

The Shop, Distributive and Allied Employees' Association

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Associate to President Ross
Fair Work Commission
Level 4
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Via email: chambers.ross.j@fwc.gov.au

Dear Associate,

Re AM2015/305 - 4 Yearly Review of Modern Awards (Penalty Rates) – Transitional Arrangements

We refer to the above matter and the submissions filed and hearing listed in respect of transitional arrangements.

The SDA wishes to notify the Commission and relevant parties that it intends to seek judicial review of any determinations the Commission may make which give effect to its decision in *Four Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, on the basis that the decision is affected by jurisdictional error.

In general terms, the application for judicial review will allege jurisdictional error by the Commission at least in the following respects:

- (a) in relation to the its approach to and consideration of s 134(1)(a) of the Act;
- (b) in its interpretation of s 156 of the Act, by failing to require that the Commission, in order to enliven its discretion to vary a modern award, first be satisfied that, since the making of the modern award, there has been a material change in circumstances.

In light of the SDA's intention to seek judicial review, in the event that the Commission makes determinations giving effect to the decision which are proposed to commence operation on a date prior to when the judicial review application will likely be heard and determined, the SDA will seek a stay of those determinations to allow time for it to file its application in the Federal Court and it will then seek a stay from the Court until the determination of its application.

The SDA confirms that its submissions filed in respect of transitional arrangements and any further submissions it may make in respect of those matters are made without prejudice to its foreshadowed judicial review application. The SDA reserves all of its rights in relation to that application.

Yours sincerely,



Gerard Dwyer
National Secretary-Treasurer