas. Commissioner Jones cited this summary with approval in *Australian Nursing Federation v Victoria Hospitals’ Industrial Association* [2011] FW 8756 when considering a s.590 production case. It was observed that:

“The documents must be relevant to an issue raised on the pleadings and to elicit documents to support the applicant’s case. It cannot be used for the purposes of ‘fishing’...or to investigate the characters of the opposing party’s evidence (Griebart v Morris [1920] 1 KB 659 at 666)”.

22. If the scope of the category of documents was amended to be limited to the external instructions, assumptions and suggestions or information given or made to Ms Pezzullo in relation to the preparation of the Pezzullo report, namely correspondence from the AHA, PGA or its lawyers, then Deloitte will withdraw its objection.

B - The working notes and drafts produced by Ms Pezzullo³

23. These documents are expressed to be:

“All documents produced or generated by Ms Pezzullo in the production of the Pezzullo Report, including workings notes and drafts of the Pezzullo Report (or parts thereof) (excluding those documents annexed to the Pezzullo Report).”

24. Deloitte’s objection to this category of documents is a partial objection. Deloitte consents to production Ms Pezzullo’s working papers and notes and to draft reports that were provided to her instructors for review, but otherwise objects to the production of the documents in this category on the basis that the documents are not relevant to the issues before the Commission and amount to fishing.

25. Attached to these submissions is a table that summarises the draft reports that were provided to external parties for comment in respect of both of Ms Pezzullo’s reports.

26. At [4.10] of their submissions United Voice submit that all draft reports are relevant because they “disclose the evolution of the report” and that variations between draft reports may disclose a desire to improve the retaining parties case. Consistent with the decisions of *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance* [2007] NSWSC 258 and *ASIC v Southcorp Ltd* [2003] FCA 804, Deloitte concedes this to be the case in respect of the draft reports that were shared with the retaining party, but not to internal draft reports and internal correspondence in connection with the preparation of those reports.

27. The category of documents as currently drafted would capture internal Deloitte communications relating to the preparation of the reports, peer reviews of the reports and internal quality assurance procedures involving Ms Pezzullo. The internal reports can be of

³ Category 4 documents in the Order for Production – Pezzullo Pharmacy Industry Report; Category 5 documents in the Order for Production – Pezzullo Weekend Report.

no forensic significance in cross examination or otherwise and on this basis do not meet the requirements for production set out in *Matthews v SPI Electricity Pty Ltd (No 10)* [2014] VSC 44 because there is no nexus between the draft internal documents and the final report.

28. In *Matthews* the test for whether draft reports should be produced was three fold. Firstly, the draft report must demonstrate an evolution between the drafts evidencing a change in the substance of the opinion, not its form. Secondly, there must be discernible influence from external lawyers in respect of the substantive opinion in the draft report. Finally, the draft report, will only be relevant if that report is needed to give a proper understanding of the final report.

29. Draft reports that were provided to external parties for comments may meet this test.

However, internal working drafts belonging to Ms Pezzullo or her team, would not.

30. The law in Australian in respect of the disclosure of draft expert reports is by no way settled. Judges have expressed reservations about requiring experts to disclose draft reports, comparing such disclosure as requiring a judge to disclose a draft judgement.

31. 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”.

32. 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].
33. Generally, draft expert reports will only be held to be relevant if the drafts are required to be produced to assist the comprehensibility of the primary report (*Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate (No 7)* [2008] FCA 323 See also *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance* [2007] NSWSC 258 and *ASIC v Southcorp Ltd* [2003] FCA 804). In *Cadbury*, Justice Heerey observed.
- “The test is concerned with the comprehensibility of the primary communication or document, If it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary”.*

Costs

34. If the party seeking the production of Deloitte’s documents is not prepared to meet the reasonable costs and expenses incurred by Deloitte in responding to the Orders for Production, Deloitte seeks for the Orders to be set aside.
35. Solicitors for Shop, Distributive & Allied Employees’ Association (**SDA**) advised Deloitte in writing on 2 September 2015 that it will not agree to pay Deloitte’s reasonable costs and expenses associated with producing the documents that are the subject of the Production Orders. A copy of the letter is annexed to the affidavit of Briar Hirst dated 8 September 2015.
36. In circumstances where the Fair Work Commission has the power to order the production of documents against a non-party under s.590 of the *Fair Work Act 2010* (Cth), the Commission has as an adjunct to this power, the power to order that the party who issues a production notice must pay the reasonable costs of the producing party. In *Danieletto v Khera* (1995) 35 NSWLR 684 per Bryson J it was held that the superior courts have an inherent power to make orders for the costs that are associated with the responding to subpoenas and document production notices. In *Danieletto* the costs of counsel and of the

Mr Khera's professional time were ordered to be paid on the basis that Mr Khera had applied to have a subpoena to produce documents set aside (pg 686 at B). Bryson J held at 686 [D]-[E]:

"As persons who are subpoenaed have a legal duty to obey the subpoena and to attend they cannot make effectual and binding contractual arrangements for payment of their expenses with the parties that require their attendance; there would be no contractual consideration for such arrangements. However such persons have an entitlement against the parties who subpoenaed them to be paid their expenses and that entitlement has been recognised and enforced by the courts incidentally to the conduct of proceedings..."

37. The Commission has routinely held that it is appropriate to adopt Court practices when dealing with the production of documents in the Commission including recently in *Coates Hire Operations Pty Ltd v Australian Manufacturing Workers' Union* [2013] FWC 1585; *Macmahon Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWA 1965; *Australian Nursing Federation v Victorian Hospitals Industrial Association* [2011] FWA 8971; *Australian Nursing Federation v Victorian Hospitals Industrial Association* [2011] FWA 8756).

38. In particular in *Coates* at [18], Commissioner Bull observed:

"In exercising its discretion to issue an order to produce documents, the Commission as stated by Munro J in Re Clerks (Alcoa of Australia) Consolidated Awards will generally be guided by what applies in courts of law".

39. That discretion under s.590 properly extends to ordering the payment of the costs and expenses associated with complying with the document production orders, particularly in cases where a large number of documents are sought to be produced in a very short timeframe, as is this case here.

40. Deloitte has in good faith attempted to negotiate the scope of the categories of documents sought by the Production Orders with solicitors for the SDA in an effort to contain the costs

associated with the producing the documents (see Affidavit of Briar Hirst dated 8 September 2015). Those attempts to date have been to no avail.

41. Deloitte seeks its costs in responding to the production orders on the basis that it will be required to review of more than 2,000 documents to identify and produce documents sought by the Production Orders. The identification and review process has commenced and based upon that exercise Deloitte expects the review to take approximately one hundred hours (see Affidavit of Ms Hirst dated 8 September 2015).
42. Deloitte has obtained legal advice and representation in respect of the Production Orders and will continue to incur legal costs, including preparation for objections to production orders and appearances before the Fair Work Commission on 8 September 2015.

Timing of request for documents

43. United Voice submits that the documents that are the subject of the Productions Orders were first sought in correspondence on 31 July 2015. Ms Pezzullo was advised in general terms of a request for documents on 5 August 2015. The Production Orders were served on Deloitte on 1 September 2015.
44. The Production Orders provide that the Deloitte documents are to be produced electronically by 4pm Thursday, 10 September 2015.
45. Based upon the volume of documents to be produced, Deloitte request an extension to comply with the Production Orders.

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13 Wentworth Selborne Chambers

9 September 2015

SUMMARY TABLE NOT REPRODUCED