Form 7A (version 5)
UCPR 14.3

~~AMENDED~~ DEFENCE TO ~~THE~~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	**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 further amended statement of claim dated ~~23 April 2021~~28 April 2022 ~~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) adopts the definitions in the statement of claim;

(ii) advances reasons for denials also as allegations of material fact;

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

(iv) joins issue on the statement of claim.

Summary of defence

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

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

(b) 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 periods 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**, and **2018 Award** ~~and **2019 Award**~~ respectively)~~.~~;

(e) as to subparagraph (vi):

(i) admits that award (**2019 Award**) covered the Plaintiff and Group Members to the extent they were employed from 1 July 2019 to 30 June 2021;

(ii) otherwise denies the subparagraph because the *Public Hospital Medical Officers (State) Award 2021* (**2021 Award**, and also included in the defined term **Awards** for the purposes of this pleading) covered the Group Members for the part of the Relevant Period on and after 1 July 2021.

10. As to subparagraph 3(de), 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:

(i) the salaries set out in that award applied from the first full pay period commencing after 1 July 2019; and

(ii) the salaries to which the Plaintiff and any covered Group Members employed from the first full pay period commencing after 1 July 2021 were entitled, as set out in an award called the *Health Professional and Medical Salaries (State) Award 2021*, applied from the first full pay period commencing after 1 July 2021.

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.

14B. As to paragraph 4AA, the Defendant:

(a) as to subparagraph (a):

(i) admits the Second Defendant was an employer in respect of the Plaintiff and *Group Members*;

(ii) otherwise denies the subparagraph because the First Defendant was not an employer in respect of the Plaintiff and Group Members for the reasons in paragraph 8 above;

(b) as to subparagraph (b):

(i) says the Second Defendant is obliged to pay such superannuation guarantee charge as is imposed by the *Superannuation Guarantee Charge Act 1992* (Cth) on any superannuation guarantee shortfall it has for a quarter;

(ii) says that the Defendant also has obligations under the *First State Superannuation Act 1992* (NSW);

(iii) otherwise denies the subparagraph because the extent of the Defendant's obligation to pay a superannuation guarantee charge is as set out in subparagraph (b)(i) above.

14C. As to paragraph 4AB, the Defendant:

(a) admits subparagraph (a) in relation to the Second Defendant;

(b) as to subparagraph (b)(i):

(i) denies the paragraph in relation to the part of the Relevant Period prior to 29 October 2019 because the relevant component of the individual superannuation guarantee shortfall was the 'total salary or wages paid by the employer to the employee for the quarter', not the quarterly salary or wages base;

(ii) otherwise admits the subparagraph;

(c) admits subparagraph (b)(ii);

(d) as to subparagraph (c):

(i) admits that, to the extent there was an individual superannuation guarantee shortfall for the Plaintiff or a Group Member for a quarter during the Relevant Period while they were employed by the Second Defendant, that was a superannuation guarantee shortfall of the Second Defendant;

(ii) otherwise does not admit the subparagraph because the Plaintiff has not identified any alleged shortfall;

(e) denies subparagraph (d) because, to the extent the Second Defendant made a contribution for the benefit of the Plaintiff or a Group member to a complying superannuation fund or RSA or (subject to conditions set out in s 22(2) of the SGA Act) a defined benefit superannuation scheme, the charge percentage was (automatically) reduced in accordance with the formula set out in s 22(2) or s 23(2) of the SGA Act as applicable;

(f) as to subparagraph (e):

(i) denies that the Second Defendant was 'entitled' to reduce its charge percentage for the reasons in subparagraph (e) above;

(ii) denies that the integers of the formula in s 23(2) of the SGA Act included sacrificed ordinary time earnings in the part of the Relevant Period prior to 29 October 2019;

(iii) says:

(A) the employee's ordinary time earnings included in the formula were only their ordinary time earnings for the relevant quarter in respect of the employer (that is, the Second Defendant); and

(B) 'ordinary time earnings' was a defined term in s 6(1) of the SGA Act;

(iii) otherwise admits the subparagraph in relation to the Second Defendant;

(g) otherwise denies the paragraph in relation to the First Defendant because the First Defendant was not an employer in respect of the Plaintiff and Group Members for the reasons in paragraph 8 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 and 2021 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

18A. The Defendant denies paragraph 9A because, on the proper construction of the Awards and the RMO Circular (for Resident Medical Officers), it was permissible for the First Defendant to require an employee to work through their meal break during a Day Shift –

Monday to Friday but in that situation the employee was required to be paid for the time worked.

Particulars

Clause 10(iii) of each of the Awards; clause 3 of the RMO Circular.

18B. As to paragraph 9B, the Defendant.

(a) says that the entitlement of an employee who was required to work during their Unpaid Meal Break was to receive payment for 'the time worked';

Particulars

Clause 10(iii) of each of the Awards; clause 3 of the RMO Circular.

(b) repeats and relies upon subparagraph 17(b) above as to the meaning of 'time worked';

(c) relies upon subparagraph 20(a) below as to the meaning of 'Day Shift – Monday to Friday';

(c) otherwise admits the paragraph.

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 1992* (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 Unrostered Overtime 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.

31A. As to paragraph 29A, the Defendant:

(a) repeats and relies upon subparagraph 17(b) and paragraph 24 above as to the meaning of 'required' and 'time worked' under the Awards and the RMO Circular;

(b) repeats and relies upon subparagraph 20(a) above as to the meaning of 'Day Shift – Monday to Friday';

(c) subject to those qualifications, admits the paragraph but says the Plaintiff has not identified any occasion on which such a payment was not made.

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.

40A. As to paragraph 38A, the Defendant 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 during Unpaid

Meal Breaks, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.

40B. As to paragraph 38B, the Defendant:

(a) does not admit that the Plaintiff or Group Members worked during Unpaid Paid Meal Breaks for the reason set out in paragraph 40A above;

(b) repeats and relies upon subparagraph 17(b) and paragraph 24 above as to the meaning of 'required' and 'time worked' under the Awards and the RMO Circular;

(c) repeats and relies upon subparagraph 20(a) above as to the meaning of 'Day Shift – Monday to Friday';

(d) subject to those qualifications, admits the paragraph but says:

(i) the Plaintiff has not identified any occasion on which such a payment was not made; and

(ii) the Defendant was only required to make a payment to the Plaintiff or Group Members when they were required by the Defendant to work during their Unpaid Meal Break.

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

42. The Defendant denies paragraph 42AA:

(a) for the reasons in paragraphs 23 to 40B 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*, or that otherwise constitutes a debt for the purposes of section 376 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 superannuation 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.~~

42B. The Defendant denies paragraph 42B because, on the proper construction of the Plaintiff's employment contracts, it was not contractually obliged to make superannuation contributions to the Plaintiff's nominated superannuation fund in the amount alleged or at all.

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

(a) says the Defendant made superannuation contributions into the nominated superannuation funds of the Plaintiff and Group Members in order to reduce its superannuation guarantee charge liability to 0%;

(b) does not admit it adhered to a 'policy' or 'practice' as described in subparagraphs (a) and (b) because that allegation is vague and the Defendant is uncertain of its truth;

(c) otherwise denies the paragraph because the Defendant was not obliged to make those payments under the SGA Act, but rather the Second Defendant was obliged to pay to the Commonwealth the superannuation guarantee charge imposed on any superannuation guarantee shortfall of the employer for a quarter.

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

(a) denies it was contractually obliged to make superannuation contributions as pleaded in paragraph 42B of the statement of claim for the reasons in paragraph 42B above;

(b) denies it had any obligation to make superannuation contributions arising out of the policy or practice pleaded in paragraph 42C of the statement of claim;

(c) denies it had any obligation to make superannuation contributions in relation to any payments made for meal breaks taken or untaken outside of an employee's ordinary hours of work, because any such payments did not form part of the employee's ordinary time earnings for the purposes of the SGA Act;

(d) otherwise does not admit the paragraph because:

(i) the Plaintiff has not identified how the Defendant was otherwise 'legally obliged' to pay superannuation contributions; and

(ii) 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 not paid amounts they should have been paid in respect of meal breaks, the Defendant cannot properly plead without those particulars and the paragraph is liable to be struck out.

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

(a) does not admit that it had any 'policy' or 'practice' as alleged for the reasons in subparagraph 42C(b) above;

(b) otherwise denies the paragraph because, to the extent there was any 'policy' or 'practice', it did not give rise to an obligation to make superannuation contributions as pleaded in paragraph 42E.

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

(a) denies it had any obligation to make superannuation contributions for the reasons in subparagraphs 42D(a) to (c) and 42E(b) above;

(b) otherwise does not admit the paragraph for the reasons in subparagraph 42D(d) above.

42G. The Defendant denies paragraph 42G for the reasons in paragraphs 42D to 42F above.

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**~~ <u>paid</u> **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	13 May 2022

AFFIDAVIT VERIFYING

Name	Dean Anthony Bell
Address	1 Reserve Road, St Leonards
Occupation	Deputy General Counsel and Director Legal
Date	13 May 2022

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 Karen D. Thomas

Address of witness 1 Reserve Road St Leonards NSW

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.]