
Form 1 (version 4)
UCPR 1.22

# NOTICE OF CONSTITUTIONAL MATTER

| COURT DETAILS | |
|---|---|
| Court | Supreme Court of NSW |
| Division | Common Law |
| List | Common Law General |
| Registry | Supreme Court Sydney |
| Case number | 2020/00356588 |
| **TITLE OF PROCEEDINGS** | |
| Plaintiff | Dr Amireh Fakhouri |
| First defendant | The Secretary for the NSW Ministry of Health |
| Second defendant | The State of NSW |
| **FILING DETAILS** | |
| Prepared for | Plaintiff |
| Legal representative | Rebecca Gilsenan, Maurice Blackburn Lawyers |
| Legal representative reference | RXG/3052894 |
| Contact name and telephone | 02 9261 1488 |
| Contact email | rgilsenan@mauriceblackburn.com.au |

## NOTICE OF CONSTITUTIONAL MATTER

1 Pursuant to rule 1.22 of the *Uniform Civil Procedure Rules 2005* (NSW), the Plaintiff gives notice that this proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**).

### Nature of Constitutional matter

2 The matter arising under the Constitution or involving its interpretation within the meaning of s 78B of the Judiciary Act is whether s 369 of the *Industrial Relations Act 1996* (NSW) (**IR Act**) is picked up and applied by s 79 of the Judiciary Act in representative proceedings, conducted under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), in the Federal Court of Australia sitting in NSW.

### Facts showing that section 78B Judiciary Act 1903 applies

3 These proceedings are representative proceedings brought in the NSW Supreme Court under Part 10 of the *Civil Procedure Act 2005* (NSW) (**CP Act**). The plaintiff is a resident of Victoria.

4 In the plaintiff's Amended Statement of Claim filed 23 April 2021, the plaintiff seeks (inter alia) the following relief against the defendants:

a. an order for recovery of remuneration payable under certain industrial awards pursuant to s 365 of the IR Act; and

b. a declaration that any underpayment of ordinary rates of pay gives rise to obligations on the defendants pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SG Act**).

5 The proceedings are in federal jurisdiction because they are a suit between a resident of one State (Victoria) and another State (NSW), and they seek enforcement of a right created by federal law (the SG Act)): Constitution, ss 75(iv), 76(ii).

6 By notice of motion filed 1 November 2021, the defendants seek various orders (including amendments to their defence, de-classing of the proceedings, and/ or strike-out of the claims relating to group members) on the footing that s 369 of the IR Act precludes the plaintiff from bringing representative proceedings under Pt 10 of the CP Act to enforce rights sourced in s 365 of the IR Act. That notice of motion is listed for hearing before Garling J on 1 December 2021.

7 The plaintiff contends that the defendants' interpretation of s 369 of the IR Act and relevant provisions of Pt 10 of the CP Act is erroneous, and that the motion should be dismissed on that basis. Alternatively, if the Court accepts the defendants' construction arguments, the plaintiff seeks the orders set out in her notice of motion filed 18 November 2021. Those orders include an order that the proceedings be transferred to the Federal Court of Australia (NSW Registry) pursuant to s 5(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

8 The central basis on which the plaintiff applies for a transfer of the proceedings to the Federal Court is that, if the proceedings were before the Federal Court sitting in NSW, the defendants would not be able to rely on s 369 of the IR Act to defeat the plaintiff's representative claim. This is because:

a. s 369 is a law that can only apply in federal jurisdiction if it is picked up and applied as surrogate federal law by s 79 of the Judiciary Act;

b. s 369 alters, impairs or detracts from ss 33C-33E of the FCA Act; and

c. accordingly, s 79 of the Judiciary Act would not pick up and apply s 369, on the basis that Commonwealth law "otherwise provides".

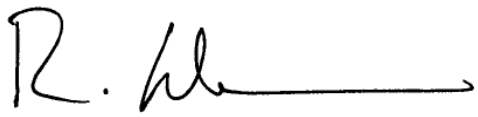
9 Annexed to this s 78B notice are:

a. the defendants' notice of motion and written submissions filed 1 November 2021; and

b. the plaintiff's notice of motion and written submissions filed 18 November 2021.

## SIGNATURE

Signature of legal representative



| | |
|---|---|
| Capacity | Solicitor for the plaintiff |
| Date of signature | 18 November 2021 |

Filed: 1 November 2021 10:47 PM

D0001HKVPD

Form 20
UCPR 6.2

# NOTICE OF MOTION

## COURT DETAILS

| | |
|---|---|
| Court | Supreme Court of NSW |
| Division | Common Law |
| List | Common Law General |
| Registry | Supreme Court Sydney |
| Case number | 2020/00356588 |

## TITLE OF PROCEEDINGS

| | |
|---|---|
| First Plaintiff | Amireh Fakhouri |
| First Defendant | The Secretary for the NSW Ministry of Health<br>ABN 92697899630 |

## FILING DETAILS

| | |
|---|---|
| Filed for | The Secretary for the NSW Ministry of Health, Defendant 1 |
| Filed in relation to | Plaintiff's claim |
| Legal representative | KATHLEEN ANNE PLOWMAN |
| Legal representative reference | |
| Telephone | +61 2 9921 4891 |

## NOTICE OF LISTING

If this Notice of Motion has been listed, a Notice of Listing must be attached and served with the Notice of Motion.

## ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Notice of Motions (Chambers) (e-Services), along with any other documents listed below, were filed by the Court.

Notice of Motion (UCPR 20) (2020-00356588 -Notice of Motion - 1 November 2021.pdf)
Affidavit (2020-00356588 - Affidavit - Kathleen Plowman - 1 November 2021.pdf)

[attach.]

Form 20 (version 3)
UCPR 18.1 and 18.3

# NOTICE OF MOTION

| COURT DETAILS | |
|---|---|
| Court | Supreme Court of New South Wales |
| Division | Common Law |
| List | General (Class Actions) |
| Registry | Sydney |
| Case number | 2020/00356588 |

| TITLE OF PROCEEDINGS | |
|---|---|
| Plaintiff | **Dr Amireh Fakhouri** |
| First Defendant | **Secretary, NSW Ministry of Health** |
| Second Defendant | **The State of New South Wales** |

| FILING DETAILS | |
|---|---|
| Person seeking orders | **Secretary, NSW Ministry of Health and State of New South Wales,** Defendants |
| Filed in relation to | Defence |
| Legal representative | Kate Plowman, MinterEllison |
| Legal representative reference | 1328209 |
| Contact name and telephone | Kate Plowman, (02) 9921 8580 |
| Contact email | kate.plowman@minterellison.com |

## PERSON AFFECTED BY ORDERS SOUGHT

**Plaintiff** Dr Amireh Fakhouri

## HEARING DETAILS

This motion is listed on 1 December 2021 before Garling J.

[on separate page]

## ORDERS SOUGHT

1 Leave be granted pursuant to s 64 of the *Civil Procedure Act 2005* (NSW) (**Act**) to file an Amended Defence in the form of Annexure 'A' to this notice of motion.

2 The Defendants are to pay the costs thrown away solely by reason of the amendments referred to in order 1.

3 An order pursuant to r 14.28(1) of the *Uniform Civil Procedure Rules 2005* (NSW) that so much of the Amended Statement of Claim as relates to the claims of the Group Members be struck out.

4 Further or in the alternative to order 3, an order pursuant to s 166(1) of the Act that the proceedings no longer continue as representative proceedings under Part 10 of the Act, subject to such conditions as the Court thinks fit.

5 Further or in the alternative to order 3, an order pursuant to s 67 of the Act that the claims of the Group Members be stayed, subject to such conditions as the Court thinks fit.

6 The plaintiff pay the defendants' costs of the notice of motion.

## SIGNATURE

Signature of legal representative 

| | |
|---|---|
| Capacity | Solicitor |
| Date of signature | 1 November 2021 |

## NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

## REGISTRY ADDRESS

Street address

Postal address

Telephone

Annexure A

Form 7A (version 5)
UCPR 14.3

# AMENDED DEFENCE TO THE AMENDED STATEMENT OF CLAIM

| COURT DETAILS | |
|---|---|
| Court | Supreme Court of New South Wales |
| Division | Common Law |
| List | General (Class Actions) |
| Registry | Sydney |
| Case number | 2020/00356588 |
| **TITLE OF PROCEEDINGS** | |
| Plaintiff | **Dr Amireh Fakhouri** |
| First Defendant | **Secretary, NSW Ministry of Health** |
| Second Defendant | **The State of New South Wales** |
| **FILING DETAILS** | |
| Filed for | **Secretary, NSW Ministry of Health**, Defendant |
| Legal representative | Kate Plowman, MinterEllison |
| Legal representative reference | 1328209 |
| Contact name and telephone | Kate Plowman, (02) 9921 8580 |
| Contact email | kate.plowman@minterellison.com |

## PLEADINGS AND PARTICULARS

In this amended defence, unless otherwise stated or the context otherwise requires:

(a) references to paragraphs and sub-paragraphs are references to paragraphs and sub-paragraphs in the amended statement of claim dated 23 April 2021 ~~16 December 2020~~ (**statement of claim**);

(b) a pleading to a paragraph or sub-paragraph is a pleading to each allegation in the paragraph or sub-paragraph;

(c) the First Defendant and Second Defendant (together, **Defendant**):

(i) adopt~~s~~ the definitions in the statement of claim;

(ii) advance~~s~~ reasons for denials also as allegations of material fact;

(iii) do~~es~~ not plead to particulars or allegations of law in the statement of claim; and

(iv) join~~s~~ issue on the statement of claim.

**Summary of defence**

1. In answer to the whole claim, the Defendant says:

(aa) the Plaintiff is not a person entitled to bring an application for an order under s 365 of the *Industrial Relations Act 1996* (NSW) on behalf of the Group Members pursuant to s 369(1) of that Act, and that the proceedings are therefore not properly constituted as representative proceedings;

(a) the Second Defendant (and not the First Defendant) ~~she~~ was ~~not~~ the employer of the Plaintiff or Group Members during the Relevant Period (see paragraphs 4A to 4C and 8 to 8A below);

(b) the Plaintiff has not identified any occasions on which she was not paid in accordance with her entitlements for:

(i) Rostered Overtime (see subparagraph 29(c) below);

(ii) Unrostered Overtime that was authorised and that she claimed pursuant to the 2010, 2015, 2016, 2017 or 2019 Policy Directive (**Employee Arrangements Policy Directive**) as applicable and her employment contract (see paragraphs 4A to 4D and subparagraphs 29(c), 32(b) and 35(d) below); or

(iii) meal breaks for which she was entitled to payment (see subparagraphs 38(a) 38(b) and 40 below);

(ba) whether the Plaintiff and Group Members were required by the Defendant to work Unrostered Overtime would depend on the circumstances of each case, that is, the circumstances of each occasion on which the Plaintiff or Group Members claim to have been required to work Unrostered Overtime (see paragraph 24 below);

(c) in relation to any Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive, or for which the Plaintiff or any Group Member did not make a claim in accordance with the applicable Employee Arrangements Policy Directive and their employment contract or otherwise during the term of the employment contract in which the relevant work was performed:

(i) such time did not constitute 'time worked' for the purposes of the Awards, or the Defendant otherwise was not liable to pay for that time, pursuant to clause 9 of the Awards (see paragraph 24 below);

(ii) further or alternatively, the Plaintiff or Group Member is estopped from asserting that, in relation to that Unrostered Overtime;

(A) they were in attendance, or were required by the Defendant to be in attendance, at a hospital to carry out functions that they had been called upon to perform on behalf of the Defendant, or they did not perform it of their own volition; and/or

(B) the hours they worked, or were required by the Defendant to work, were different from those specified in their timesheets, which they were required to certify at the end of each pay period, or any claim they submitted for Unrostered Overtime within four weeks of the claimed Unrostered Overtime being worked or otherwise during the term of the employment contract in which they performed that work (see paragraphs 44 to 57 below); and

(iii) alternatively, the Court should decline to exercise its discretion to grant relief.

**Parties**

2. ~~The Defendant does not plead to paragraph 1 because it does not allege a material fact, but~~ As to paragraph 1, the Defendant:

(a) denies that the proceedings are properly constituted as a representative proceeding pursuant to s 157 of the *Civil Procedure Act 2005* (NSW) (***Civil Procedure Act***) or that the Plaintiff has standing pursuant to s 158 of the *Civil Procedure Act*;

(b) says that the Plaintiff is not a person entitled to bring an application for an order under s 365 of the *Industrial Relations Act 1996* (NSW) on behalf of the Group Members pursuant to s 369(1) of that Act;

(c) says, as a consequence, that the proceedings as they relate to the Group Members are liable to be struck out, further or alternatively that the Court should order:

(i) pursuant to s 164(b) of the *Civil Procedure Act*; or

(ii) pursuant to s 166(1)(d) and/or (e) of the *Civil Procedure Act*,

that the proceedings no longer continue as a representative proceeding under Part 10 of the Act, with such conditions and consequential orders as the Court thinks fit;

(d) says further there is no position of 'Junior Medical Officer', only the positions in subparagraphs 1(b)(i)(2) to (5); and

(e) does not otherwise plead to paragraph 1 because it does not allege a material fact.

***Particulars***

*As to paragraph 2(d). Clause 1 of each of the Awards.*

3. The Defendant admits subparagraph 2(a) in relation to the Second Defendant and says that the Plaintiff's periods of employment, the local health district or specialty network in which she was employed for each period, and her classification under the *Health Professional and Medical (State) Salaries Award* (**Salaries Award**) for each period, were as set out in the table below:

| | **Start date** | **End date** | **Local health district / specialty network** | **Classification** |
|---|---|---|---|---|
| (a) | 19/01/2015 | 31/01/2016 | Western Sydney Local Health District | Medical Officer – Intern |
| (b) | 1/02/2016 | 31/01/2017 | Western Sydney Local Health District | Medical Officer – Resident – 1st Year |
| (c) | 1/02/2017 | 5/02/2017 | Western Sydney Local Health District | Medical Officer – Resident – 2nd Year |
| (d) | 7/08/2017 | 4/02/2018 | Sydney Children's Hospital Network | Medical Officer – Resident – 2nd Year |

4. As to subparagraph 2(b), the Defendant:

   (a) denies subparagraph (i) because the Plaintiff was employed in the position of Intern in the period set out in row (a) of the table in paragraph 3 above;

   (b) denies subparagraph (ii) because the Plaintiff was employed in the position of Resident Medical Officer in the periods set out in rows (b) and (c) of the table in paragraph 3 above; and

   (c) admits subparagraph (iii) and says the Plaintiff was employed in the position of Senior Resident Medical Officer in the period set out in row (d) of the table in paragraph 3 above.

4A. On or about 13 October 2014, the Plaintiff entered into a contract of employment with the First Defendant (on behalf of the Second Defendant), pursuant to which the ~~First~~ Second Defendant agreed to employ the Plaintiff on a temporary basis for the periods and classifications set out in subparagraphs 3(a) to (c) above (**Plaintiff's first employment contract**).

***Particulars***

*The contract was entirely in writing and comprised:*

*(a) a letter from the Manager, Statewide eRecruit Operations, HealthShare NSW for and on behalf of the First Defendant, dated 29 September 2014 (**Plaintiff's first offer letter**);*

*(b) a document titled 'Acceptance of offer of temporary employment' signed by the Plaintiff on 13 October 2014; and*

*(c) a document titled 'Health Declaration Form' signed by the Plaintiff on 13 October 2014.*

4B. The terms of the Plaintiff's first employment contract included:

(a) '[y]ou will be employed pursuant to section 116 of the *Health Services Act 1997* ... within the NSW Health Service by the Government of NSW' (Plaintiff's first offer letter, p 1);

(b) 'you agree to read, be bound by and comply with NSW Health Policy Directives, and any relevant local workplace procedures, as are in place or issued or amended from time to time' (Plaintiff's first offer letter, p 1);

(c) '[y]our terms and conditions of employment will be in accordance with the relevant salaries award, including any increments which are due and payable. Your conditions of employment will be in line with the Public Hospital Medical Officers (State) Award' (Plaintiff's first offer letter, p 1);

(d) '[y]our continued employment is conditional upon your:

1. compliance with all applicable public health organisation and hospital policies and protocols, and with applicable Policy Directives and Guidelines issued by the Ministry of Health, as amended and as in force from time to time ...

...

4. observance of general conditions of clinical practice applicable at the Public Health Organisation where you will be working from time to time ...' (Plaintiff's first offer letter, 'Conditions of employment', pp 1 – 2);

(e) '[y]ou will be required to work the normal hours of work appropriate to the particular clinical service where you are working. You will be required to work reasonable rostered overtime as required by the clinical service within which you are placed from time to time by the Health Service and to be available for patient handover and

reasonable on-call and recall duties in accordance with the Public Hospital Medical Officers (State) Award' (Plaintiff's first offer letter, 'Hours of duty', p 2); and

(f) '[y]ou are required to certify your timesheet at the end of each pay period and submit it to your Public Health Organisation. Unrostered overtime must be approved by the appropriate employer delegate in accordance with NSW Department of Health Policy Directive 2010_074 *Medical Officers – Employment Arrangements in NSW Public Health System.* Claims for unrostered overtime are to be submitted for payment no later than four weeks after the claimed unrostered overtime was worked' (Plaintiff's first offer letter, 'Payment', p 3).

4C. On or about 19 November 2016, the Plaintiff entered into a contract of employment with the First Defendant (on behalf of the Second Defendant), pursuant to which the Second ~~First~~ Defendant agreed to employ the Plaintiff on a temporary basis for the period~~s~~ and classifications set out in subparagraph 3(d) above (**Plaintiff's second employment contract**).

***Particulars***

*The contract was entirely in writing and comprised:*

*(a) a letter from the Manager, Statewide eRecruit Operations, HealthShare NSW for and on behalf of the First Defendant, dated 16 November 2016 (**Plaintiff's second offer letter**);*

*(b) a document titled 'Acceptance of offer of temporary employment – NSW Health facilities only' signed by the Plaintiff on 19 November 2016; and*

*(c) a document titled 'Health Declaration Form' signed by the Plaintiff on 19 November 2016.*

4D. The terms of the Plaintiff's second employment contract included:

(a) '[y]ou will be employed pursuant to section 116 of the *Health Services Act 1997* ... within the NSW Health Service by the Government of NSW' (Plaintiff's second offer letter, p 1);

(b) '[y]our conditions of employment will be in line with the Public Hospital Medical Officers (State) Award' (Plaintiff's second offer letter, 'Remuneration', p 1); and

(c) '[y]ou are required to certify your timesheet at the end of each pay period and submit it to your Public Health Organisation. Unrostered overtime must be approved by the appropriate employer delegate in accordance with NSW Department of Health Policy

Directive 2010_074 *Medical Officers – Employment Arrangements in NSW Public Health System.* Claims for unrostered overtime are to be submitted for payment no later than four weeks after the claimed unrostered overtime was worked' (Plaintiff's second offer letter, 'Remuneration', pp 1 – 2);

(d) '[y]ou will be required to work the normal hours of work appropriate to the particular clinical service where you are working. You will be required to work reasonable rostered overtime as required by the clinical service within which you are placed from time to time by the Health Service and to be available for patient handover and reasonable on-call and recall duties in accordance with the Public Hospital Medical Officers (State) Award' (Plaintiff's second offer letter, 'Hours of duty', p 2); and

(e) '[y]ou are required to comply with the NSW Health Code of Conduct as amended from time to time. ... You are also required to comply with such other NSW Health Policy Directives, and public health organisation policies, as issued and or amended from time to time. Without limiting the generality of the above, the following policies are specifically brought to your attention:

...

Policy Directive 2010_074 *Medical Officers – Employment Arrangements in NSW Public Health System*: [web link]' (Plaintiff's second offer letter, 'Compliance with legislation and policies', p 3).

4E. The Plaintiff's first employment contract and the Plaintiff's second employment contract are referred to together in this pleading as the Plaintiff's **employment contract**.

5. As to subparagraph 2(c), the Defendant:

(a) admits the Plaintiff was required to work Rostered Overtime, Unrostered Overtime and Paid Meal Break Shifts from time to time;

(b) to the extent it is alleged that the Plaintiff was required to work Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive, or for which she did not make a claim in accordance with the applicable Employee Arrangements Policy Directive and her employment contract or otherwise during the term of the employment contract in which the relevant work was performed, denies the allegation for the reasons in paragraphs 24 to 27 and 44 to 57 below;

(c) otherwise does not admit the subparagraph for the reasons in paragraphs 33, 35, 37 and 39 and 44 to 57 below.

6. The Defendant denies subparagraph 2(d) for the reasons in paragraphs 23 to 40 below.

7. The Defendant admits subparagraph 2(e).

8. The Defendant denies subparagraph 3(a) because:

   (a) the Plaintiff and Group Members were employed by the Government of New South Wales in the NSW Health Service pursuant to Chapter 9, Part 1 of the *Health Services Act 1997* (NSW) (***Health Services Act***);

   (b) pursuant to section 115(1) of the *Health Services Act*, members of the NSW Health Service are employed in the service of the Crown, such that the Crown in right of New South Wales (the Second Defendant) is their true employer ~~(**State**)~~;

   ***Particulars***

   *Section 13(b) of the Interpretation Act 1987 (NSW).*

   (c) pursuant to section 116H(1) of the *Health Services Act*, the First Defendant is taken to be the employer of members of the NSW Health Service only for the purposes of any proceedings relating to a member of the NSW Health Service held before a competent tribunal having jurisdiction to deal with industrial matters; and

   (d) this Court is not a competent tribunal having jurisdiction to deal with industrial matters within the meaning of section 116H(1) of the *Health Services Act*, because it:

      (i) is not a tribunal within the meaning of the *Health Services Act*;

      ~~(ii) further or alternatively, is not an industrial tribunal; and~~

      (iii) further or alternatively, is not a tribunal having ~~does not have general~~ jurisdiction over "industrial matters" within the meaning of section 6 of the *Industrial Relations Act 1996* (NSW) (***Industrial Relations Act***) and section 116H(1) of the *Health Services Act*.

8A. As to subparagraph 3(b), the Defendant admits that the Plaintiff and Group Members were employed by the Second Defendant in the service of the Crown.

9. As to subparagraph 3(c~~b~~), the Defendant:

   (a) denies subparagraph (i) because:

      (i) the Plaintiff and any Group Members employed in the NSW Health Service in a classification set out in the applicable Salaries Award (**covered Group Members**) in the period from 1 July 2014 to 30 June 2015 were covered by an

award called the *Public Hospital (Medical Officers) Award* (374 IG 332) (**Reviewed Award**), as varied up to 1 July 2014 (**2014 Award**); and

(ii) the Reviewed Award took effect from 26 April 2012 and remained in effect until rescinded by the successor award from 1 July 2015;

(b) denies subparagraph (ii) because the award that covered the Plaintiff and any covered Group Members employed in the period from 1 July 2015 to 30 June 2016 was called the *Public Hospital (Medical Officers) Award* (377 IG 1901) (**2015 Award**);

(c) denies subparagraph (iii) because the award that covered the Plaintiff and any covered Group Members employed in the period from 1 July 2016 to 30 June 2017 was called the *Public Hospital Medical Officers Award* (380 IG 615) (**2016 Award**);

(d) admits subparagraphs (iv) to (vi) (the awards referred to in those subparagraphs being the **2017 Award**, **2018 Award** and **2019 Award** respectively).

10. As to subparagraph 3(dc), the Defendant:

(a) says that the Awards were binding on the employer and employees to which they related, including being binding on the Plaintiff and Group Members in the periods they were covered by each Award;

(b) says that, accordingly, the Plaintiff and covered Group Members had entitlements under the Awards during those periods;

(c) otherwise does not admit the subparagraph because the Defendant does not otherwise understand what is meant by 'entitled to the benefits'.

11. As to subparagraph 3(ed), the Defendant:

(a) denies subparagraph (i) because:

(i) the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2014 to 30 June 2015 were entitled were as set out in a variation to an award called the *Health Professional and Medical Salaries (State) Award*, the variation having been published on 24 June 2014 (377 IG 689); and

(ii) the salaries set out in that variation applied from the first full pay period commencing after 1 July 2014;

(b) denies subparagraph (ii) because the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2015 to 30 June 2016 were

entitled were as set out in an award called the *Health Professional and Medical Salaries (State) Award* (377 IG 1592);

(c) denies subparagraph (iii) because the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2016 to 30 June 2017 were entitled were as set out in an award called the *Health Professional and Medical Salaries (State) Award* (380 IG 378);

(d) denies subparagraph (iv) because:

(i) the salaries to which the Plaintiff and any covered Group Members employed in the period from 1 July 2017 to 30 June 2018 were entitled were as set out in an award called the *Health Professional and Medical Salaries (State) Award* (382 IG 305); and

(ii) the salaries set out in that award applied from the first full pay period commencing after 1 July 2017;

(e) denies subparagraph (v) because the the salaries set out in that award applied from the first full pay period commencing after 1 July 2018;

(f) denies subparagraph (vi) because the the salaries set out in that award applied from the first full pay period commencing after 1 July 2019.

12. As to subparagraph 3(fe), the Defendant:

(a) says that, pursuant to clause 10 of the Awards (including Ministry of Health Circular No. 88/251 (**RMO Circular**) in relation to Resident Medical Officers), the arrangements in the Circular applied in relation to meal breaks during Shifts Other than Day Shifts, Monday to Friday within the meaning of clause 10 and the RMO Circular;

(b) says that, accordingly, the Plaintiff and covered Group Members had entitlements under the Awards that the Circular would be applied in relation to their meal breaks during Shifts Other than Day Shifts, Monday to Friday;

(c) otherwise denies the subparagraph because the entitlements of the Plaintiff and covered Group Members in relation to Day Shifts – Monday to Friday within the meaning of clause 10 of the Award were as set out in:

(i) for Resident Medical Officers – clauses 1 to 4 of the RMO Circular; and

(ii) otherwise – subclauses 10(i) to (iv) of the Award.

13. As to subparagraph 3(gf), the Defendant:

    (a) admits subparagraph (i);

    (b) as to subparagraph (ii):

        (i) admits that, from time to time, the Plaintiff was required to work Unrostered Overtime;

        (ii) otherwise does not admit the subparagraph because no particulars have been provided of the alleged requirement to work outside of the rostered hours and the Defendant cannot properly plead without those particulars and the subparagraph is liable to be struck out.

14. As to paragraph 4, the Defendant:

    (a) as to subparagraph (a):

        (i) admits the First Defendant has the function of providing governance, oversight and control of the public health system and the statutory health organisations within it, under subsection 122(1)(c1) of the *Health Services Act*;

        (ii) otherwise denies the subparagraph because the functions of the First Defendant are as set out in section 122 of the *Health Services Act* and other legislation that confers functions on the First Defendant;

***Particulars***

*Other legislation that confers functions on the First Defendant includes the Health Administration Act 1982 (NSW) and the Public Health Act 2010 (NSW).*

    (b) denies subparagraph (b) for the reasons in paragraphs 8 and 8A above.

14A. As to paragraph 4A, the Defendant:

    (a) denies subparagraph (a) because:

        (i) the functions of governance, oversight and control of the public health system and the statutory health organisations within it are functions of the First Defendant as set out in subparagraph 14 (a)(i) above; and

        (ii) the First Defendant exercises the employer functions of the Government of NSW in relation to the NSW Health Service (other than executives identified in

subsections 116(3A) to (3D) of the *Health Services Act*) pursuant to subsection 116(3) of the *Health Services Act*;

(b) admits subparagraph (b)~~.~~ and repeats paragraphs 2, 8 and 8A above.

**The Awards**

15. The Defendant admits paragraph 5.

16. The Defendant admits paragraph 6 but says that, in addition to rostered ordinary hours, the Defendant was permitted to roster employees to work reasonable overtime.

***Particulars***

*Clauses 6(vii) and the 'Reasonable Hours' clause of each of the Awards (clause 32 of the 2017, 2018 and 2019 Awards, clause 33 of the 2015 and 2016 Awards and clause 34 of the 2014 Award); the provision of the Plaintiff's first employment contract set out in subparagraph 4B(e) above; the provision of the Plaintiff's second employment contract set out in subparagraph 4D(d) above.*

Overtime

17. As to paragraph 7, the Defendant:

(a) denies the paragraph to the extent that the Plaintiff or any Group Member elected to take time off in lieu of payment for overtime, in which case the employee would be entitled to take one hour off for each hour of overtime worked, paid at the ordinary time rate (**TOIL election**);

***Particulars***

*Clause 18B(iv) of each of the Awards.*

(b) says that 'time worked' has the meaning set out in clause 9 of the Awards, which does not include Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive or for which a claim was not made in accordance with the applicable Employee Arrangements Policy Directive and their employment contract, for the reasons in paragraph 24 below;

(c) subject to subparagraph 17(a) and (b) above, admits the paragraph.

18. As to paragraphs 8 and 9, the Defendant:

(a) denies the paragraphs to the extent that the Plaintiff or any Group Member made a TOIL election for the reasons in subparagraph 17(a) above;

(b) subject to ~~sub~~paragraph 17~~(b)~~ and subparagraph 18(a) above, otherwise admits the paragraphs.

Payment for meal breaks

19. As to paragraph 10, the Defendant:

(a) admits that the Awards required the First Defendant, on behalf of the Second Defendant ~~State~~, to apply the arrangements outlined in the Circular in relation to meal breaks during Shifts Other than Day Shift – Monday to Friday within the meaning of clause 10 of the Award and the RMO Circular;

(b) otherwise denies the paragraph for the reasons in subparagraph 12(c) above.

20. As to paragraphs 11 and 12, the Defendant:

(a) denies the paragraphs because:

(i) subclauses 10(i) to (iv) of the Awards, and clauses 1 to 4 of the RMO Circular in relation to Resident Medical Officers, governed the entitlements of officers covered by the Awards to meal breaks for 'Day Shifts – Monday to Friday' within the meaning of clause 10 of the Award and the RMO Circular;

(ii) the meaning of 'Day Shifts – Monday to Friday' for the purposes of clause 10 of the Award and the RMO Circular was not constrained by the Circular;

(iii) further or alternatively, on its proper construction, clause 2.2(iii) of the Circular does not apply to every shift commencing before 8.00 am or finishing after 6.00 pm;

(b) says the arrangements in clause 2.2(ii) of the Circular were expressed not to apply where agreement was reached between a hospital and the Public Service Association.

21. Subject to the qualification in subparagraph 20(b) above, the Defendant admits paragraph 13.

22. The Defendant does not admit paragraph 14 because, despite making reasonable inquiries, the Defendant does not know whether an agreement of the kind described in subparagraph 20(b) above was in operation during the Relevant Period in respect of the Plaintiff and/or each of the Group Members.

22A. As to paragraph 14A, the Defendant:

(a) denies the paragraph to the extent it relates to shifts referred to in paragraph 12 of the statement of claim that are not 'Day Shifts – Monday to Friday' on the proper construction of that phrase, or do not fall within clause 2.2(iii) of the Circular on its proper construction, as set out in subparagraph 20(a) above;

(b) does not admit the paragraph to the extent that any agreement of the kind described in subparagraph 20(b) above was in operation during the Relevant Period, which the Defendant does not know;

(c) otherwise admits the paragraph.

22B. As to paragraph 14B, the Defendant:

(a) says that payments to the Plaintiff and Group Members for meal breaks taken during their ordinary hours of work constituted earnings in respect of ordinary hours of work for the purposes of the definition of 'ordinary time earnings' in the *Superannuation Guarantee (Administration) Act 1982* (Cth) (**SGA Act**);

(b) denies the paragraph because whether an amount constitutes 'ordinary time earnings' for the purposes of the SGA Act does not depend on the rate of pay.

**Unrostered overtime**

23. ~~The Defendant denies~~ As to paragraph 15, the Defendant ~~because~~:

(a1) admits that in circumstances in which the Plaintiff and Group Members were required by the Defendant to attend, and attended, a hospital for the purpose of carrying out such functions as required by the Defendant, that time was to be treated as time worked for the purposes of clause 9 of the Awards, subject to subparagraphs (a2), (a) and (b) below;

(a2) says that whether the Plaintiff or any Group Member attended, and was required by the Defendant to attend, is a matter that is to be determined in each individual instance of Unrostered Overtime claimed;

(a) otherwise denies the paragraph because, in addition to circumstances where they were not ~~'~~required~~'~~ by the Defendant to be in attendance at a hospital for the purpose of carrying out such functions as the Defendant may call on them to perform, the Plaintiff's and the ~~covered~~ Group Members' time is not to be treated as 'time worked' for the purposes of the Awards if:

(i) they attended work of their own volition outside of hours rostered on duty, or when they remained in attendance when formally released from the obligation to perform professional duties; or

(ii) the time constituted a break allowed and actually taken for meals;

(b) says the Defendant was not liable to pay for any time falling within the categories in subparagraphs (a)(i) or (a)(ii) above.

***Particulars***

*Clause 9 of each of the Awards.*

24. The Defendant denies paragraphs 16 to 19:

(a) because, pursuant to each of Employee Arrangements Policy Directives, employees were authorised to work Unrostered Overtime (without prior approval) in the circumstances set out in paragraphs 16 to 19, but whether they were required by the Defendant to do so would depend on the circumstances of each case;

***Particulars***

*The clauses in the Employee Arrangements Policy Directives referred to in subparagraph (ii) of the particulars of paragraphs 16 to 19 provide that an employee 'may' undertake unrostered overtime without prior approval.*

*Circumstances in which the Plaintiff and other Group Members were not required by the Defendant to work Unrostered Overtime, despite being authorised to do so, included:*

*(i) where they were told or invited to go home by their supervisor or a more senior employee; or*

*(ii) where another employee was available to take over the Plaintiff or other Group Member's duties.*

(b) further or alternatively, for the reasons in subparagraphs (c) and (d) below;

(c) the authorisation to work in the circumstances set out in paragraphs 16 to 19 was subject to the condition that the employee make a claim in relation to the time purportedly worked in accordance with the applicable Employee Arrangements Policy Directive and the employee's employment contract;

***Particulars***

*(i) Clauses 9.3 and 9.4 of the 2019 Policy Directive; clause 9.2 of the 2015, 2016 and 2017 Policy Directives; clause 8.2 of the 2010 Policy Directive.*

*(ii) The provisions of the Plaintiff's first employment contract set out in subparagraphs 4B(b), (d) and (f) above. ~~Third paragraph, and clause headed 'Payment', of the 'Offer of Temporary Employment' to the Plaintiff dated 29 September 2014, which contained terms of her employment contract between 19 January 2015 and 5 February 2017 (**Plaintiff's first employment contract**).~~*

*(iii) The provisions of the Plaintiff's second employment contract set out in subparagraphs 4D(c) and (e) above. ~~Clauses headed 'Remuneration' and 'Compliance with legislation and policies' of the 'Offer of Temporary Employment' to the Plaintiff dated 16 November 2016, which contained terms of her employment contract between 7 August 2017 and 4 February 2018 (**Plaintiff's second employment contract**).~~*

*(iv) Further particulars in relation to other Group Members will be provided after the Group Members are known.*

(d) if an employee did not make a claim in accordance with the applicable Employee Arrangements Policy Directive and their employment contract, or otherwise during the term of the employment contract in which the relevant work was performed:

(i) for the purposes of clause 9 of the Awards, the employee is taken:

(A) not to have been required by the employer to be in attendance at a hospital for the purpose of carrying out functions that the employer called on the employee to perform during the relevant time;

(B) further or alternatively, to have attended during the relevant time of his or her own volition;

(C) further or alternatively, to have been formally released from their obligation to perform professional duties;

(ii) further or alternatively, the employee is estopped from asserting the contrary of the matters in subparagraph (i)(A) or (i)(B) above for the reasons in paragraphs 44 to 57 below.

25. The Defendant denies paragraph 20:

(a) in relation to time worked prior to 2 July 2019, because, pursuant to the 2010, 2015, 2016 and 2017 Policy Directives, there was no authorisation to work or requirement to work in those circumstances unless the employee had obtained prior approval;

***Particulars***

*Clause 9.2 of the 2015, 2016 and 2017 Policy Directives; clause 8.2 of the 2010 Policy Directive.*

(b) in relation to time worked on or after 2 July 2019, because, pursuant to the 2019 Policy Directive, the authorisation to work or requirement to work U~~u~~nrostered O~~o~~vertime to complete outstanding patient transfer / discharge summaries did not apply if the task was able to be handed over to another medical officer to finish;

(c) further or alternatively, for the reasons in paragraph 24 above.

26. The Defendant denies paragraph 21:

(a) in relation to time worked on or after 2 July 2019, because, pursuant to the 2019 Policy Directive, the authorisation to work unrostered overtime when requested by a superior to attend a late ward round terminated either when the employee's ward round responsibilities concluded or when it was feasible for the work to be handed over to another medical officer to complete and there was no requirement to work Unrostered Overtime thereafter;

***Particulars***

*Clause 9.1.6 of the 2019 Policy Directive.*

(b) further or alternatively, for the reasons in paragraph 24 above;

(c) further or alternatively in relation to time worked prior to 2 July 2019, for the reasons in subparagraph 25(a) above.

27. As to paragraphs 22 to 24, the Defendant:

(a) denies the paragraphs in relation to the circumstances pleaded in paragraphs 16 to 21 of the statement of claim for the reasons in paragraphs 23 to 26 above;

(b) otherwise denies the paragraphs:

(i) because pursuant to each of the Employee Arrangements Policy Directives, there was no authorisation to work or requirement to work Unrostered Overtime in any circumstance outside those expressly identified in the applicable Employee Arrangements Policy Directive as not requiring prior approval (**pre-**

**authorised Unrostered Overtime**), unless the employee had obtained prior approval;

***Particulars***

*The circumstances expressly identified as not requiring prior approval were those set out in clauses 9.1.1 to 9.1.9 of the 2019 Policy Directive; clauses 9.2.1 to 9.2.4 of the 2015, 2016 and 2017 Policy Directives; and clauses 8.2.1 to 8.2.4 of the 2010 Policy Directive.*

(ii) further or alternatively, for the reasons in subparagraphs 24(c) and (d) above.

**Underpayment**

28. As to paragraph 25, the Defendant:

(a) admits the paragraph to the extent that 'time worked' is understood as set out in subparagraph 17(b) and paragraph 23 above;

(b) otherwise denies the paragraph because the Defendant was not otherwise required to pay for any time of the Plaintiff or Group Members.

29. As to paragraphs 26 and 27, the Defendant:

(a) denies the paragraphs to the extent that the Plaintiff or any Group Member made a TOIL election for the reasons in subparagraph 17(a) above;

(b) denies the paragraphs to the extent it is alleged that the Fortnightly Overtime or the Daily Overtime included Unrostered Overtime for which no claim had been made in accordance with the applicable Employee Arrangements Policy Directive and the employee's employment contract, or which had not been approved prior to being performed when required by the applicable Employee Arrangements Policy Directive, for the reasons in paragraphs 23 to 27 above;

(c) otherwise admits the paragraphs but says the Plaintiff has not identified any amounts she was not paid and to which she was entitled for:

(i) Rostered Overtime; or

(ii) Unrostered Overtime which was approved in accordance with the applicable Employee Arrangements Policy Directive and her employment contract, and for which she claimed in accordance with the applicable Employee Arrangements Policy Directive and her employment contract or otherwise during the term of the employment contract in which the relevant work was performed.

30. The Defendant denies paragraph 28 for the reasons in paragraph 20 above.

31. The Defendant does not admit paragraph 29 for the reasons in paragraph 22 above.

32. As to paragraph 30, the Defendant:

    (a) denies the paragraph to the extent the purported Unrostered Overtime includes Unrostered Overtime that was not authorised under the applicable Employee Arrangements Policy Directive or for which no claim had been made in accordance with the applicable Employee Arrangements Policy Directive and the employee's employment contract, for the reasons in paragraphs 23 to 27 above;

    (b) says that, from time to time during the Fakhouri Employment Period, the Plaintiff submitted claims for Unrostered Overtime which were approved and the Plaintiff has not identified any such claims for which she was not paid;

***Particulars***

*The claims for Unrostered Overtime made by the Plaintiff and approved and paid included those set out in the table below:*

| | **Date of claim** | **Period for which Unrostered Overtime claimed** | **Total days (hours) of Unrostered Overtime claimed** | **Date of approval** |
|---|---|---|---|---|
| (i) | 17/02/2015 | 2/02/2015 – 13/02/2015 | 9 days (9 hrs) | 24/02/2015 |
| (ii) | 26/02/2015 | 16/02/2015 – 27/02/2015 | 10 days (11.5 hrs) | 2/03/2015 |
| (iii) | 12/03/2015 | 2/03/2015 – 13/03/2015 | 10 days (10 hrs) | 12/03/2015 |
| (iv) | 26/03/2015 | 16/03/2015 – 26/03/2015 | 8 days (8.5 hrs) | 26/03/2015 |
| (v) | 5/05/2015 | 13/04/2015 – 17/04/2015 | 5 days (7 hrs 20 mins) | 5/05/2015 |
| (vi) | 28/10/2016 | 13/09/2016 – 13/10/2016 | 22 days (18 hrs, 10 mins)[1] | 2/11/2016 |

[1] *In preparing this pleading, the Defendant has become aware that, by inadvertence, 30 minutes of this period was not paid. The Defendant will take steps to rectify that inadvertent underpayment as soon as possible. The Defendant is not otherwise aware of any claimed Unrostered Overtime that has not been paid to the Plaintiff.*

(c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members worked Unrostered Overtime, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out, but refers to subparagraph 29(c) above.

33. As to paragraph 31, the Defendant:

(a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work in excess of 80 hours in a fortnight;

(b) admits that, from time to time, Group Members were rostered to work in excess of 80 hours in a fortnight; and

(c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members were required by the Defendant to work in excess of 80 hours in a fortnight, and the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.

34. As to paragraph 32, the Defendant:

(a) denies the paragraph to the extent set out in subparagraph 32(a) above;

(b) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members worked Fortnightly Overtime, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out, but refers to subparagraph 29(c) above.

35. As to paragraph 33, the Defendant:

(a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work in excess of 10 hours in a day;

(b) admits that, from time to time, Group Members were rostered to work in excess of 10 hours in a day;

(c) otherwise does not admit the paragraph because no particulars have been provided of the periods or circumstances in which it is alleged that the Plaintiff or any Group Members worked Daily Overtime, and the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out;

(d) says that, from time to time during the Fakhouri Employment Period, the Plaintiff made claims for Unrostered Overtime for which she was paid.

***Particulars***

*See particulars of subparagraph 32(b) above.*

36. As to paragraph 34, the Defendant:

(a) denies the paragraph to the extent set out in subparagraph 32(a) above;

(b) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members worked Daily Overtime, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out, but refers to subparagraphs 29(c), 32(b) and 35(d) above.

37. As to paragraph 35, the Defendant:

(a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work shifts that commenced before 08:00 or finished after 18:00, Monday to Friday;

(b) admits that, from time to time, Group Members were rostered to work shifts that commenced before 08:00 or finished after 18:00, Monday to Friday;

(c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members were required by the Defendant to work such shifts, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.

38. As to paragraph 36, the Defendant:

(a) denies the paragraph for the reasons in paragraph 20 above;

(b) says the Plaintiff has not identified any occasion on which such a payment was not made.

39. As to paragraph 37, the Defendant:

(a) admits that, from time to time during the Fakhouri Employment Period, the Plaintiff was rostered to work shifts on Saturdays and Sundays;

(b) admits that, from time to time, Group Members were rostered to work shifts on Saturdays and Sundays;

(c) otherwise does not admit the paragraph because no particulars have been provided of the dates on which or circumstances in which it is alleged that the Plaintiff or any Group Members were required by the Defendant to work such shifts, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.

40. The Defendant admits paragraph 38, but says the Plaintiff has not identified any occasion on which such a payment was not made.

41. The Defendant denies paragraphs 39 to 41 for the reasons in paragraphs 23 to 40 above.

42. The Defendant denies paragraph 42:

(a) for the reasons in paragraphs 23 to 40 above;

(a1) further or alternatively, the Plaintiff has not pleaded or particularised an amount payable under an industrial instrument that remains unpaid to the person to whom it is payable within the meaning of section 365 of the *Industrial Relations Act*;

(b) further or alternatively, because an order under section 365 of the *Industrial Relations Act* is discretionary, and the Court should decline to exercise that discretion by reason of the matters in paragraphs 44 to 57 below.

42A. As to paragraph 42A, the Defendant:

(a) does not admit the paragraph for the reasons in subparagraphs 37(c) and 39(c) above;

(b) says:

(ia) payments made to the Plaintiff and Group Members in respect of meal breaks taken during their ordinary hours of work would form part of their 'ordinary time earnings' for the purposes of the SGA Act;

(i) however, the SGA Act and the *Superannuation Guarantee Charge Act 1992* (Cth) do not impose obligations on an employer to make superannation contributions in relation to its employees, but rather obliges the employer to pay to the Commonwealth the superannuation guarantee charge imposed on any superannuation guarantee shortfall of the employer for a quarter; and

(ii) the Plaintiff has not pleaded that the Defendant had any obligation to make superannuation contributions in relation to the Plaintiff or other Group Members.

43. The Defendant does not plead to paragraphs 43 to 46 because they do not allege material facts, but says the Defendant does not accept that the questions set out in paragraphs 43 to 46 are common questions of law or fact for all Group Members or appropriate common questions because, for example, the extent of any requirement to be in attendance at a hospital for the purpose of carrying out and performing functions as called on by the Defendant differed between hospitals and departments.

**Estoppel by conduct**

Background to the estoppel

44. Pursuant to the terms of their employment contracts, the Plaintiff and Group Members were:

    (a) informed that their conditions of employment were governed by the Award;

    (aa) obliged to certify their timesheets at the end of each pay period and submit them to the Public Health Organisation;

    (b) obliged to comply with the Employee Arrangements Policy Directives as in force from time to time;

    (c) obliged to obtain approval for unrostered overtime from the appropriate employer delegate in accordance with the applicable Employee Arrangements Policy Directive; and

    (d) obliged to submit claims for unrostered overtime for payment no later than four weeks after the claimed unrostered overtime was worked.

***Particulars***

*(i) In relation to the Plaintiff, see the provisions of the Plaintiff's first employment contract set out in subparagraphs 4B(b), (c), (d) and (f) above, and the provisions of the Plaintiff's second employment contract set out in subparagraphs 4D(b), (c) and (e) above. ~~particulars (ii) and (iii) of subparagraph 24(b) above, and fifth paragraph of the Plaintiff's second employment contract.~~*

*(ii) Particulars in relation to Group Members will be provided after the Group Members are known.*

45. Pursuant to each of the Employee Arrangements Policy Directives, a medical officer was required:

(a) to obtain prior approval before undertaking any unrostered overtime other than pre-authorised Unrostered Overtime; and

(b) to submit any claims for unrostered overtime to the relevant public health organisation no later than four weeks after the unrostered overtime was worked.

***Particulars***

*Clauses 9.2 and 9.3 of the 2019 Policy Directive; clause 9.2 of the 2015, 2016 and 2017 Policy Directives; clause 8.2 of the 2010 Policy Directive.*

46. Pursuant to the 2019 Policy Directive, in addition to the requirement in subparagraph 45(b) above, a medical officer was required to:

(a) submit any claims for unrostered overtime using an overtime claim form;

(b) provide specified minimum information on the overtime claim form; and

(c) sign the form and as part of this signature confirm that the claims were a true and accurate reflection of work performed and that the officer sought prior approval where it was required.

***Particulars***

*Clause 9.3 of the 2019 Policy Directive. The minimum information was specified in clause 9.3 as:*

*(i) the employee's name and employee number;*

*(ii) the department or cost centre where overtime was worked;*

*(iii) the name and Medical Record Number (MRN) of the last patient seen during the period claimed (if relevant);*

*(iv) reason for the overtime (as per clause 9.1, or state the reason if not included in this list);*

*(v) date, start and finish time of the unrostered overtime; and*

*(vi) for a claim relating to Mandatory Training, the name of the training course.*

47. The Plaintiff and at least some Group Members who commenced employment with NSW Health at the beginning of their first clinical year as a medical officer, in the position of Intern, participated in an orientation in which they were informed of:

(a) their ordinary hours of work (and given a copy of the Award);

(b) the requirement to make a claim for unrostered overtime;

(c) the requirement for a claim for unrostered overtime to be submitted within four weeks;

(d) the process for claiming unrostered overtime, including by submitting the claim using the approved claim form; and

(e) a web address where they could access the Employment Arrangements Policy Directive then in force.

***Particulars***

*(i) The Plaintiff was informed of those matters in documents provided or shown to her as part of her orientation with the Western Sydney Local Health District at Westmead Hospital between 19 January 2015 and 30 January 2015. The documents included:*

*(A) a document titled 'Understanding Your Timesheet' dated January 2013 (page 2);*

*(B) a document titled 'JMO Payment – Frequently Asked Questions' dated January 2013 (pages 1, 4);*

*(C) a document titled 'Policy Summaries' dated January 2015 (section 1);*

*(D) a presentation titled 'Westmead Hospital Medical Workforce Unit', by Kylie Laraghy – JMW Manager (slide 5);*

*(E) a copy of the Reviewed Award;*

*(F) an unrostered overtime claim form.*

*(ii) Particulars in relation to Group Members will be provided after the Group Members are known.*

48. The Plaintiff and Group Members who participated in a rotation in the Westmead Hospital Department of Gastroenterology & Hepatology were, at the beginning of their rotation, given a handbook which stated to the effect that:

(a) Resident Medical Officers should claim for unrostered overtime worked; and

(b) they were to ensure that unrostered overtime claims were submitted for authorisation within four weeks of the overtime being worked.

***Particulars***

*(i) The handbook provided to the Plaintiff was titled 'Department of Gastroenterology & Hepatology – Medical Officer Manual' updated 5 January 2015. The relevant passage is on page 12 under the heading 'Un-rostered Overtime'.*

*(ii) Particulars in relation to Group Members will be provided after the Group Members are known.*

49. From time to time throughout the Relevant Period, the Plaintiff and Group Members submitted claims for Unrostered Overtime which were approved and for which they were paid (~~**claimed**~~ **paid Unrostered Overtime**).

***Particulars***

*(i) In relation to the Plaintiff, see the particulars of subparagraph 32(b) above.*

*(ii) Particulars in relation to Group Members will be provided after the Group Members are known.*

50. By reason of paragraphs 44 to 49 above, the Plaintiff and Group Members were:

(a) aware of their ordinary hours of work;

(b) aware of the requirement to obtain prior approval to work unrostered overtime other than the pre-authorised Unrostered Overtime;

(c) aware of the requirement to submit claims for Unrostered Overtime and the process for doing so; and

(d) capable of complying with those requirements.

Operation of the estoppel

51. In the circumstances set out in paragraphs 44 to 50 above, to the extent that the Plaintiff and Group Members did any, or a combination of any, of the following:

(a) attended or remained at work outside their ordinary hours of work other than for Rostered Overtime or pre-authorised Unrostered Overtime, having not obtained prior approval in accordance with the applicable Employee Arrangements Policy Directive and their employment contract; or

(aa) attended or remained at work for pre-authorised Unrostered Overtime in circumstances in which:

(i) they had been told or invited to ~~go home~~ leave work by their supervisor or a more senior employee; or

(ii) where another employee was available to take over the Plaintiff or other Group Member's duties; or

(ab) certified their timesheet (including by reviewing and verifying or validating it) at the end of each pay period, without including Unrostered Overtime; or

(b) did not submit a claim for work outside their ordinary hours of work:

(i) in accordance with the applicable Employee Arrangements Policy Directive and their employment contract; or

(ii) otherwise during the term of the employment contract in which they performed that work,

then, by that conduct, the Plaintiff and Group Members induced the Defendant to assume, and the Defendant did assume:

(c) that the Plaintiff and Group Members ~~they~~ were not, or were not required by the Defendant to be, in attendance at a hospital to carry out functions that they had been called upon to perform on behalf of the Defendant during any such time;

(d) further or alternatively, that any attendance at a hospital during any such time was of their own volition; and

(e) further or alternatively, that the hours the Plaintiff and the Group Members worked, or were required by the Defendant to work, were those specified in their timesheets, which they were required to certify at the end of each pay period, or any claim they submitted for Unrostered Overtime within four weeks of the claimed Unrostered Overtime being worked or otherwise during the term of the employment contract in which they performed that work.

52. The Plaintiff and Group Members did not correct any mistake in the assumptions set out in subparagraph 51(c), further or alternatively, 51(d) above and, further or alternatively, 51(e) above (**unapproved or unclaimed time assumptions**), despite being under a duty to do so:

(a) by reason of their contractual obligations set out in subparagraphs 44(b) to (d) above;

(b) further or alternatively, because, by reason of the matters in paragraphs 44 to 50 above:

(i) the Plaintiff and Group Members knew, or should reasonably have known, that the Defendant would be induced by the acts or omissions referred to in subparagraphs 51(a) to ~~or~~ (b) above to make the unapproved or unclaimed time assumptions; and

(ii) a reasonable person would have expected the Plaintiff and Group Members to correct any mistake in those assumptions by submitting a claim in accordance with the applicable Employee Arrangements Policy Directive and their

employment contract, or otherwise informing the Defendant that they were working or had worked outside their ordinary hours of work.

53. In the circumstances set out in paragraph 52 above, to the extent the Plaintiff or Group Members engaged in the conduct in subparagraph 51(a) to ~~or~~ 51(b) above, it amounted to a representation by the Plaintiff and Group Members as to the matters in subparagraph 51(c), further or alternatively, 51(d) above and, further or alternatively, 51(e) above (**unapproved or unclaimed time representations**).

54. The Defendant acted in reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions, in that the Defendant, by reason of the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions:

(a) was not aware of, and did not investigate or verify contemporaneously, any assertion that the Plaintiff or Group Members had purportedly attended at work outside their ordinary hours of work other than during the periods of Rostered Overtime and ~~claimed~~ paid Unrostered Overtime;

(aa) did not create or retain documents, other than as required by law, that would enable the Defendant to investigate or verify the hours worked by the Plaintiff or Group Members, and had no opportunity to do so at a time proximate to when those hours are claimed to have been worked;

(b) was not aware of, and did not make any payment to the Plaintiff or Group Members in relation to, any purported attendance at work outside their ordinary hours of work other than during the periods of Rostered Overtime and ~~claimed~~ paid Unrostered Overtime; ~~and~~

(c) did not take steps that were available to the Defendant to reduce any such time being worked by the Plaintiff and Group Members; and~~.~~

(d) did not take into account the cost, or likely cost, of any Unrostered Overtime other than Rostered Overtime and ~~claimed~~ paid Unrostered Overtime for the purpose of the Defendant's processes for obtaining and allocating funds.

***Particulars of (c)***

*The steps that would have been available to the Defendant included:*

*(i) changing roster arrangements to reduce the possibility of Unrostered Overtime arising;*

*(ii) changing models of care and making operational changes in the delivery of health services, such as changing theatre scheduling arrangements, to address the causes of Unrostered Overtime, based on the information provided by the Plaintiff and Group Members in their claim forms;*

*(iii) employing or rostering more medical officers;*

*(iv) reallocating responsibility for some activities or functions to more senior doctors or other personnel;*

*(v) issuing directions in relation to working or not working Unrostered Overtime or performing or not performing particular activities, including changing the circumstances in which Unrostered Overtime was authorised without approval and approval processes;*

*(vi) planning, forecasting or budgeting for the Unrostered Overtime to ensure that the Defendant could meet any liability for Unrostered Overtime~~.~~;*

*(vii) if the Defendant had been informed that the Plaintiff or Group Member was working outside their ordinary hours of work other than for Rostered Overtime, telling them ~~to go home~~ not to attend or to leave work;*

*(viii) if the Defendant had been informed that the Plaintiff or Group Member had worked outside their ordinary hours of work other than for Rostered Overtime, telling them not to do so in the future.*

*Which steps would have been taken by the Defendant in respect of the Plaintiff and each Group Member, and when, will vary depending on the particular circumstances in which it is alleged that the Plaintiff and each Group Member worked Unrostered Overtime for which they were not paid, which have not been pleaded or particularised.*

*Generally, those steps would have been taken by the Defendant:*

*(ix) upon the Plaintiff or the relevant Group Member informing the Defendant that they were working or had worked outside their ordinary hours of work other than for Rostered Overtime, or otherwise corrected the unapproved or unclaimed time assumptions, by making a claim or otherwise;*

*(x) further or alternatively, upon the Defendant identifying a pattern of the Plaintiff or a Group Member working outside their ordinary hours of work other than for Rostered Overtime. Each individual's failure to correct the unapproved or unclaimed time assumptions, on each occasion on which they failed to do so, made a material contribution to this pattern being unknown to the Defendant, and therefore to the Defendant's reliance on the unapproved or unclaimed time representations.*

***Particulars of (d)***

*The relevant processes included:*

*(i) the process for obtaining funding for the NSW health system, where the amount of that funding is based on (among other things) evidence of past costs; and*

*(ii) budgeting and financial forecasting processes, by which the Defendant allocates resources based on past costs.*

54A. Further or in the alternative, the Plaintiff and the Group Members knew that the Defendant would, or intended the Defendant to, act in reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions as alleged in paragraph 54 above.

***Particulars***

*The Defendant refers to and repeats paragraphs 44 to 50 and 52(b) above.*

*With the knowledge and awareness referred to in paragraph 50 above, the Plaintiff and Group Members verified or had opportunity to verify timesheets and submitted claims for paid Unrostered Overtime as alleged in paragraphs 32(b) and 49, above with the intention of receiving payment for the time worked as recorded in the timesheets and paid Unrostered Overtime claims.*

55. To the extent the Plaintiff or Group Members engaged in the conduct in subparagraph 51(a) to ~~or~~ 51(b) above, it was reasonable for the Defendant to regard that conduct as amounting to the unapproved and unclaimed time representations, to make the unapproved or unclaimed time assumptions, and to rely on those assumptions as set out in paragraph 54 above, in circumstances in which the Plaintiff and Group Members:

(a) were obliged to comply with the Employee Arrangements Policy Directives and the requirements of their employment contracts in relation to obtaining approval for Unrostered Overtime other than pre-authorised Unrostered Overtime, and submitting claims for Unrostered Overtime, as set out in paragraphs 44 to 46 above;

(b) were informed of those obligations by the Defendant as set out in paragraphs 47 and 48 above;

(c) were capable of complying with those obligations as set out in paragraph 50 above; and

(d) were on notice of the Defendant's reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions.

***Particulars of (d)***

*The Plaintiff and Group Members were on notice including because:*

*(i) they were not paid in relation to any purported attendance at work outside their ordinary hours of work other than during the periods of Rostered Overtime and ~~claimed~~ paid Unrostered Overtime;*

*(ii) their day-to-day work was autonomous, such that they could not reasonably expect the senior staff with authority to approve or require Unrostered Overtime on behalf of the Defendant to have known they were working outside their ordinary hours unless they submitted a claim or otherwise brought that work to the Defendant's attention.*

56. The Defendant would suffer a detriment if the Plaintiff and Group Members were permitted to assert to the contrary of any of unapproved or unclaimed time assumptions, to the extent that any of those assumptions is incorrect (which is not admitted), being that:

(a) the Defendant would be required to make further payments to the Plaintiff and Group Members in relation to Unrostered Overtime;

(aa) further or alternatively, by reason of subparagraphs 54(a) and, further or alternatively, 54(aa) above, the Defendant lost the opportunity to investigate or verify any claims for Unrostered Overtime other than Rostered Overtime and ~~claimed~~ paid Unrostered Overtime at a time when records and recollections were available~~, and thereby to decline any claim that was not properly made~~;

(ab) further or alternatively, by reason of subparagraphs 54(a) and, further or alternatively, 54(aa) above, the Defendant has incurred and will incur costs seeking to reconstruct the Plaintiff's and Group Members' work days based on those records, to the extent any records are available for an accurate reconstruction to occur and given the purpose of many of those records is not to record hours worked, so as to investigate and verify any claimed Unrostered Overtime;

(b) further or alternatively, the Defendant has lost the opportunity to avoid all or some of the Unrostered Overtime by taking the steps referred to in subparagraph 54(c) above, which the Defendant ~~she~~ did not take in reliance on the unapproved or unclaimed time representations and the unapproved or unclaimed time assumptions; and~~.~~

(c) further or alternatively, by reason of subparagraph 54(d) above, the Defendant lost the opportunity to obtain further funding or otherwise allocate its financial resources to accommodate the Unrostered Overtime.

***Particulars of (b)***

*The detriment to the Defendant in respect of the Plaintiff and each Group Member, including when it arose, will vary depending on the particular circumstances in which it is alleged that the Plaintiff and each Group Member worked Unrostered Overtime for which they were not paid, which have not been pleaded or particularised.*

*Generally, the detriment would have arisen:*

*(i) from the first time the Plaintiff or a Group Member failed to correct the unapproved or unclaimed time assumptions when they should have done as set out in paragraph 52 above;*

*(ii) further or alternatively, from the first time a pattern would have been established of the Plaintiff or Group Member working outside ordinary hours other than Rostered Overtime.*

57. By reason of paragraphs 51 to 56 above, the Plaintiff and Group Members are estopped from asserting:

(a) that they were, or were required by the Defendant to be, in attendance at a hospital to carry out functions that they had been called upon to perform on behalf of the Defendant during any time other than Rostered Overtime or paid Unrostered Overtime ~~any such time~~;

(b) further or alternatively, that any attendance at a hospital during any such time was not of their own volition; and

(c) further or alternatively, that they worked any hours beyond those specified in their timesheets, which they were required to certify at the end of each pay period, or any claim they submitted for Unrostered Overtime within four weeks of the claimed Unrostered Overtime being worked or otherwise during the term of the employment contract in which they performed that work.

## SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

| | |
|---|---|
| Signature | |
| Capacity | Solicitor on the record |
| Date of signature | [date]2021 |

**AFFIDAVIT VERIFYING**

| | |
|---|---|
| Name | Dean Anthony Bell |
| Address | 1 Reserve Road, St Leonards |
| Occupation | Deputy General Counsel and Director Legal |
| Date | [date] 2021 |

I affirm:

1 I am the Deputy General Counsel and Director Legal, NSW Ministry of Health.

2 I believe that the allegations of fact contained in the defence are true.

3 I believe that the allegations of fact that are denied in the defence are untrue.

4 After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

AFFIRMED at

Signature of deponent _____

Name of witness

Address of witness

Capacity of witness

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent)**:

1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*

2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
#I have confirmed the deponent's identity using the following identification document:

_____
Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

---

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[†"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

Filed: 1 November 2021 10:48 PM

D0001HKVPL

# Written Submissions

## COURT DETAILS

| | |
|---|---|
| Court | Supreme Court of NSW |
| Division | Common Law |
| List | Common Law General |
| Registry | Supreme Court Sydney |
| Case number | 2020/00356588 |

## TITLE OF PROCEEDINGS

| | |
|---|---|
| First Plaintiff | Amireh Fakhouri |
| First Defendant | The Secretary for the NSW Ministry of Health<br>ABN 92697899630 |

## FILING DETAILS

| | |
|---|---|
| Filed for | The Secretary for the NSW Ministry of Health, Defendant 1 |
| Legal representative | KATHLEEN ANNE PLOWMAN |
| Legal representative reference | |
| Telephone | +61 2 9921 4891 |

## ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (2020-00356588 - Submissions on Leave application - 1 November - 2021.pdf)

[attach.]

**State of NSW and Secretary, NSW Health**

**ats Fakhouri**

# DEFENDANTS' SUBMISSIONS ON NOTICE OF MOTION

## A. Introduction

1. By notice of motion filed on 1 November 2021 the defendants seek leave to amend the defence to the amended statement of claim. The proposed amendments are marked up on the draft Amended Defence in Annexure A to the notice of motion.

2. The defendants also seek relief under section 166 of the *Civil Procedure Act 2005* (NSW) (**CP Act**) that the claims in respect of Group Members be struck out (or alternatively that the proceedings no longer continue as a representative proceeding under Part 10 of the CP Act), which the defendants contend is the necessary consequence of the amendments that rely on the operation of s 369(1) of the *Industrial Relations Act 1996* (NSW) (**IR Act**).

3. In support of the notice of motion the defendants rely on the affidavit of Kathleen Anne Plowman affirmed on 1 November, 2021 (**Plowman Affidavit**).

4. The plaintiff has indicated consent to a number of the proposed amendments on the basis of an order that the defendants pay the costs thrown away by reason of those amendments. Annexure KAP-1 of the Plowman Affidavit is a version of the proposed further amended defence setting out (with double underlining) those amendments that are consented to by the plaintiff and (with double underlining and highlighting) those that are not consented to.

5. In these submissions, Part B addresses the proposed amendments to the defence in paragraphs 1(aa) and 2(a)-(c) and the relief sought in respect of the representative claims on the grounds identified in those amendments; and Part C addresses the remaining amendments that are in dispute.

## B. The plaintiff's standing to represent group members

6. The plaintiff's claim is framed as an application under s 365 of the IR Act for the recovery of remuneration payable under the *Public Hospital Medical Officers (State) Award* (in each of the years 2014 – 2019): see Amended Statement of Claim filed 23 April 2021

(**AmSoC**), paras 1 and 2 of the "Relief Claimed".

7. Section 365 is in Part 2 ("*Recovery of remuneration and other amounts*") (ss 364-380) of Chapter 7 ("*Enforcement*") of the *Industrial Relations Act 1996*.

8. The plaintiff's claim is also framed as a representative proceeding under Part 10 of the CP Act. In para 1 of the AmSoC, the plaintiff pleads that she brings the proceedings under Part 10 in her own right and also "*on behalf of all persons who,at any time in the period from 16 December 2014 to 22 April 2021*" were employed in one or other of five identified positions (JMO, Intern, RMO, Registrar or Senior Registrar), were required to work in excess of their rostered ordinary hours (overtime), and were not paid all their entitlements for the overtime. Those persons are defined as the "*Group Members*" in the pleading.

9. Section 369 of the IR Act provides:

> (1) An application for an order under this Part for the payment of money may be made—
>
> (a) by the person to whom the money is payable, or
>
> (b) with the written consent and on behalf of that person—by an inspector, by a person employed in a Public Service agency or by an officer of an industrial organisation concerned in the industry to which the proceedings relate.
>
> (2) A single application may be made by a person for 2 or more orders against the employer. A single application may also be made by an officer of an industrial organisation for orders against an employer on behalf of 2 or morepersons.
>
> (3) An application for an order may only be made if the money became duewithin the period of 6 years immediately before the application was made.

10. The defendants contend that section 369(1) has the effect that it is not open to the plaintiff to bring representative proceedings for an order under Part 2 of Chapter 7 of the IR Act because it is not an application "*by an inspector, by a person employed in a Public Service agency or by an officer of an industrial organisation concerned in the industry to which the proceedings relate*" (and, further, there is no evidence that the plaintiff has the written consent of each of the persons she claims to represent). The plaintiff is not entitled to claim an order under s 365 of the IR Act for the payment of money to anyone but herself.

11. The defendants should be granted leave to amend the defence to rely on the operation of s 369 of the IR Act because:

    (a) the issue raised is fundamental to the constitution of the proceedings – if the plaintiff is not entitled to bring the application on behalf of others, the

proceedings are not properly constituted, or the plaintiff is not adequately able to represent the interests of group members;

(b) the issue was raised promptly after it was first identified by the legal representatives of the defendants: Plowman Affidavit at [17] - [20]; and

(c) the proceedings are at a relatively early stage.

12. Further, the substantive point should be considered and determined promptly, given the very significant consequences for the litigation if the defendants' contentions are upheld. The defendants understand that the Court has accepted that proposition and has fixed the issue for submissions on 1 December 2021.

13. For the reasons set out below, the contentions in paragraph 10 above ought to be accepted and orders made as sought in paragraphs 3 or 4 of the Notice of Motion.

14. Part 2 ("*Recovery of remuneration and other amounts*") (ss 364-380) of Chapter 7 ("*Enforcement*") of the IR Act provides for the recovery of remuneration and other amounts from employers in certain circumstances.

15. Section 365 provides:

> **365 Order for recovery of remuneration and other amounts payable under industrial instrument**
>
> An industrial court may, on application, order an employer to pay any amount payable under an industrial instrument that remains unpaid to the person to whom it is payable.

16. In that provision, an "*industrial instrument*" includes an award (s 8) and an "*industrial court*" is defined in s 364(1) as follows:

> ***industrial court*** means—
>
> (a) the Supreme Court, or
>
> (b) in the case of proceedings under section 380 (Small claims during other Commission proceedings)—the Commission, or
>
> (c) the Local Court constituted specially for the purposes of this Part by an Industrial Magistrate sitting alone.

17. While ss 365 and 369(1) are the provisions of the IR Act of central relevance, other provisions of Part 2 of Chapter 7 provide relevant statutory context.

18. Sections 366, 367 and 368 provide for other orders that an industrial court may, on application, make against an employer – namely, an order for recovery of over-award payments under a contract of employment (s 366); and order for recovery of payments not fixed by industrial instruments (s 367) and an order for recovery of unpaid superannuation (s 368).

19. Section 370 provides:

> **370 Making of order**
>
> (1) An industrial court may, on an application for an order under this Part, make such order as it considers just in the circumstances.
>
> (2) An order may be made despite any smaller payment or any express orimplied agreement to the contrary.
>
> **Note—**
>
> An order under this section may also be made in connection with proceedings for a contravention of an industrial instrument (see section 358) or, in the case of a small claim, in connection with other proceedings before the Commission (see section 380).

20. Section 371 provides that an industrial court is not to make an order under the Part until (for Supreme Court proceedings) "*the parties to the application for the order satisfy the Court that they unsuccessfully attempted to settle the matter by means of a conciliation conducted by the Commission*". The subsequent provisions provide for the industrial court to make orders in respect of interest (s 372), costs (s 373), amendments (s 374) and recovery of amounts ordered to be paid by the Local Court (s 375).

21. Section 376 provides:

> **376 Alternative proceedings for debt recovery in other courts**
>
> A person entitled to apply for an order for the payment of money under this Part may, instead of applying for such an order, recover the money as a debt in any court of competent jurisdiction.

22. Section 378 provides:

> **378 Payment where employee represented by industrial organisation**
>
> (1) This section applies to an order for the payment of money under this Part(except under section 368) where the proceedings were taken on behalf of the employee by an industrial organisation or one of its officers.
>
> (2) The amount ordered to be paid may be paid to the organisation or officerwho took the proceedings and a receipt by the organisation or officer for the payment is a sufficient discharge to the employer for the amount specified in the receipt.
>
> (3) Any amount so paid (less any costs properly incurred in connection withthe proceedings and not paid by the employer) must be held on trust forthe person on whose behalf the proceedings were taken.

23. Section 379 provides that a person making the application may request that the application be dealt with by an industrial court as a small claims application, in which case the industrial court is not bound by the rules of evidence and the parties cannot be legally represented unless the industrial court so approves. Section 380 permits an industrial organisation, during any proceedings before the Commission, to make an application for an order under the Part by way of a small claims procedure, which may

be dealt with by the Commission or remitted to an industrial court constituted by an Industrial Magistrate for determination.

24. Part 10 (ss 155-184) of the CP Act provides for representative proceedings in the Supreme Court. Part 10 was inserted into the CP Act in 2010 by the *Courts and Crimes Legislation Further Amendment Act 2010* and commenced operation on 4 March 2011. Section 157, 158 and 159 of the CP Act provide:

> **157 Commencement of representative proceedings**
>
> (cf s33C FCA)
>
> (1) Subject to this Part, where—
>
> (a) 7 or more persons have claims against the same person, and
>
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances, and
>
> (c) the claims of all those persons give rise to a substantial common question of law or fact,
>
> proceedings may be commenced by one or more of those persons asrepresenting some or all of them.
>
> (2) Representative proceedings may be commenced—
>
> (a) whether or not the relief sought—
>
> (i) is, or includes, equitable relief, or
>
> (ii) consists of, or includes, damages, or
>
> (iii) includes claims for damages that would require individual assessment, or
>
> (iv) is the same for each person represented, and
>
> (b) whether or not the proceedings—
>
> (i) are concerned with separate contracts or transactions between the defendant in the proceedings and individual groupmembers, or
>
> (ii) involve separate acts or omissions of the defendant done oromitted to be done in relation to individual group members.
>
> **158 Standing**
>
> (cf s33D FCA)
>
> (1) For the purposes of section 157 (1) (a), a person has a sufficient interest to commence representative proceedings against another person on behalf ofother persons if the person has standing to commence proceedings on the person's own behalf against that other person.
>
> (2) The person may commence representative proceedings on behalf of otherpersons against more than one defendant irrespective of whether or not the person and each of those persons have a claim against every defendant in the proceedings.
>
> (3) If a person has commenced representative proceedings, that person retains standing—

(a) to continue the proceedings, and

(b) to bring an appeal from a judgment in the proceedings,

even though the person ceases to have a claim against any defendant.

**159 Is consent required to be a group member?**

(cf s33E FCA)

(1) Subject to subsection (2), the consent of a person to be a group member is not required.

(2) None of the following is a group member in representative proceedings unless the person gives consent in writing to being so—

(a) the Commonwealth, a State or a Territory,

(b) a Minister of the Commonwealth, a State or a Territory,

(c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association,

(d) an officer of the Commonwealth, a State or a Territory, in his or hercapacity as an officer.

25. Section 155 sets out definitions of various terms used in Part 10, which include the following definitions:

***Court*** means the Supreme Court.

***defendant*** means a person against whom relief is sought in representativeproceedings.

***group member*** means a member of a group of persons on whose behalf representative proceedings have been commenced.

***proceedings*** means proceedings in the Court other than criminal proceedings.

***representative party*** means a person who commences representative proceedings.

***representative proceedings*** —see section 157.

26. The explanatory materials for the *Courts and Crimes Legislation Further Amendment Bill 2010*, which introduced Part 10 into the CP Act, do not contain anything that would assist in determining Parliament's intention in relation to the interaction between Part 10 and earlier legislative provisions conferring standing to recover amounts payable under the IR Act.

27. The relevant historical legislative materials in respect of the IR Act indicate that a version of the procedure in s 369 of the Act for an application on behalf of a person by an industrial representative was first introduced in 1943, by the *Industrial Arbitration (Amendment) Act 1943*. The provision was introduced alongside provisions intended to expand the industrial rights or powers of union members and industrial representatives.

There is otherwise not much elaboration in the historical legislative materials as to the purpose or intended operation of this provision.

28. Significantly, authorities that have considered comparable regimes indicate that the provisions ought be regarded as a code or an exclusive procedure for recovering money owed under an industrial agreement governed by the provisions. In particular, in *Josephson v Walker* (1914) 18 CLR 691 at 697 and 701, the High Court recognised that the provisions then before the Court (which may be regarded as precursor provisions to the current regime in the IR Act) provided a "*special mode of enforcing*" the right to payments in accordance with an award. That also reflects the general principle of statutory interpretation articulated in *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course, bringing with it different statutory constraints: see also *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR219 at [43].

29. The present issue may be addressed by adopting the analysis suggested in extrajudicial commentary of Leeming JA that resolving conflicts of laws is best analysed in two stages – "*The first stage is interpretative; the second involves the application of conflict resolution rules. In many cases, the first stage is the only stage: apparent conflict will be resolved as a matter of legal interpretation, so that there is no occasion to apply a conflict resolution rule*" – see Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011), section 1.4, p 7. The apparent conflict in the present case is that:

    (a) s 369(1) of the IR Act provides for two categories of applicant for an order under Part 2 for the payment of money, namely (a) the person to whom the money is payable; or (b) one or other of the three types of person mentioned in the subsection (inspector, Public Service agency employee, or officer of an industrial organisation) (which will be referred to as a person's industrial representative) who may apply "*with the written consent andon behalf of that person*";

    (b) ss 157-159 of the CP Act provide that in any civil proceedings in the Supreme Court in which the conditions in s 157(1) are satisfied, one or more of at least 7 persons who have a claim against the same person may commence proceedings representing some or all of them. Those provisions include a section stating that a person has a sufficient interest to commence representative proceedings on behalf of other persons if the person has

standing to commence proceedings on the person's own behalf (s 158(1)); and a provision that (subject to presently irrelevant exceptions) the consent of a person to be a group member is not required (s 159(1)). Further, as noted above, a group member is defined in s 155 as a member of a group of persons on whose behalf representative proceedings have been commenced.

30. Evidently, the relevant provisions here do conflict. The conflict arises from the initial words of subsection 369(1)(b), "*with the written consent and on behalf of that person*", and the stipulation of the three permitted types of industrial representative. The natural meaning of subsection (b) is that when an application for an order under the Part for the payment of money is made on behalf of another person, it is to be made by an industrial representative acting with the written consent of the person to whom the money is payable. That meaning of s 369(1)(b) conflicts with the CP Act provisions because the latter permit a representative party to commence representative proceedings in the Supreme Court (which the statute itself describes as proceedings brought "*on behalf of*" the group members) whether or not the representative party is an industrial representative and whether or not the industrial representative has the written consent of the person to whom the money is payable. The conflict arises from the IR Act identifying only one specific way in which an application for an order under Part 2 can be made on behalf of a person to whom the money is payable, whereas if the terms of Part 10 of the CP Act were applied they would authorise another, different way to bring an application on behalf of another person.

31. The issue here is as the Privy Council identified in *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538 at 553: "*The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject matter; is it to override the earlier statute incase of any inconsistency between the two; is it to add an additional layer of legislationon top of the pre-existing legislation, so that each may operate within its respective field?*".

32. It may be noted that there are no express words in either Act that establish a hierarchy between the provisions of Part 2 of Chapter 7 of the IR Act and the provisions of Part 10 of the CP Act in respect of an application to the Supreme Court for an order under Part 2 for the payment of money.

33. Nevertheless, in the present circumstances, the resolution of the conflict is clear.

34. Again to cite the analytical framework set out by Leeming JA, "*One recurring way of deriving a hierarchy between apparently conflicting provisions is by concluding that some provisions are general, others are specific, and giving primacy to the latter*"

(p 57).

35. In *Ombudsman v Laughton* (2005) 64 NSWLR 114 at [19], Spigelman CJ said:

> 19 The maxim of statutory construction *generalia specialibus non derogant* reflects an underlying principle that a legislature, which has created a detailed regime for regulating a particular matter, intends that regime to operate in accordance with its complete terms. Where any conflict arises with the general words of another provision, the very generality of the words of which indicates that the legislature is not able to identify or even anticipate every circumstance in which it may apply, the legislature is taken not to have intended to impinge upon its own comprehensive regime of a specific character.

36. The defendants submit that Spigelman CJ's phrase "*comprehensive regime of a specific character*" is an apt description of the provisions of Part 2 of Chapter 7 of the IR Act. As identified in the relevant provisions of Part 2 set out above, the Part provides for various specific orders that may be sought from an industrial court and a range of substantive and procedural provisions that regulate such proceedings – including how they are to be commenced, what orders may be made, what procedures must be followed (including the requirement to conciliate in the Commission before an order for payment is made), and the provisions even address how questions of interest and costs are to be dealt with. It remains an appropriate descriptor of Part 2 to say the provisions provide a special mode of enforcing claims for underpayment of award entitlements (*Josephson v Walker* (1914) 18 CLR 691 at 697 and 701), consistent with the special mode by which civil penalty proceedings may be brought under Part 1 of Chapter 7.

37. Accordingly, the circumstances here can be seen to involve an apparent conflict between provisions of the same legislature, the earlier provision dealing with what is a "*comprehensive regime of a specific character*" (see para 36 above), whereas the later provision is of a general character, in that it provides for representative proceedings in Supreme Court civil proceedings generally (that is, whether the claim is for equitable relief, or for damages; whether in tort or contract or under statute; and whatever the subject matter or industry involved in the proceedings).

38. It follows that in enacting the representative proceedings provisions in 2010, the State legislature is taken not to have intended to impinge upon (and significantly change) the regime for applications to an industrial court for an order under Part 2 of Chapter 7 of the IR Act for the payment of money. The provisions of Part 10 of the CP Act ought to be read down so as not to apply to proceedings regulated by Part 2 of Chapter 7 of the IR Act for the payment of money.

39. It follows that the plaintiff is not a person able to commence the proceedings

representing the group members for the purposes of s 157(1) of the CP Act or a person entitled to commence the proceedings on behalf of group members for the purposes of s 158 of the CP Act, because:

(a) she is neither an inspector, a person employed in a Public Service agency or an officer of an industrial organisation concerned in the industry to which the proceedings relate: Plowman Affidavit at [21] - [24]; and

(b) the proceedings being open class proceedings, she could not have the written consent of group members to bring the application on their behalf,

as required by s 369(1)(b) of the IR Act.

40. Section 157 of the CP Act is set out at paragraph 24 above. Section 166 of the CP Act relevantly provides:

> **166 Court may order discontinuance of proceedings in certain circumstances**
>
> (1) The Court may, on application by the defendant or of its own motion, order that proceedings no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because—
>
> (a) the costs that would be incurred if the proceedings were to continue as representative proceedings are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or
>
> (b) all the relief sought can be obtained by means of proceedings other than representative proceedings under this Part, or
>
> (c) the representative proceedings will not provide an efficient and effective means of dealing with the claims of group members, or
>
> (d) a representative party is not able to adequately represent the interests of the group members, or
>
> (e) it is otherwise inappropriate that the claims be pursued by means of representative proceedings.

41. The plaintiff's lack of standing to commence or maintain proceedings on behalf of the group members leads to the conclusion that (a) the proceedings were not properly commenced as a representative action for the purposes of s 157 of the CP Act; or (b) she is not able to adequately represent the interests of the group members for the purposes of s 166(1)(d) of the CP Act so that it is in the interests of justice for the proceedings to no longer continue as representative proceedings.

42. The proper order consequent on (a) above is that AmSoC should be struck out insofar as it seeks to pursue claims on behalf of the group members, or the proceedings insofar as they purport to represent the claims of group members should be stayed pursuant to s 67 of the CP Act: *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR

487; [2000] FCA 229 at [12], [21], [125]; *Bright v Femcare Ltd* (2002) 195 ALR 574; [2002] FCAFC 243 at [132], *Lloyd v Belconnen Lakeview Pty Ltd (No 2)* [2020] FCA 698 at [9], with an order pursuant to s 183 of the CP Act that the proceedings no longer continue as representative proceedings.

43. Alternatively, if the proceedings were properly commenced but the plaintiff has no authority to bring an application under s 365 of the IR Act so that she cannot adequately represent the group members' interests (s 166(1)(d)), it follows that the representative proceedings will not efficiently or effectively deal with the claims of group members (s 166(1)(c)) and it is inappropriate for the proceedings to continue as representative proceedings because they are inconsistent with the regime established by Part 2 of Chapter 7 of the IR Act (s 166(1)(e)).

44. In the circumstances outlined above it is in the interests of justice that the proceedings not continue as representative proceedings, because the interests of group members in pursuing their claims cannot as a matter of law be furthered by the plaintiff. That is an instance in which "*the inefficiency or inappropriateness of the claims as a representative proceeding will be so great that the only possible order is to 'de-class' the proceeding*": *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [131].

**C. Other amendments**

45. The power of the Court to order an amendment to a document in the proceedings, including a defence, are to be exercised so as to ensure that all necessary amendments are made for the purposes of determining the real questions raised by or otherwise depending on the proceedings: s 64(2) of the CP Act. Amendments will be "necessary" in this respect where they arise from the existing factual issues raised in the defence and represent a refinement or reformulation of an existing defence so as to clarify the issues that will be raised by the defendants at trial. Where amendments are of this nature they should be allowed where they are in the proper form, fairly arguable and where they will not cause such serious prejudice to the opposing party that they would occasion injustice: *TCN Channel Nine Pty Ltd v Antoniadis* (1998) 44 NSWLR 682 at 690-5, CP Act s 58(1)(a)(i) and (2).

46. The amendments to the defence that are sought to be made may be summarised as follows:

    (a) An allegation that, when it comes to considering whether the Plaintiff or Group Members were not paid for "time worked" for the purposes of the Awards, whether the Plaintiff or Group Members were required to work Unrostered

Overtime on each occasion will depend on the circumstances of each case (paragraphs 1(ba) and 23(a2)) which is relevant to the amendments to the estoppel case described in paragraph (c) below, and already pleaded in the existing pleading (see for example paragraph 24(a) of the amended defence);

(b) An allegation that the Plaintiff has not pleaded or particularised an amount payable under an industrial instrument that remains unpaid within the meaning of s 365 of the *Industrial Relations Act 1996* (NSW) (paragraph 42(a1)), which merely repeats, in respect of that paragraph, the same point already made in paragraphs 1(b), 13(b)(ii), 29(c), 32(c), 33(c), 34(b), 35(c), 36(b), 37(c), 38(b), and 39(c) of the amended defence; and

(c) Amendments to the assumptions and content of the estoppel alleged to be raised by the Plaintiff and Group Members' conduct, namely that, by failing to submit records of the time not claimed to have been worked, the Plaintiff and Group Members represented that the time worked was that recorded in the documents submitted in accordance with the obligations imposed by their contracts of employment, which caused the Defendants detriment due to the costs and time that will now be occasioned by investigating and verifying that the Unrostered Overtime claimed to have been worked (i) was in fact worked; and (ii) was worked at the Defendants' direction, so that the Plaintiff and Group Members are estopped from asserting that the time worked was other than as recorded in the documents they submitted (paragraphs 1(c)(ii)(B), 51(e), 54(aa) and (b), 54A, 56(ab) and 57(c)).

47. The Court should order that the amendments be made, for the following reasons.

48. *First*, the amendments are made for a proper purpose, are in the proper form and are not liable to be struck out. They are a refinement to the estoppel case already pleaded in the amended defence. The Plaintiff does not (and could not) suggest that the proposed amendments do not disclose a reasonable cause of action in the sense contemplated by *General Steel Industries Inc v Cmr for Railways (NSW)* (1964) 112 CLR 125. The Plaintiff cannot demonstrate that the proposed amendments are unarguable by raising a factual dispute in relation to them.[1]

49. *Second*, the amendments summarised in paragraph (c) do not involve a new cause of action or significant new area of dispute, nor do they substantially change the factual case the Plaintiff must meet, because the facts supporting the new estoppel pleading

[1] See Plowman Affidavit Annexure KAP-16

were already pleaded in the amended defence: see paragraphs 4B, 4D, 5(b), 17(b), 24(c) and (d), 25-27, 29(b), 32(a)-(b), 44(d), 45-50, 51(a)-(b), 54(a)-(b) and 55(aa). The only newly identified matters in those amendments are the Defendants' reliance on the submission of time sheets by the Plaintiff and Group Members in accordance with their obligations under the contract of employment (see paragraphs 51(e), 57(c), but see the obligations already pleaded at paragraphs 4B(f) and 4D(c)) and the detriment alleged to be suffered by the Defendants in the sense of the costs and burden of investigating and verifying the Unrostered Overtime claims pursued in the proceedings. Ms Plowman deposes to the emergence of this issue in the course of addressing the discovery to be ordered in the proceedings,[2] which explains why the amendments are sought to be made at this stage.

50. *Third,* the proceedings are presently at an early stage, in that orders for discovery are currently being formulated and no orders for service of the Plaintiff's evidence will be made until discovery is complete. The Plaintiff has not yet taken any steps in advancing her case that would occasion prejudice if the amendments were ordered. This is particularly so where the proposed amendments raise no new or unforeseen factual matters, but are rather another way of putting the estoppel defence based on the facts already disclosed in the amended defence. It could not be said that amendments of this nature would require any fresh notice to Group Members or be material to the Group Members' decision to opt out.

51. Accordingly, the Court should order that the balance of the amendments to the amended defence be made. The Defendants accept that it is responsible for the costs thrown away by reason of these amendments (if any).

Richard Lancaster SC

Elizabeth Raper SC

Catherine Gleeson

Dan Fuller

1 November 2021

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[2] Plowman Affidavit [12] and [13].

Filed: 18 November 2021 11:09 AM

D0001HU9QK

# NOTICE OF MOTION ACKNOWLEDGEMENT

## NOTICE OF MOTION RECEIVED

Your motion has been received and is being processed by the registry. This acknowledgement and its attachments should NOT be served.

## WHAT NEXT?

Once the motion has been processed, you will be able to see any orders made online. To do this, you should:

- Log in to the Online Registry
- Click on the name of the case on the case list page
- Click on the Judgments & orders tab

If your motion requires a listing, an order will be made to list the motion. If there is an order to list the motion, you will be required to download your sealed Notice of Motion and the relevant Notice of Listing and serve both of these on all parties. To do this, you should click on the Filed documents tab.

## COURT DETAILS

| | |
|---|---|
| Court | Supreme Court of NSW |
| Division | Common Law |
| List | Common Law General |
| Registry | Supreme Court Sydney |
| Case number | 2020/00356588 |

## TITLE OF PROCEEDINGS

| | |
|---|---|
| First Plaintiff | Amireh Fakhouri |
| First Defendant | The Secretary for the NSW Ministry of Health<br>ABN 92697899630 |

Form 20 (version 3)
UCPR 19.1

# NOTICE OF MOTION

| COURT DETAILS | |
|---|---|
| Court | Supreme Court of NSW |
| Division | Common Law |
| List | Common Law General |
| Registry | Supreme Court Sydney |
| Case number | 2020/00356588 |

| TITLE OF PROCEEDINGS | |
|---|---|
| Plaintiff | Dr Amireh Fakhouri |
| First defendant | The Secretary for the NSW Ministry of Health |
| Second defendant | The State of NSW |

| FILING DETAILS | |
|---|---|
| Prepared for | Plaintiff |
| Legal representative | Rebecca Gilsenan, Maurice Blackburn Lawyers |
| Legal representative reference | RXG/3052894 |
| Contact name and telephone | 02 9261 1488 |
| Contact email | rgilsenan@mauriceblackburn.com.au |

## PERSON AFFECTED BY ORDERS SOUGHT

**Plaintiff**

**The Secretary for the NSW Ministry of Health** and **State of NSW** (Defendants)

## HEARING DETAILS

This motion is listed at

**Note:** The plaintiff requests that the motion be dealt with at the interlocutory hearing listed before Garling J on 1 December 2021.

## ORDERS SOUGHT

1 The plaintiff be granted leave pursuant to s 64 of the *Civil Procedure Act 2005* (NSW) to file a further amended statement of claim in the form of Annexure A to this notice of motion.

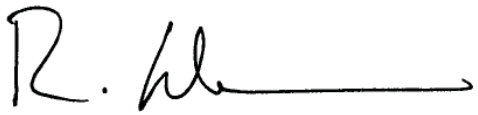
2 Further or in the alternative to order 1, the proceedings be transferred to the Federal Court of Australia (NSW Registry) pursuant to s 5(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

3 The defendants pay the plaintiff's costs of the notice of motion.

4 Such further or other orders as the Court considers appropriate.

## SIGNATURE

Signature of legal representative



| | |
|---|---|
| Capacity | Solicitor for the plaintiff |
| Date of signature | 18 November 2021 |

## NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

# Annexure A

Form 3A (version 7)
UCPR 6.2

## FURTHER AMENDED STATEMENT OF CLAIM

| COURT DETAILS | |
|---|---|
| Court | Supreme Court of New South Wales |
| Division | Common Law |
| List | General (Class Actions) |
| Registry | Sydney |
| Case number | 2020/00356588 |
| **TITLE OF PROCEEDINGS** | |
| Plaintiff | **Dr Amireh Fakhouri** |
| First Defendant | **The Secretary for the NSW Ministry of Health** |
| Second Defendant | **The State of New South Wales** |
| **FILING DETAILS** | |
| Filed for | **Dr Amireh Fakhouri**, Plaintiff |
| Legal representative | Rebecca Gilsenan, Maurice Blackburn Lawyers |
| Legal representative reference | RXG/3052894 |
| Contact name and telephone | Rebecca Gilsenan, (02) 8267 0959 |
| Contact email | rgilsenan@mauriceblackburn.com.au |

**TYPE OF CLAIM**

Contractual dispute (Common Law)
Breach of contract (employment related)

## RELIEF CLAIMED

1 A declaration pursuant to ss 23 and 75 of the *Supreme Court Act 1970* (NSW) and/ or s 355C of the *Industrial Relations Act 1996* (NSW) that the First Defendant has contravened the Awards (as defined in paragraph 3c below), by failing to pay the Plaintiff and Group Members all remuneration payable under the Awards.

2 In the alternative to Order 1, a declaration pursuant to ss 23 and 75 of the *Supreme Court Act 1970* (NSW) and/ or s 355C of the *Industrial Relations Act 1996* (NSW) that the Second Defendant has contravened the Awards (as defined in paragraph 3c below), by failing to pay the Plaintiff and Group Members all remuneration payable under the Awards.

3 An order against the First Defendant for recovery of remuneration payable under the Awards (as defined in paragraph ~~3b~~ 3c below) pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).

4 In the alternative to Order 3, an order against the First Defendant for recovery of a debt, being remuneration payable under the Awards (as defined in paragraph 3c below).

5 In the alternative to Order ~~1~~ 3, an order against the Second Defendant for recovery of remuneration payable under the Awards (as defined in paragraph ~~3b~~ 3c below) pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).

6 In the alternative to Order 5, an order against the Second Defendant for recovery of a debt, being remuneration payable under the Awards (as defined in paragraph 3b below).

7 An order that the First Defendant pay interest pursuant to section 100 of the *Civil Procedure Act 2005* (NSW) and/ or section 372 of the *Industrial Relations Act 1996* (NSW).

8 In the alternative to Order ~~3~~ 7, an order that the Second Defendant pay interest pursuant to section 100 of the *Civil Procedure Act 2005* (NSW) and/ or section 372 of the *Industrial Relations Act 1996* (NSW).

9 A declaration that any underpayment of ordinary rates of pay gives rise to obligations on the First Defendant pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth).

10 In the alternative to Order 5~~9~~, a declaration that any underpayment of ordinary rates of pay gives rise to obligations on the Second Defendant pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth).

11 Costs.

12 Such further or other order as the Court thinks fit.

## COMMON QUESTIONS, PLEADINGS AND PARTICULARS

### A. PLEADINGS

**PARTIES**

1 The Plaintiff brings this proceeding as a representative proceeding pursuant to Part 10 of *the Civil Procedure Act 2005* (NSW):

a. in her own right; and

b. on behalf of all persons who, at any time in the period from 16 December 2014 to ~~16 December 2020~~22 April 2021 (**Relevant Period**):

i. were employed by the ~~Defendant~~First Defendant, or in the alternative the Second Defendant, in the positions of:

1. Junior Medical Officer;

2. Intern;

3. Resident Medical Officer;

4. Registrar; and

5. Senior Registrar,

ii. were required to, from time to time, work in excess of their rostered ordinary hours (**Overtime**);

iii. were not paid all of their entitlements for the Overtime; and

iv. have not, as at the date of commencement of this proceeding, commenced proceedings against the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ in respect of the non-payment or underpayment of his or her full entitlements for the Overtime,

(**Group Members**).

2 The Plaintiff:

a. was employed by the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ from about January 2015 until about February 2017, and from about August 2017 until about February 2018 (**Fakhouri Employment Period**);

b. was employed in the positions of:

i. Intern from about January 2015 until about May 2016;

ii. Resident Medical Officer from about June 2016 until about February 2017; and

iii. Senior Resident Medical Officer from about August 2017 until about February 2018,

c. as pleaded below at paragraphs 31, 33, 35 and 37, was required to work, from time to time:

i. in accordance with a roster which provided for more than 80 hours of work in a fortnight (**Rostered Overtime**);

ii. in excess of her ordinary hours, other than as notified on the roster (**Unrostered Overtime**); and

iii. shifts which commenced before 08:00 or finished after 18:00, Monday to Friday, and shifts on Saturday and Sunday (**Paid Meal Break Shifts**),

d. as pleaded below at paragraph 39, was not paid her entitlements for the Rostered Overtime, the Unrostered Overtime and all hours rostered on the Paid Meal Break Shifts; and

e. has not, as at the date of commencement of this proceeding, commenced proceedings against the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ in respect of the non-payment or underpayment of her full entitlements for the Rostered Overtime, the Unrostered Overtime and the Paid Meal Break Shifts.

3 The Plaintiff and each Group Member were, at times during the Relevant Period:

a. taken to have been employed by the First Defendant ~~for the purposes of these proceedings~~;

**Particulars**

Section 116H of the *Health Services Act 1997* (NSW).

b. <u>further, and in the alternative to (a) above, taken to have been employed by the Second Defendant;</u>

**<u>Particulars</u>**

<u>Section 115(1) of the *Health Services Act 1997* (NSW).</u>

c. during the times that they were employed, they were covered by the:

   i. *Public Hospital Medical Officers (State) Award 2014*, in the period from 1 July 2014 until 30 June 2015;

   ii. *Public Hospital Medical Officers (State) Award 2015*, in the period from 1 July 2015 until 30 June 2016;

   iii. *Public Hospital Medical Officers (State) Award 2016*, in the period from 1 July 2016 until 30 June 2017;

   iv. *Public Hospital Medical Officers (State) Award 2017*, in the period from 1 July 2017 until 30 June 2018;

   v. *Public Hospital Medical Officers (State) Award 2018*, in the period from 1 July 2018 until 30 June 2019; and

   vi. *Public Hospital Medical Officers (State) Award 2019*, in the period from 1 July 2019,

   (collectively, the **Awards**),

d. entitled to the benefits of the Awards, at the relevant times;

e. entitled to be paid the salaries set out in the:

   i. *Health Professional and Medical Salaries (State) Award 2014*, in the period from 1 July 2014 until 30 June 2015;

   ii. *Health Professional and Medical Salaries (State) Award 2015*, in the period from 1 July 2015 until 30 June 2016;

   iii. *Health Professional and Medical Salaries (State) Award 2016*, in the period from 1 July 2016 until 30 June 2017;

   iv. *Health Professional and Medical Salaries (State) Award 2017*, in the period from 1 July 2017 until 30 June 2018;

   v. *Health Professional and Medical Salaries (State) Award 2018*, in the period from 1 July 2018 until 30 June 2019; and

vi. *Health Professional and Medical Salaries (State) Award 2019*, in the period from 1 July 2019,

f. entitled to the benefit of the Ministry of Health Circular No. 83/250 (**Circular**);

**Particulars**

Clause 10 of the Awards.

g. required to:

i. work in accordance with his or her rostered hours; and/ or

ii. perform work outside of the rostered hours.

4 The ~~Defendant~~First Defendant was, at all material times:

a. responsible for the management and oversight of NSW Health; and

b. the employer of each of the Group Members for the purposes of these proceedings.

**Particulars**

Section 116H of the *Health Services Act 1997* (NSW).

4A Further, and in the alternative to paragraph 4 above, the Second Defendant was, at all material times:

a. responsible for the management and oversight of NSW Health; and

b. the employer of each of the Group Members for the purposes of these proceedings.

**Particulars**

Section 115(1) of the *Health Services Act 1997* (NSW).

**THE AWARDS**

5 Pursuant to each of the Awards, the ordinary hours of work for the Plaintiff and each of the Group Members were not permitted to exceed an average of 38 hours per week.

**Particulars**

Clause 6(i) of each of the Awards.

6 Pursuant to each of the Awards, the Plaintiff and each of the Group Members was to be rostered to work no more than 80 ordinary hours in a fortnight.

**Particulars**

Clause 6(i) of each of the Awards.

Overtime

7 Pursuant to each of the Awards, all time worked by the Plaintiff and each of the Group Members in excess of 80 hours in a fortnight was to be paid as overtime (**Fortnightly Overtime**) at the following rates:

a. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;

b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and

c. at the rate of double time (200%) for all overtime performed on a Sunday.

**Particulars**

Clause 11(i) of each of the Awards.

8 Pursuant to each of the Awards, the Plaintiff and each of the Group Members was entitled to be paid at overtime rates for all time worked in excess of 10 hours in any one shift, irrespective of the total hours worked in the respective fortnight (**Daily Overtime**).

**Particulars**

Clause 6(v) of each of the Awards.

9 Pursuant to each of the Awards, all Daily Overtime worked by the Plaintiff and each of the Group Members was to be paid as overtime at the following rates:

a. at the rate of time and one-half (150%) for the first two hours worked in excess of 10 hours in any one shift;

b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 10 hours in any one shift; and

c. at the rate of double time (200%) for all hours worked in excess of 10 hours in any one shift on a Sunday.

**Particulars**

Clause 11(i) of each of the Awards.

Payment for meal breaks

10 Pursuant to each of the Awards, the First Defendant, or in the alternative the Second Defendant, was required to comply with the Circular in relation to meal breaks.

**Particulars**

Clause 10 of each of the Awards.

11 Pursuant to the Circular, the Plaintiff and each of the Group Members, whose shift commenced before 08:00 or finished after 18:00, Monday to Friday, was entitled to receive payment for all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift.

**Particulars**

Clause 2.2(ii) of the Circular.

12 In the premises pleaded above at paragraph 11, the Plaintiff and each of the Group Members, whose shift commenced before 08:00 or finished after 18:00, Monday to Friday, was entitled to receive payment for any meal breaks taken during that shift.

13 Pursuant to the Circular, the Plaintiff and each of the Group Members, who worked on Saturday or Sunday, was entitled to receive payment for all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift.

**Particulars**

Clause 2.2(ii) of the Circular.

14 In the premises pleaded above at paragraph 13, the Plaintiff and each of the Group Members, who worked on Saturday or Sunday, was entitled to receive payment for any meal breaks taken during that shift.

14A Payment for any meal breaks taken during shifts referred to in paragraphs 12 and 14 above which formed part of the employee's ordinary hours was to be paid at the Plaintiff's and each of the Group Members' ordinary rate of pay.

14B Ordinary rate of pay for the Plaintiff and each of the Group Members is "ordinary time earnings" for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

**UNROSTERED OVERTIME**

15 Pursuant to each of the Awards, the time during which the Plaintiff and each of the Group Members were, and are, required by the First Defendant, or in the alternative the Second Defendant, to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant, may call on them to perform is to be treated as time worked.

**Particulars**

Clause 9 of each of the Awards.

16 On each and every occasion where a Group Member, including the Plaintiff, was "treating a critically ill patient or a patient's condition ha[d] changed dramatically" at the completion of a Group Member's shift, the Group Member was required to work Unrostered Overtime until other adequate medical attention could be arranged.

**Particulars**

i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, as a circumstance in which each Group Member was required to work Unrostered Overtime in the First Defendant's, or in the alternative the Second Defendant's, policy directives:

1. PD2010_074, titled "Employment Arrangements for Medical Officers in the New South Wales Public Health System" (**2010 Policy Directive**), at clause 8.2.1;
2. PD2015_034, titled "Medical Officers – Employment Arrangements in the NSW Health Service" (**2015 Policy Directive**), at clause 9.2.1;
3. PD2016_059, titled "Medical Officers – Employment Arrangements in the NSW Public Health Service" (**2016 Policy Directive**), at clause 9.2.1;
4. PD2017_042, tiled "Employment Arrangements for Medical Officers in the NSW Public Health Service" (**2017 Policy Directive**), at clause 9.2.1; and
5. PD2019_027, titled "Employment Arrangements for Medical Officers in the NSW Public Health Service" (**2019 Policy Directive**), at clause 9.1.1.

17 On each and every occasion where a Group Member, including the Plaintiff, was "treating a patient who require[d] transfer", the Group Member was required to work Unrostered Overtime until the transfer process was complete.

**Particulars**

i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, ~~Defendant~~as a circumstance in which each Group Member was required to work Unrostered Overtime in clause:

1. 8.2.2 of the 2010 Policy Directive;
2. 9.2.2 of the 2015 Policy Directive;
3. 9.2.2 of the 2016 Policy Directive;
4. 9.2.2 of the 2017 Policy Directive; and
5. 9.1.2 of the 2019 Policy Directive.

18 On each and every occasion where a Group Member, including the Plaintiff, was "already working in theatre and the procedure continue[d] past the scheduled end of [the Group Member's] shift", the Group Member was required to work Unrostered Overtime until their responsibilities concluded.

**Particulars**

i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, ~~Defendant~~as a circumstance in which each Group Member was required to work Unrostered Overtime in clause:

1. 8.2.3 of the 2010 Policy Directive;
2. 9.2.3 of the 2015 Policy Directive;

3. 9.2.3 of the 2016 Policy Directive; and
4. 9.2.3 of the 2017 Policy Directive; and
5. 9.1.3 of the 2019 Policy Directive.

19 On each and every occasion where a Group Member, including the Plaintiff, was "responsible for the admission and/ or discharge of a patient at the completion of a shift", the Group Member was required to work Unrostered Overtime until their responsibilities concluded.

**Particulars**

i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, ~~Defendant~~ as a circumstance in which each Group Member was required to work Unrostered Overtime in clause:

1. 8.2.3 of the 2010 Policy Directive;
2. 9.2.4 of the 2015 Policy Directive;
3. 9.2.4 of the 2015 Policy Directive;
4. 9.2.4 of the 2017 Policy Directive; and
5. 9.1.4 of the 2019 Policy Directive.

20 On each and every occasion where a Group Member, including the Plaintiff, was unable to complete patient transfer/discharge summaries during their normal rostered hours and performed work outside of their rostered hours for this purpose, the Group Member was required to work Unrostered Overtime until the summaries were completed.

**Particulars**

i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

21 On each and every occasion where a Group Member, including the Plaintiff, was requested by a superior to attend a late ward round outside of their rostered shift, the Group Member was required to work Unrostered Overtime until the ward round was completed.

**Particulars**

i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

22 On each and every occasion when a Group Member, including the Plaintiff, worked Unrostered Overtime in one or more of the circumstances pleaded in paragraphs 16 to 21, or was otherwise required by the First Defendant, or in the alternative the Second Defendant, ~~Defendant~~to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ called on him or her to perform, the Group Member was required by the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ to be in attendance at a hospital.

23 In the premises, on each and every occasion when a Group Member, including the Plaintiff, worked Unrostered Overtime in one or more of the circumstances pleaded in paragraphs 16 to 21, or otherwise worked Unrostered Overtime as he or she was required by the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ called on him or her to perform, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to treat the Unrostered Overtime worked by the Group Member as time worked for the purposes of the Awards.

**Particulars**

Clause 9 of each of the Awards.

24 In the premises, on each occasion when a Group Member, including the Plaintiff, worked Unrostered Overtime in one or more of the circumstances pleaded in paragraphs 16 to 21, or otherwise worked Unrostered Overtime because he or she was required by the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second

Defendant,~~Defendant~~ called on him or her to perform, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to pay the Group Member for all Unrostered Overtime hours worked.

**UNDERPAYMENT**

25 The First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to pay the Plaintiff and each of the Group Members for all time worked by him or her in the period after 15 December 2014.

26 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members for all Fortnightly Overtime:

a. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;

b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and

c. at the rate of double time (200%) for all overtime performed on a Sunday.

27 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members for all Daily Overtime:

a. at the rate of time and one-half (150%) for the first two hours worked in excess of 10 hours in any one shift;

b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 10 hours in any one shift; and

c. at the rate of double time (200%) for all hours worked in excess of 10 hours in any one shift on a Sunday.

28 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members, whose shift commenced before 08:00 or finished after 18:00, Monday to Friday, for all hours worked, including any meal breaks taken during that shift.

29 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members, who worked on Saturday or Sunday, for all hours worked, including any meal breaks taken during that shift.

30 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work Unrostered Overtime so as to:

a. treat a critically ill patient or treat a patient whose condition had changed dramatically at the completion of a shift, until other adequate medical attention could be arranged;

b. treat a patient who required transfer, until the transfer process was complete;

c. complete a procedure in theatre where such a procedure continued past the scheduled end of a shift;

d. conclude responsibilities for the admission and/ or discharge of a patient at the completion of a shift;

e. complete patient transfer/discharge summaries which they were unable to complete during their normal rostered hours;

f. attend a late ward round outside of their rostered shift at the request of a superior; and/ or

g. be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ called on them to perform.

**Particulars**

i. Particulars will be provided after discovery.

ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

31 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work in excess of 80 hours in a fortnight.

**Particulars**

i. Particulars will be provided after discovery.

ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

32 In the premises pleaded above, on each occasion that the Plaintiff and each of the Group Members worked as set out in paragraphs 30 and 31 above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to

make payment to the Plaintiff and each of the Group Members for all Fortnightly Overtime:

a. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;

b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and

c. at the rate of double time (200%) for all overtime performed on a Sunday.

33 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work in excess of 10 hours in a shift.

**Particulars**

i. Particulars will be provided after discovery.

ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

34 In the premises pleaded above, on each occasion that the Plaintiff and each of the Group Members worked as set out in paragraphs 30 and 33 above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members for all Daily Overtime:

a. at the rate of time and one-half (150%) for the first two hours worked in excess of ten hours in any one shift;

b. at the rate of double time (200%) for all hours after the first two hours worked in excess of ten hours in any one shift; and

c. at the rate of double time (200%) for all hours worked in excess of ten hours in any one shift on a Sunday.

35 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work shifts which commenced before 08:00 or finished after 18:00, Monday to Friday.

**Particulars**

i. Particulars will be provided after discovery.

ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

36 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members, on each and every occasion when his or her shift commenced before 08:00 or finished after 18:00, Monday to Friday, for all hours worked, including any meal breaks taken during that shift.

37 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work shifts on Saturdays and Sundays.

**Particulars**

i. Particulars will be provided after discovery.

ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

38 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members, on each and every occasion when he or she worked on a Saturday or Sunday, for all hours worked, including any meal breaks taken during that shift.

39 In the period after 15 December 2014, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ did not pay the Plaintiff and each of the Group Members their full entitlements, for all time worked, pursuant to:

a. clause 6 of each of the Awards;

b. clause 10 of each of the Awards; and/or

c. clause 11 of each of the Awards.

40 By reason of the matters pleaded in paragraph 39 above, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ has contravened:

a. clause 6 of each of the Awards;

b. clause 10 of each of the Awards; and/or

c. clause 11 of each of the Awards.

41 In the premises, the Plaintiff and each Group Member were not paid their full entitlements pursuant to the Awards, and were thereby underpaid, in the period after 15 December 2014.

**Particulars**

The difference between the amount that the Plaintiff and each Group Member was entitled to receive for all time worked in the period after 15 December 2014, and the amount paid to the Plaintiff and each Group Member by the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ in the period after 15 December 2014.

42 In the premises, the Plaintiff and each of the Group Members are entitled to an order pursuant to section 365 of the *Industrial Relations Act 1996* (NSW) that the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ is obliged to compensate them for the underpayment of entitlements owed to them pursuant to the Awards.

42AA Further and in the alternative to paragraph 42 above, in the premises, the Plaintiff and each of the Group Members are entitled to an order under the general law for the recovery of debt against the First Defendant, or in the alternative the Second Defendant, being the underpayment of entitlements owed to them pursuant to the Awards.

42A During the Relevant Period, the First Defendant, or in the alternative the Second Defendant:

(a) in the premises pleaded in paragraphs 14A and 14B above, was required to include in the calculation of "ordinary time earnings" for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth) the payments that should have been made to the Plaintiff and Group Members in respect of meal breaks taken during shifts, which formed part of the employee's ordinary hours, where they had worked them as pleaded in paragraphs 35 and 37 above;

(b) did not comply with this requirement.

**COMMON QUESTIONS**

The questions of law or fact common to the claims of Group Members in this proceeding are:

43 Whether, on the proper interpretation of the Awards, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to pay each Group Member for:

a. all time worked by each of the Group Members in excess of 80 hours in a fortnight at the following rates:

i. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;

ii. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and

iii. at the rate of double time (200%) for all overtime performed on a Sunday.

b. all time worked in excess of 10 hours in any one shift, at overtime rates, irrespective of the total hours worked in the respective fortnight at the following rates:

i. at the rate of time and one-half (150%) for the first two hours worked in excess of 10 hours in any one shift;

ii. at the rate of double time (200%) for all hours after the first two hours worked in excess of 10 hours in any one shift; and

iii. at the rate of double time (200%) for all hours worked in excess of 10 hours in any one shift on a Sunday.

c. all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift, if his or her shift commenced before 08:00 or finished after 18:00, Monday to Friday; and

d. all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift, on Saturday or Sunday.

44 Whether in each of the following circumstances, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ required Group Members to be in attendance at a hospital for the purpose of carrying out and performing functions as called on by the First Defendant, or in the alternative the Second Defendant:~~Defendant:~~

a. treating a critically ill patient or patient whose condition had or has changed dramatically at the completion of the Group Member's shift;

b. treating a patient who required or requires transfer, until the transfer process was or is complete;

c. continuing to work in theatre where the procedure continued or continues past the scheduled end of the Group Member's shift;

d. completing the admission and/ or discharge of a patient at the completion of a shift, where the Group Member was or is responsible for that admission and/ or discharge;

e. completing patient transfer/ discharge summaries which were unable to be completed during their normal rostered hours;

f. attending a late ward round outside of their rostered shift at the request of a superior; and/or

g. being in attendance at a hospital, on request, for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ called on him or her to perform.

45 Whether, on the proper interpretation of the Awards, in each of the circumstances identified in paragraph 44, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ required Group Members to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ called on them to perform and should be treated as time worked within the meaning of clause 9 of each of the Awards.

46 Whether, on the proper interpretation of the Awards, the First Defendant, or in the alternative the Second Defendant,~~Defendant~~ was required to pay each Group Member for all hours that he or she worked outside of his or her rostered hours.

## SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

| | |
|---|---|
| Signature | |
| Capacity | Solicitor on record |
| Date of signature | 22 April 2021 |

## NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

1 **If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.

2 **If money is claimed, and you believe you owe the money claimed,** by:

- Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

3 **If money is claimed, and you believe you owe part of the money claimed**, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

| REGISTRY ADDRESS | |
|---|---|
| Street address | Law Courts Building, 184 Phillip Street, Sydney, NSW 2000. |
| Postal address | Supreme Court of NSW, GPO Box 3, Sydney, NSW 2001. |
| Telephone | 1300 679 272 |

**AFFIDAVIT VERIFYING**

| | |
|---|---|
| Name | Amireh Fakhouri |
| Address | 2 Stockyard Street, Truganina, Victoria 3029 |
| Occupation | Doctor |
| Date | 22 April 2021 |

I say on oath:

1 I am the plaintiff.

2 I believe that the allegations of fact in the amended statement of claim are true.

| | |
|---|---|
| SWORN at | 2 Stockyard Street, Truganina, Victoria 3029 |
| Signature of deponent | _____ |
| Name of witness | Jonathan Peck |
| Address of witness | Level 21, 380 La Trobe Street, Melbourne, Victoria 3000 |
| Capacity of witness | Solicitor |

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent)**:

1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]

#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.*

2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]

#I have confirmed the deponent's identity using the following identification document:

_____

Identification document relied on (may be original or certified copy) †

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

---

[* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[†"Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

## FURTHER DETAILS ABOUT PLAINTIFF

**Plaintiff**

| | |
|---|---|
| Name | Dr Amireh Fakhouri |
| Address | 2 Stockyard Street<br>Truganina Victoria 3029 |

**Legal representative for plaintiff**

| | |
|---|---|
| Name | Rebecca Gilsenan |
| Practising certificate number | 32587 |
| Firm | Maurice Blackburn Lawyers |
| Address | Level 32<br>201 Elizabeth Street<br>Sydney NSW 2000 |
| DX address | 13002 Sydney Market Street |
| Telephone | (02) 8267 0959 |
| Fax | (02) 9261 3318 |
| Email | rgilsenan@mauriceblackburn.com.au |

## DETAILS ABOUT DEFENDANT

**~~Defendant~~First Defendant**

| | |
|---|---|
| Name | Ms Elizabeth Koff<br>The Secretary for the NSW Ministry of Health |
| Address | 1 Reserve Road<br>St Leonards NSW 2065 |

**Second Defendant**

| | |
|---|---|
| Name | The State of New South Wales |
| Address | Crown Solicitor's Office<br>60 – 70 Elizabeth Street<br>Sydney NSW 2000 |

Filed: 18 November 2021 11:06 AM

D0001HU9M8

# Written Submissions

## COURT DETAILS

| | |
|---|---|
| Court | Supreme Court of NSW |
| Division | Common Law |
| List | Common Law General |
| Registry | Supreme Court Sydney |
| Case number | 2020/00356588 |

## TITLE OF PROCEEDINGS

| | |
|---|---|
| First Applicant | Amireh Fakhouri |
| First Respondent | The Secretary for the NSW Ministry of Health<br>ABN 92697899630 |

## FILING DETAILS

| | |
|---|---|
| Filed for | Amireh Fakhouri, Applicant 1 |
| Legal representative | REBECCA GILSENAN |
| Legal representative reference | |
| Telephone | 02 9261 1488 |

## ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (21.11.18 Plantiff's subs on defendants' NoM(401970896.1).pdf)

[attach.]

***FAKHOURI v SECRETARY, NSW MINISTRY OF HEALTH & ANOR***

**NSW SUPREME COURT, CASE NO. 2020/00356588**

**PLAINTIFF'S SUBMISSIONS ON THE NOTICE OF MOTION**

## I. INTRODUCTION

1. Aside from the proposed amendments to the Defence described at DS [45]-[51] (addressed at [32]-[38] below), the defendants' interlocutory applications all hinge upon a single argument of statutory construction: that s 369 of the *Industrial Relations Act 1996* (**IR Act**) precludes the plaintiff from bringing representative proceedings under Pt 10 of the *Civil Procedure Act 2005* (**CP Act**) to enforce rights sourced in s 365 of the IR Act.

2. For the reasons explained below, that argument should be rejected. Properly construed, ss 365 and 369 of the IR Act can operate concurrently with Pt 10 of the CP Act, because s 369 is a facultative provision that establishes, non-exhaustively, two procedural avenues for vindicating rights under s 365. The claims brought by the plaintiff on behalf of group members do not invoke s 369. They rely on the separate mechanism created by ss 157-159 of the CP Act. Alternatively, any conflict between these two statutory regimes should be resolved in favour of Pt 10 of the CP Act, the later-enacted provisions that prescribe a comprehensive scheme dealing with the topic of representative proceedings in the Supreme Court. On either basis, the defendants' interlocutory applications should be dismissed with costs.

3. If, contrary to the plaintiff's submissions, the Court accepts the defendants' construction arguments, it should grant the relief sought in the plaintiff's notice of motion filed 18 November 2021. Specifically, leave should be granted to amend the Amended Statement of Claim (**ASOC**) to invoke two alternative causes of action that are unaffected by s 369 of the IR Act; alternatively, the matter should be cross-vested to the Federal Court, where the procedural barrier relied upon by the defendants would not operate.

## II. SECTION 369 OF THE *INDUSTRIAL RELATIONS ACT 1996* (NSW)

4. Before turning to the proper construction of s 369 of the IR Act and ss 157-159 of the CP Act, there are two points that require emphasis.

5. *First*, the defendants should have raised any issues concerning the proper constitution of the proceedings under Pt 10 of the CP Act at the initial case conference: Practice Note SC Gen 17 at [7.1]. They did not. Rather, the defendants' counsel indicated at that case conference that there was no dispute on this question (T11/02/21 p2 lns 32-

36), and the defendants allowed the case to progress for approximately 9 months from the date the proceedings were filed, through the close of pleadings and the completion of the opt-out process, before belatedly raising the argument of statutory construction on which they now rely. The explanation for delay given in the affidavit of Kathleen Anne Plowman affirmed 1 November 2021 – that the defendants' legal team only identified s 369 of the IR Act after reviewing a fact sheet prepared by ASMOF ([18]-[19]) – is inadequate. These matters are relevant to the Court's consideration of the plaintiff's motion, and the appropriate costs orders arising from the defendants' notice of motion.

6. *Secondly*, the relief the defendants seek is too broad even if they are correct on the construction question. The ASOC pleads causes of action to which s 369 of the IR Act is irrelevant on any view – most notably, the claim for declarations concerning entitlements under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SG Act** and **SG Act claim**): see prayers 5-6, [42A]. The defendants do not, and cannot sensibly, contend that this claim is an "application for an order under [IR Act Ch 7 Pt 2] for the payment of money" (s 369(1)). Thus, at least with respect to the SG Act claim, there cannot be any dispute that the proceedings are properly constituted as representative proceedings (cf DS [41]-[42]). That brings into sharper relief the consequences of the defendants' argument: the plaintiff may run the case (and obtain a binding judgment: CP Act, s 179) for the group members concerning the defendants' contraventions of the awards that ground the *SG Act claim*, but the related award breaches that give rise to underpayment claims pursuant to s 365 must be litigated individually by 23,851 junior doctors[1] or by an industrial organisation with those persons' written consent. Happily, s 369 of the IR Act does not require that unattractive result.

*Sections 365 and 369 of the IR Act can operate concurrently with Pt 10 of the CP Act*

7. The defendants are quick to conclude that there is an "evident … conflict" between s 369 of the IR Act and ss 157-159 of the CP Act (DS [30]). However, as the High Court explained in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***) at [70]:

> [w]here conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.

[1] See affidavit of Kathleen Plowman affirmed 13 August 2021 at [15].

8. That foundational principle of construction applies whether the provisions to be reconciled are found in the same statute or in different statutes enacted by the same legislature: see, eg, *Re Maritime Union; Ex parte CSL Pacific Shipping* (2003) 214 CLR 397 at [28]-[29]. Thus, where it is possible to construe apparently conflicting provisions of two Acts to have separate spheres of concurrent operation, the Court should do so: Herzfeld and Prince, *Interpretation* (2nd ed, 2020) (**Herzfeld and Prince**) at [11.130].

9. In the present case, the relevant provisions can readily be interpreted to yield that result. Section 369 of the IR Act sets out certain procedures for bringing claims in an industrial court to enforce the rights conferred by s 365. Part 10 of the CP Act sits on top of that regime (as it does for any cause of action), expanding the arsenal of court procedures available to a plaintiff where the tests in ss 157-158 are satisfied. These provisions can and should be reconciled by recognising that they address different routes by which underpayments may be recovered from employers:

   (a) application by the employee (IR Act, s 369(1)(a));

   (b) application by an inspector, person employed in a Public Service agency or officer of a relevant industrial organisation, with the employee's written consent (IR Act, s 369(1)(b)); and

   (c) where there are 7 or more employees with claims under s 365 against the same employer, application by one or more of those persons as representing some or all of them (CP Act, s 157(1)).

10. *First*, this follows from the text of the sections in question. The legal *right* to repayment of amounts owing under industrial instruments is conferred by s 365 of the IR Act.[2] Section 369 deals with a different topic – namely, procedures for *enforcing* the right in s 365, beyond the ordinary processes for recovery of a debt (as to which see s 376). The language of s 369(1) is permissive: an application "may be made". There is no reason to read "may" as "must", such that rights under s 365 can *only* be enforced by making the applications prescribed therein. On the contrary, the structure and content of s 369(1) indicates that the section is facultative not exhaustive: it is designed to expand the procedural avenues for obtaining relief in favour of underpaid employees. The persons who may apply for that relief extend beyond the employees themselves (s 369(1)(a)) to (inter alia) an officer of an industrial organisation on behalf of, and with the written

[2] That provision simultaneously confers jurisdiction on an industrial court (as defined in s 364) to enforce the entitlement – and, as such, is a "double function" provision: see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 155, 165-167.

consent of, one or more employees (s 369(1)(b)). Nothing in the statutory text requires that statutory expansion to be construed as an exhaustive statement of the available enforcement procedures; see, by contrast, s 486B(4)-(5) of the *Migration Act 1958* (Cth). Nor do any of the surrounding provisions (cf DS [17]-[23]). The fact that s 369(1)(b) identifies "only one specific way" (DS [30]) that the named persons can bring an application on behalf of an employee is very far from a prescription that no other procedure, including a bespoke mechanism for representative proceedings established under another statute, can be invoked to vindicate a s 365 claim. The contrary contention that this is the "natural meaning" of s 369(1)(b) (DS [30]) ignores the word "may".

11. The defendants appear to rely on an interpretive presumption that, where Parliament has in the same statute created a new right and a mode of enforcing it, that mode is exclusive: *Josephson v Walker* (1914) 18 CLR 691 (***Josephson***) at 697, cited at DS [36]. But "on examination of the legislation, the legislative intention may be found to be different" (*Josephson* at 701). Here, it is evident from (*inter alia*) s 376, which expressly contemplates recovery of entitlements under s 365 through other procedures and causes of action, that this is not a scenario where "the right and the remedy are inseparable" (*Josephson* at 702). The present case is broadly analogous to *Gall v Domino's Pizza Enterprises Ltd (No 2)* [2021] FCA 345, in which Murphy J rejected the argument that a claim under s 236 of the *Australian Consumer Law* (**ACL**) was unavailable to the applicant and group members. In response to the contention that the *Fair Work Act 2009* (Cth) created a code for the enforcement of rights under modern awards by establishing statutory entitlements together with remedies ([34]-[36]), Murphy J said (at [67]):

> [T]he FW Act does not state that it operates as an exclusive code. It does not, in terms, set up a regime under which the only means by which a party can obtain redress for a loss which is measured by reference to the gap between wages due under an industrial instrument and the amount they were actually paid, is under the FW Act. Nor does the FW Act state in terms that a person cannot commence an action under the ACL, against a person other than his or her employer, for such loss and damage.

12. Emphasising the strong "presumption that the legislature intended that the provisions of both Acts should operate" (at [71]), his Honour did "not consider the express words of the FW Act" to "reveal a Parliamentary intention to somehow limit the operation of ss 52 and 82 of the ACL to the extent of any inconsistency or where there was relevant overlap" (at [73]).

13. As to Pt 10 of the CP Act, the broad language of ss 156-159 clearly authorises a person with entitlements under s 365 to bring a representative proceeding on behalf of other similarly situated employees. Part 10 applies to any "proceedings" (defined in s 155 as

any civil proceedings in the Supreme Court) commenced after the commencement of s 156, whenever the cause of action arose (s 156). Here, the plaintiff and group members all have claims against the defendants; their claims all arise out of the circumstances of the alleged underpayments of junior doctors described in the ASOC; and the claims give rise to the substantial common questions of law or fact identified in the ASOC as the "common questions" (CP Act, s 157(1)). As such, "proceedings may be commenced" by the plaintiff "as representing" the group members (s 157(1)). That is so even though group members' claims include "claims for damages that would require individual assessment" (s 157(2)(a)(iii)), and involve "separate acts or omissions" of the defendants "done or omitted to be done in relation to individual group members" (s 157(2)(b)(ii)). The fact that the plaintiff is entitled to seek enforcement of her rights under s 365 on her own behalf gives her sufficient interest to commence these proceedings in a representative capacity (s 158(1)), and the consent of the group members is not required (s 159(1)). Should it ultimately prove necessary to address certain issues separately, the regime provides for the determination of questions that are not common to all group members, the appearance of individual group members for that purpose, and/ or the commencement of separate proceedings (ss 168-170).

14. *Secondly*, the proposition that s 369 of the IR Act does not exclude the procedures available under Pt 10 of the CP Act is supported by the broad grants of jurisdiction in the IR Act and the CP Act. As to the IR Act, s 355B confers jurisdiction on the Supreme Court over all proceedings for the exercise of the Court's functions under any industrial legislation (see ss 355B(k) and 355A), including (inter alia) proceedings for the recovery of money under s 365 and other provisions of Ch 7 Pt 2 (s 355B(h)). It is to be presumed that Parliament intended for this conferral of jurisdiction to be applied in accordance with the "general system of law" (*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [64]), and to bring "with it the usual incidents of the exercise of jurisdiction by the Supreme Court" (*Gypsy Jokers v Commissioner of Police* (2008) 234 CLR 532 at [19]) – which, since 2010, has included the architecture for representative proceedings erected by Pt 10 of the CP Act. The procedural entitlement to bring representative proceedings is just as much an incident of the Court's usual exercise of jurisdiction as the liability to appeal, which "travels with" the court in the absence of clear legislative intention to the contrary: see *Mansfield v DPP (WA)* (2006) 226 CLR 486 at [7]. Further, it would be a very odd result for the procedures available in the Court's exercise of s 355B jurisdiction in, eg, proceedings for declarations of right (s 355B(f)), or "other industrial proceedings" (s 355B(k)), to differ from those

available in enforcing entitlements conferred by s 365 (s 355B(h)) – but that would be the result of the defendants' construction of s 369.

15. The same principles bring about the same result from the opposite end. "Like other provisions conferring jurisdiction upon or granting powers to a court, Pt IVA" of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) – and, by analogy, Pt 10 of the CP Act – "is not to be read by making implications or imposing limitations not found in the words used": *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (***Wong***) at [11]; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421. There is no basis for reading down the clear language of ss 156-159 of the CP Act to exclude claims invoking s 365 of the IR Act from the scope of the "proceedings" that the Supreme Court may entertain under Pt 10 (cf DS [38]).

16. *Thirdly*, the character of Pt 10 as supplementing, rather than conflicting with, separate procedures established under other statutes is borne out by the kinds of claims that have proceeded in the form of class actions:

    (a) In *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 (affirmed in *Ethicon Sàrl v Gill* (2021) 387 ALR 494), the applicants brought proceedings under Pt IVA of the FCA Act (at [13]), alleging claims under (inter alia) s 75AD of the *Trade Practices Act 1975* (**TPA**). Section 75AD relevantly provided that, if "an individual" suffers injuries due to defective manufacture of goods, "the corporation is liable to compensate the individual" for loss and "*the individual* may recover that amount by action against the corporation" (see at [3161], emphasis added).

    (b) Similarly, in *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, the appellant brought a representative claim under Pt 10 of the CPA, relevantly under ss 267(3) and (4) of the ACL for breaches of statutory guarantees: *Scenic Tours Pty Ltd v Moore* (2018) 361 ALR 456 at [3], [11]. Pursuant to those subsections, "*the consumer may*, by action against the supplier, recover damages" (emphasis added).

    (c) And in *Wotton v Queensland (No 5)* (2016) 352 ALR 146, the applicants brought representative proceedings under Pt IVA of the FCA Act by virtue of s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) (see at [14]), which entitles "any person who was an affected person" (defined as a person on whose behalf the complaint was lodged: s 3) in relation to a terminated complaint to "make an application" to the court alleging unlawful discrimination.

    Neither the parties nor the courts adjudicating these claims suggested that the statute's conferral of procedural entitlements on an "individual", "consumer" or "person"

precluded a plaintiff acting in a representative capacity from vindicating the relevant statutory rights.

17. For these reasons, the representative proceedings brought by the plaintiff are properly constituted (cf DS [39]-[43]). The defendants' interlocutory applications should be dismissed on that basis.

*Alternatively, s 369 of the IR Act yields to Pt 10 of the CP Act to the extent of any conflict*

18. If (contrary to [7]-[17] above) there is a conflict between s 369 of the IR Act and ss 156-159 of the CP Act, that conflict should be resolved by treating the latter as the "leading provisions" (*Project Blue Sky* at [70]) to which the former must give way.

19. Like Pt IVA of the FCA Act, Pt 10 of the CP Act "creates new procedures and confers upon the [Supreme Court] new powers in relation to the exercise of jurisdiction with which it has been invested by another law made by the Parliament": *Wong* at [1]. The "legislative policy underlying group proceedings" is "to avoid multiplicity of actions, and to provide a means by which, where there are many people who have claims against a defendant, those claims may be dealt with, consistently with the requirements of fairness and individual justice, together": *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [12]. Speaking of s 33C of the FCA Act, which is identical to s 157 of the CP Act, the High Court noted in *Wong* (at [12]) that this provision "attempts to resolve issues which bedevilled representative procedures as they had been developed, particularly by courts of equity". For example, where each member of a class had a distinct demand in equity (eg for misrepresentation arising from a prospectus), individual actions would be required given that (eg) the "case of each person deceived would be peculiar to himself and would depend upon its own circumstances": *Wong* at [14]. In other words, Pt IVA of the FCA Act is directed towards the very circumstance in which the procedures otherwise applicable for enforcement of a right do not permit group claims.

20. The later-enacted Pt 10 of the CP Act "emulated Pt IVA" and pursued the same objectives "through the regime for representative proceedings tailored to address these defects in the law": *BMW Australia Ltd v Brewster* (2019) 374 ALR 627 at [82].[3] The statutory intention to make the new representative procedures accessible even where (and, indeed, especially where) the law otherwise applicable to the suit only entitle individuals to bring personal actions is clear from s 157(2) of the CP Act. That subsection expressly provides

[3] See also the second reading speech for the Courts and Crime Legislation Further Amendment Bill 2010 (NSW) (Hansard, NSW Legislative Council, 24 November 2010), stating that new Pt 10 was "substantially modelled on part IVA of the [FCA Act]".

that representative actions can be brought in the classic circumstances in which courts historically considered them to be unavailable.[4] Consistent with Pt 10's evident legislative purpose, s 157 should be broadly construed: *Dyczynski v Gibson* [2020] FCAFC 120 at [165] (addressing s 33C of the FCA Act).

21. Against this backdrop, it is not correct to characterise Ch 7 Pt 2 of the IR Act as the more "specific" principles that should be given "primacy" over Pt 10 of the CP Act on an application of the *generalia specialibus non derogant* maxim (cf DS [34]-[37]). To the contrary, Part 10 is a scheme enacted by the Parliament as a comprehensive statement of the law on the specialised topic of procedures for bringing representative claims in NSW. There is no warrant for reading it down to prevent it from doing that work. Cutting down Part 10's operation by the application of other State laws that prescribe a more limited subset of procedures for bringing claims would be wholly inconsistent with the text and purpose of ss 156-159. It would defeat Part 10's central function of rectifying the "defects in the law" that precluded the bringing of group proceedings in the first place. Section 4(5) of the CP Act, relevantly providing that the Act "does not limit the operation of any other Act with respect to the conduct of civil proceedings", does not require any different conclusion. Section 4(5)'s language is not readily applicable in a situation where s 369 of the IR Act itself imposes limits which Part 10 of the CP Act purports to broaden. In other words, assuming s 369 to be a law "with respect to the conduct of civil proceedings", Part 10 does not limit it; rather it expands upon the remedial mechanisms available in respect of s 365. In any event, s 4(5) "cannot of itself preclude the balance of the statute being regarded as laying down 'a set of principles to cover the relevant field. . .'": *Bevan v Coolahan* (2019) 101 NSWLR 86 at [90]-[91] (addressing the similarly worded s 3A of the *Civil Liability Act 2002* (NSW)).

22. Finally on this topic, Part 10 of the CP Act was enacted in 2010 by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) and commenced in 2011. Section 369 was contained in the IR Act from that statute's enactment in 1996 and has been left materially unamended since.[5] Applying the principles of implied repeal, if the two sets of provisions cannot stand or live together, the earlier in time (s 369) should be subordinated to the later in time (ss 156-159): see Herzfeld and Prince at [11.120]-[11.130], citing, eg,

[4] As to the historical inability to bring representative proceedings for the recovery of damages (cf CP Act, s 157(2)(a)(iii)), see, eg, Australian Law Reform Commission Report No 46, *Grouped Proceedings in the Federal Court* (1988) at [5], [41]-[42].

[5] Only one amendment has been made to s 369 since its enactment. By Act No 58 of 2015, the words "a person employed in a Public Service agency" were substituted for the words "an officer of a Government Department" in s 369(1)(b).

*Shergold v Tanner* (2002) 209 CLR 126 at [34]-[35].

23. On this alternative basis, the defendants' interlocutory applications should be dismissed.

*Relief sought by the plaintiff if her construction arguments are not accepted*

24. Against the possibility that this or another court might accept the defendants' construction arguments concerning s 369 of the IR Act, the plaintiff seeks the interlocutory relief sought in her notice of motion filed 18 November 2021. She submits that:

    (a) leave should be granted to amend the ASOC to invoke two alternative causes of action that are unaffected by s 369 of the IR Act; and alternatively

    (b) the matter should be cross-vested to the Federal Court, where the procedural barriers relied upon by the defendants would not operate.

25. ***Amendments to the ASOC:*** The plaintiff applies for leave to amend her statement of claim under s 64 of the CP Act, to plead the following additional causes of action and associated relief:

    (a) debt recovery, brought under the general law, in respect of the amounts to which the plaintiff and group members are entitled under s 365 of the IR Act; and

    (b) declarations of right concerning group members' entitlements under the relevant awards, brought pursuant to ss 23 and 75 of the *Supreme Court Act 1970* (NSW) and/ or s 355C of the IR Act.

26. The proposed amendments are marked up on the draft Further Amended Statement of Claim in Annexure A to the plaintiff's notice of motion. These amendments arise from the same facts as those underpinning the causes of action already pleaded in the ASOC.

27. If the Court grants leave, these amendments will be taken to have effect as from the date on which the proceedings were commenced unless the Court otherwise orders: CP Act, ss 65(2)(c) and (3). There is no reason to displace the usual position here, particularly having regard to the late stage at which the defendants have raised the statutory construction issues to which these amendments are directed (approximately 9 months after the plaintiff filed proceedings, 6 months after the defendants filed their defence, and after the conclusion of the opt-out process).

28. ***Cross-vesting application:*** For the reasons given below, the plaintiff seeks, in the alternative to dismissal of the defendants' motion and allowance of the plaintiff's motion, an order under s 5(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (**CV Act**) for the proceedings to be transferred to the NSW Registry of the Federal Court. Upon the transfer, the proceedings would be treated as having been brought under Pt IVA

of the FCA Act: see *Wileypark Pty Ltd v AMP Ltd* (2018) 265 FCR 1 at [37].

29. These proceedings are in federal jurisdiction. They are a suit between a resident of one State (Victoria) and another State (NSW), and they seek enforcement of a right created by federal law (the SG Act)): Constitution, ss 75(iv), 76(ii). The NSW Parliament is constitutionally incapable of legislating to affect the exercise of federal jurisdiction by a State court: *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***) at [58]-[62]. As such, s 79 of the *Judiciary Act 1903* (Cth) picks up the text of State laws governing the exercise of State jurisdiction and applies that text as Commonwealth law "to govern the manner of exercise of federal jurisdiction": *Rizeq* at [63]. By that route, the provisions of the CP Act relating to representative proceedings are picked up and applied to the Supreme Court in this case as surrogate federal law: *Scenic Tours Pty Ltd v Moore* (2018) 361 ALR 456 at [31] (overturned on appeal, but not on this issue). The same is true of s 365 of the IR Act. Whilst that provision creates a substantive right, it also confers jurisdiction and powers on a court – meaning that it falls into the category of State laws that "regulate or govern the court's authority to decide" (*Masson v Parsons* (2019) 266 CLR 554 (***Masson***) at [67]) which can only apply in federal jurisdiction through the operation of s 79. And the same is also true of s 369.

30. Critically for present purposes, if these proceedings were before the Federal Court sitting in NSW, the defendants would not be able to rely on s 369 of the IR Act to defeat the plaintiff's representative claim. This is borne out by the following chain of reasoning:

    (a) In the Federal Court proceedings, Pt 10 of the CP Act would not be picked up and applied by s 79 of the Judiciary Act because Commonwealth law, in the form of the substantially identical Pt IVA of the FCA Act, "otherwise provides" (s 79(1)). Like the equivalent provisions of Pt 10, Pt IVA of the FCA Act states that a person may commence representative proceedings if the tests in s 33C(1) are satisfied; that a representative applicant with a sufficient interest to commence the proceedings on his or her own behalf has a sufficient interest to commence the representative proceedings (s 33D(1)); and that the consent of a person to be a group member is not required, with presently immaterial exceptions (s 33E(1)).

    (b) Section 365 of the IR Act would be picked up and applied by s 79. The fact that s 365 is on its face directed towards "industrial courts", defined in s 364 as (relevantly) the Supreme Court, does not alter that result. "[A] State statute may be applicable as a source of rights and remedies in federal jurisdiction even though, on its own terms, that law identifies only the courts of the enacting State as the courts

to provide those remedies": *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 (***Edensor***) at [68]; see similarly *Northern Territory v GPAO* (1999) 196 CLR 553 at [34]. Put another way, s 365 is not "inapplicable" for the purposes of s 79 simply because, on its proper construction, it was intended to apply only to NSW courts: *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88. Thus, the Federal Court, "seized … of jurisdiction in the matter, [would] not lack the power to make the orders" described in s 365: *Edensor* at [80].

(c) The question then arising is: how, if at all, would s 369 operate? Section 369 is not a State law that applies of its own force, independently of anything done by a court, as part of the single composite body of law operating throughout the Commonwealth: cf *Rizeq* at [24]-[25], [103]-[105]; *Masson* at [49]-[50]. Rather, it "regulate[s] the procedure of the court" (*Rizeq* at [89]) by "defin[ing] the circumstances in which a proceeding may, or may not, be brought in a court": *Rizeq* at [22]. Like s 365, s 369 could only operate in federal jurisdiction if picked up and applied as surrogate federal law by s 79 of the Judiciary Act. For that to occur, s 369 must be an "applicable" State law relating to "procedure" (etc), and Commonwealth law must not "otherwise provide".

(d) On the defendants' interpretation, the effect of s 369 is that an application to a court for an order to recover entitlements sourced in s 365 may *only* be made in a representative capacity in the limited circumstances described in s 369(1)(b). However, that law alters, impairs or detracts from ss 33C-33E of the FCA Act, which provisions expressly authorise the bringing of representative proceedings in the Federal Court in a broader set of circumstances (eg without the consent of group members).

(e) Accordingly, s 369 would not be picked up by s 79 because the FCA Act "otherwise provides".

31. If the defendants are correct about the interaction between s 369 of the IR Act and Pt 10 of the CP Act, the result of the foregoing analysis is that the plaintiff can bring a representative claim to recover alleged underpayments, without the written consent of the tens of thousands of other junior doctors falling within the class, in the Federal Court – but not in the Supreme Court. That is reason enough to conclude that a "substantial part" of these proceedings is "incapable of being brought" in the Supreme Court and is "capable of being instituted in the Federal Court" (CV Act, s 5(1)(b)(ii)(A)); that it is in the interests of justice for the proceeding to be determined by the Federal Court (CV Act,

s 5(1)(b)(ii)(C)); and that the Federal Court is the more appropriate forum (CV Act, s 5(1)(b)(iii)). Under the rubric of the "interests of justice", it is appropriate to consider "the ability of a particular court to deal with all aspects of a matter, and to make and to enforce all the orders to which a party may be entitled": *Bourke v State Bank of NSW* (1988) 22 FCR 378 at 394, applied in, eg, *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [96]. As to the criterion in s 5(1)(b)(ii)(B), the plaintiff's claim raises important issues for determination under the SG Act: see [6] above.

## III. OTHER ISSUES

32. The balance of the amendments to the Defence to which the plaintiff did not consent fell into the following categories:

    (a) amendments which assert that the question of whether the plaintiff and group members were required by the defendants to work Unrostered Overtime would depend on the circumstances of each case: see, for example, [1(ba)] and [23(a2)];

    (b) amendments which assert that the plaintiff and group members are estopped from asserting that, in relation to the Unrostered Overtime, the hours they worked were different from those specified in their timesheets – which the group members either verified or had the opportunity to verify: see, for example, [1(c)(ii)(B)], [51(e)] and [54A];

    (c) amendments which assert that the plaintiff has not pleaded or particularised an amount payable under an industrial instrument which remains unpaid: see, for example, [42(a1)]; and

    (d) amendments which assert that the defendants did not create or retain documents that would enable the defendants to investigate or verify the hours worked by the plaintiff or group members, or would be put to cost seeking to reconstruct the plaintiff's and group members' work days based on the records that exist: see, for example, [54(aa)] and [56(ab)].

33. The plaintiff has to date opposed these amendments on the basis that the defendants did not provide an adequate explanation for the delay in circumstances where the proposed amendments are not a mere refinement, pleadings have closed and there will be costs thrown away occasioned by the amendments.

34. The explanation for the delay in the application to amend, or indeed why these matters were not raised in the Defence filed on 14 May 2021, is wanting. At its highest, the affidavit of Kathleen Anne Plowman affirmed 1 November 2021 discloses (at [13]) that it became apparent to Ms Plowman, sometime before late June 2021 (that is, some months

ago) that there was a lack of contemporaneous records of the unrostered overtime worked by the plaintiff, which would significantly burden discovery. To the extent that this is the explanation for the delay, it only deals with the category summarised at [32](d) above. Nothing is said about the balance of the amendments. The absence of reason for the delay is a relevant, indeed serious, consideration for the Court in considering the grant of leave to amend: see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [5] and [109].

35. Nor can it fairly be said that the proposed amendments are a mere "refinement" of the case already advanced by the defendants. The reliance now placed on timesheets submitted by the plaintiff and group members – which the group members allegedly either verified or had the opportunity to verify – is a new argument. The reliance now placed on the cost that the defendants would incur seeking to reconstruct the plaintiff's and group members' work days based on the records that exist is also entirely new.

36. It is not correct to say that the proceedings are at an early stage. The pleadings have closed. Indeed, the pleadings have already gone through one round of amendments. Opt out is completed. Discovery is underway. But for this application to amend being raised at the case management conference on 24 September 2021, the plaintiff was in a position to seek hearing dates from the Court.

37. The proposed amendments set back the orderly progress of proceedings. The amendments will give rise to an amended Reply and the categories for discovery will significantly expand.

38. If the defendants are granted leave to amend, it must be conditioned on their paying the plaintiff's costs thrown away by reason of and occasioned by the amendments.


| **John Sheahan** | **Yaseen Shariff** | **Vanja Bulut** | **Celia Winnett** |
|---|---|---|---|
| Banco Chambers | 12 Wentworth Selborne Chambers | 12 Wentworth Selborne Chambers | Sixth Floor Selborne Wentworth Chambers |


18 November 2021