

**FAIR WORK COMMISSION**

**AM 305 of 2014**

**FOUR YEARLY REVIEW OF MODERN AWARDS  
PENALTY RATES**

**AMENDED SUBMISSION OF AUSTRALIAN INDUSTRY GROUP  
IN REPLY TO SUBMISSIONS OF UNION PARTIES IN RELATION TO ORDERS TO PRODUCE  
DOCUMENTS DIRECTED TO UNION EXPERTS**

**(A) Response to submissions filed by the Shop, Distributive and Allied Employees' Union (SDA) on 5 October 2015**

1. On 22 September 2015 Vice President Catanzariti made an order in Fair Work Commission Proceedings AM2014/305 (the **Proceedings**) requiring the Shop, Distributive and Allied Employees' Association (**SDA**) to produce various categories of documents in respect of the evidence of the following experts, filed by it in the Proceedings (the **22 September Order**):
  - (a) Professor Morris Altman;
  - (b) Ms Helen Bartley;
  - (c) Professor Sara Charlesworth;
  - (d) Dr Fiona Macdonald;
  - (e) Mr Kevin Kirchner;
  - (f) Mr Martin O'Brien;
  - (g) Professor David Peetz;
  - (h) Dr Ian Watson;
  - (i) Ms Serena Yu (collectively, the **SDA Experts**).
2. The 22 September Order was subsequently amended and re-issued by Vice President Catanzariti on 30 September 2015 (the **Amended 22 September Order**).
3. On 30 September 2015 President Ross made an order requiring the SDA Experts to produce various documents and categories of documents in respect of the evidence prepared by them (and filed by the SDA) in the Proceedings (the **30 September Order**; referred to together with the Amended 22 September Order as the **SDA Expert Orders**).
4. On 5 October 2015, the SDA filed two separate submissions in the Proceedings regarding:
  - (a) the Amended 22 September Order (the **First SDA Submissions**); and
  - (b) the 30 September Order (the **Second SDA Submissions**),pursuant to the Statement and Directions issued by his Honour President Ross in the Proceedings on 1 October 2015 (together, the **SDA Submissions**).<sup>1</sup> The SDA Submissions include objections to the SDA Expert Orders.

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<sup>1</sup> [2015] FWC 6791 at [4](i)(a).

5. This submission is filed on behalf of The Australian Industry Group (**Ai Group**) in response to the objections contained in the First SDA Submissions and Second SDA Submissions, pursuant to Item 4(i)(b) of the Statement and Directions<sup>2</sup>.
6. Paragraph 5 of the First SDA Submission objects to the production of documents in categories 6, 12, 18, 23, 29, 35, 41, 47 and 53 of the Amended 22 September Order (the **SDA Disputed Documents**).
7. The SDA Disputed Documents all relate to orders in substantially the same terms, namely that the SDA produce “*All documents, including notes and emails, recording communications between*” the respective SDA Expert, the institution/university/organisation with which that expert is affiliated, the SDA and/or AJ Macken & Co, “*relating to the preparation and content of*” the relevant SDA Expert’s report.
8. The objections in relation to the SDA Disputed Documents are grounded in a claim of client legal privilege, on the basis that:
  - (a) privilege is claimed not to have been waived over the SDA Disputed Documents by the filing of the relevant expert reports; and
  - (b) the communications contained or recorded in the SDA Disputed Documents did not influence the contents of the respective reports in such a way that it could be unfair for the SDA to rely upon the relevant report without disclosing the document.<sup>3</sup>
9. Paragraphs 3 and 4 of the Second SDA Submission set out an objection to the production of any documents by the SDA Experts, where such documents fall within the categories of SDA Disputed Documents (and in respect of which the SDA’s claim of client legal privilege awaits determination by the Commission).<sup>4</sup>
10. Ai Group acknowledges that the Affidavit of Dominic James Macken sworn on 25 September 2015 prima facie gives rise to a claim of legal professional privilege over the SDA Disputed Documents.
11. Ai Group agrees with the submission of the SDA that it is appropriate for a member of the Commission (other than a presiding member of the Full Bench sitting in the Proceedings) to hear and determine the SDA’s claim in respect of waiver of legal professional privilege by way of inspection of the SDA Disputed Documents, for the purpose of ascertaining whether the communications recorded in those documents have influenced the content of any of the reports of the SDA Experts in such a way that would render unfair the non-disclosure of those documents to other parties in the Proceedings: See *Re Lynne Pezzullo, Professor John Rose, Professor Phil Lewis, 4 Yearly Review of modern awards – penalty rates* [2015] FWC 6385 at [16] – [19], and the authorities cited therein.

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<sup>2</sup> [2015] FWC 6791.

<sup>3</sup> First SDA Submission, at [5].

<sup>4</sup> Second SDA Submission, at [3] and [4].

12. To this end, during the course of a Mention in the Proceedings on 8 September 2015 his Honour President Ross outlined the information required by the Commission in order to undertake this task: see Confidential Transcript, AM2014/305, 8 September 2015 at PN421 – PN422.
13. Ai Group submits that it is appropriate for the Commission to direct the SDA to prepare, for the purpose of determining the issue of waiver:
  - (a) a chronology showing:
    - (i) when each draft of each of the SDA Experts' reports were prepared; and
    - (ii) when each of the communications contained in the SDA Disputed Documents were made; and
  - (b) a comparison between the final report of each SDA Expert and each draft report preceding their final report, identifying the changes that have been made between each different iteration of the report.
14. Separately to the above, on Friday 2 October 2015 Ai Group filed (and subsequently served on the SDA) five Form F52s with the Commission in respect of the following SDA Experts:
  - (a) Ms Helen Bartley;
  - (b) Professor Sara Charlesworth;
  - (c) Dr Fiona Macdonald;
  - (d) Professor David Peetz; and
  - (e) Ms Serena Yu.
15. It is noted that the Commission has not as yet issued orders to the SDA based on the Form F52s. The SDA has acknowledged, in correspondence to the Commission dated 6 October 2015, that it is currently considering the requests for production contained in the Form F52s. To the extent that the SDA (or any of the SDA Experts to whom the orders may be directed) may object to any orders (if or once made) based on the Form F52s, Ai Group submits it would be most efficient to deal with any objections at the same time as the objections to the existing SDA Expert Orders are heard.

**(B) Response to submissions filed by Professor Charlesworth and Dr Macdonald dated 6 October 2015**

16. In addition to the objections made by the SDA to the 30 September Order, Professor Charlesworth and Dr Macdonald have separately filed with the Commission a submission dated 6 October 2015, setting out their objections to sub-items (a) and (b) of Item 40 of the 30 September Order (the **SDA Expert Submission**).
17. Ai Group does not press any request for the production of the "*full survey findings from AWALI 2014 survey*" contained in Item 40(a) of the 30 September Order.
18. However, Ai Group presses the request for production contained in Item 40(b) of the 30 September Order in so far as it relates to the transcribed records of interviews referenced in paragraph 15 of Part B of the report authored by Professor Charlesworth and Dr Macdonald (and

notes that a request for production of this item appears as Item 9 of the Form F52 directed to Dr Macdonald and filed by Ai Group with the Commission on 2 October 2015).

19. The report authored by Professor Charlesworth and Dr Macdonald makes extensive reference to the interviews conducted. It is Ai Group's respectful submission that, in circumstances where the authors of the report have relied on and referenced those interviews in a substantial manner, substantial unfairness to the employer parties will be occasioned in the Proceedings if the transcribed records of interview are not produced for the purpose of cross examination of the expert witnesses.

20. Paragraph 4(c) of the SDA Expert Submission cites the research consent form signed by research participants (and to whom the transcribed interview records relate). Relevantly, the consent form states:

The privacy of the personal information you provide will be safeguarded and only disclosed where you have consented to the disclosure or as required by law....

21. The 30 September Order has been issued pursuant to s.590(2) of the *Fair Work Act 2009 (FW Act)*. Sub-section 590(2)(c) of the FW Act confers on the Commission power to require a person "to provide copies of documents or records, or to provide any other information to the FWC". It is Ai Group's respectful submission that on this basis, Professor Charlesworth and Dr Macdonald may be considered as being "required by law" to disclose the transcribed interview records and accordingly, the disclosure would appear to be consistent with the terms of the participant consent form.

22. Ai Group does not object to the production of the transcribed interview records being subject to an appropriate confidentiality order pursuant to section 594 of the FW Act.

23. We note that earlier in the Proceedings the SDA sought and obtained an order<sup>5</sup> requiring Dr Sean Sands to produce "All documents to which Dr Sands had regard in producing the Sands Report...".<sup>6</sup> During his cross-examination of Dr Sands on 25 September 2015<sup>7</sup>, Mr Moore S.C. relied upon and tendered the "top line notes" recording the focus group discussions referred to in Dr Sands' report.<sup>8</sup> It is Ai Group's respectful submission that Item 40(b) of the 30 September Order, and the requirement contained therein to produce the transcribed interview records, is of a similar kind to Item 5 of the Sands Order.

### **(C) Response to submissions filed by the Australian Council of Trade Unions (ACTU) on 6 October 2015**

24. On 22 September 2015 Vice President Catanzariti made an order in the Proceedings requiring the Australian Council of Trade Unions (**ACTU**) to produce various documents and categories of

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<sup>5</sup> Issued by Vice President Catanzariti on 31 August 2015, herein referred to as the **Sands Order**.

<sup>6</sup> Item 5 of the Sands Order.

<sup>7</sup> Confidential Transcript in matter AM2014/305 for 25 September 2015, at PN9897 – PN9901.

<sup>8</sup> Exhibit #SDA3 Document – Retail Employee Focus Group Discussion.

documents in respect of the evidence of Professor Markey filed by it in the Proceedings (the **ACTU Order**).

25. On 6 October 2015 the ACTU filed submissions objecting to the production of certain categories of documents required to be produced pursuant to the ACTU Order (the **ACTU Disputed Documents**).
26. Ai Group does not press the production of any document in relation to the “First Retainer” (as that term is defined in the ACTU submission) between the ACTU and Professor Markey.
27. With respect to the ACTU’s submission concerning Categories 4 and 5 of the ACTU Order, given these categories refer to documents produced or generated by Professor Markey in the production of his report (including working notes and drafts), and other documents to which Professor Markey had regard in producing the report, it is not immediately apparent how a claim of privilege by the ACTU may attach to these items. The ACTU submission does not particularise how it is said that a claim of legal professional privilege may attach to these documents, nor has it filed an affidavit in support of its claim. In the absence of evidence to support its objection or clear indication as to how legal professional privilege attaches to these categories the ACTU should produce the documents as ordered (*Australian Securities & Investment Commission v Southcorp Limited [2003] FCA 804*, per Lindgren J at [21]).
28. If the Commission determines to allow the ACTU to file an affidavit in support of its claim for privilege, and the ACTU is able to demonstrate that documents produced or generated by Professor Markey in the production of his report can be the subject of privilege, it is appropriate for the Commission to hear the ACTU’s claim in respect of waiver of privilege in the same manner as set out at paragraph 11, above.
29. With respect to the ACTU’s submission concerning Category 6 of the ACTU Order, Ai Group submits that the issue of waiver should be dealt with in the same manner proposed for Categories 4 and 5, as outlined at paragraph 28 above. In relation to the concern identified by the ACTU with respect to document ACTU#6B, in circumstances where part of the document is relevant it is not immediately apparent why the remainder of the document should be redacted (in the absence of any claim of legal professional privilege or confidentiality with respect to the remaining content). Accordingly, Ai Group respectfully submits that the ACTU should be directed to produce the document as ordered.
30. In addition to the above, on Friday 2 October 2015 Ai Group filed with the Commission (and served on the ACTU) Form F52s in respect of Professor Markey and Dr Martin O’Brien (the other expert retained by ACTU for the purpose of the Proceedings). Although the Commission has not as yet issued orders for the documents requested in the Form F52s, the ACTU has not indicated whether it intends to object to the production of the items sought in the Form F52s. Ai Group submits it would be most efficient to deal with any objections of the ACTU to the production request at the same time as the objections concerning the ACTU Disputed Documents are heard.

**9 October 2015**