

ENTITLEMENTS OF STAFF SPECIALISTS UNDER THE AWARD AND DETERMINATION

1. The work of a Staff Specialist within the public hospital system includes clinical duties treating patients, both public and private, teaching and research. It also includes attending to administrative duties as may be required by the particular Staff Specialist appointment.
2. The terms and conditions of employment for Staff Specialists are regulated by the *Staff Specialists (State) Award 2022 (Award)*, together with the *Staff Specialists Determination 2015 (Determination)*.

Annual salary

3. The Award is a "salaried" Award – that is, it provides a rolled-up annual salary for Staff Specialists, without separate penalties for overtime, or on-call / recall. The exception is for shift workers under clause 4A(d) of the Award, who receive additional penalty rates as set out in clause 4A(d)(iii) of the Award. Pursuant to clause 4A(d) and Part C Schedule 3 of the Award, shift work for Staff Specialists is currently limited to emergency physicians.
4. The Commission has formulated the annual salary for Staff Specialists to build in compensation for working overtime, on-call and recall. A summary of the Commission decisions relating to the setting of the annual salary under the Award are below.
5. The first version of the Award was made in 1966. The reasons of the Commission in making that version of the Award are reported in *Re Medical Officers – Hospital Specialists (State) Award [1966] AR (NSW) 144*. Among other things, the Commission said in those reasons:

"Mr Cohen submitted that, when we came to fix salaries, it would be relevant for us to take into account that the award would contain no prescription of ordinary hours, no rates for overtime and no penalty rates for week-end work. He said that the applicant association did not seek to have those matters regulated and that the specialists recognized that they had an obligation to respond to the calls of their hospital and of the public. The evidence showed that the vocation of staff hospital specialist makes heavy demands on the time of those who follow it. It is a rarity for the hours of hospital duty of a specialist to approximate to the standard working hours of workers in this State. More other than not hospital duty involves the Staff Specialists in a good deal more than forty hours, and many hours are devoted at home to professional reading, preparation of papers for publication and the like. It seems exceptional for a normal meal hour to be taken and what passes for a midday break is often time devoted to consultation with professional colleagues. In very many cases some work on Saturday is necessary. All specialists are on call for emergencies, sometimes on a rostered basis, at other times bearing the sole responsibility; but there is great variety in the extent to which they are in fact called out, the burden being appreciable for some and minimal for others. The practice of some specialities makes exceptional demands on the practitioner's time: the case of a paediatric heart surgeon who quite often slept at the hospital to be near his patients was a striking illustration of this. But the specialities, such as pathology, which do not involve the specialist in direct patient responsibility, allow the working of much more limited and regular hours.

We think that there is substance in Mr Cohen's submissions on this matter. We have attempted to get a balanced picture of the specialists' working hours and to refrain from giving undue weight to cases which are exceptional one way or to the other. In the result we think that the fact that there will be no regulation of hours, no overtime, and no special rates for work at week-ends or on public holidays, must be given appreciable weight by us in fixing salaries. We have not failed to take into account the time concessions for lecturing which we have mentioned earlier." (at 156 – 157)

6. In *Re Medical Officers, Hospital Specialists (State) Award* [1972] AR (NSW) 675, in which the Commission made a new award dealing with Staff Specialists on work value grounds, the Commission said:

"Another important matter which must be given adequate consideration in the fixation of salaries is that of hours of work. The new award, like the present award and the original award, will contain no provision on that subject. All parties accept that this cannot be a 40 hours per week, Monday to Friday, type of industry. Virtually every witness who gave evidence stated that his weekly working hours were considerably in excess of 40 per week. Further, documentary evidence produced, showing in summary form the hours worked by a great number of specialists employed in various hospitals, according to information supplied by them, shows that for a very substantial number of specialists, hours greater than 40 per week are the standard. The evidence in the case also shows that weekend work is commonplace and that being on call and being called in for duty at night and at weekends are quite regular and accepted features of many specialists' employment. There is also evidence of some work being performed on public holidays ..." (at 683)

7. In setting the level of annual leave provided for in that award, the Commission also took into consideration:

"the fact that very many of them work in excess (some of them very much in excess) of 40 hours per week; the incidence of weekend work, both programmed work and call-back work; the incidence of work on public holidays; the fact that a considerable amount of off duty time is not completely free because of on-call arrangements; the considerable amount of reading done at home outside normal working hours because of the need to keep up-to-date with developments particular fields of medicine; and the exacting demands which the day to day work itself imposes on the employees." (at 688)

8. In *Re Medical Officers – Hospital Specialists (State) Award* [1975] AR (NSW) 78, in evaluating the salaries of Staff Specialists, the Commission said:

- (a) *"Another matter which needs to be taken into account is that, in fixing the salaries for specialists, appreciable weight has always been given by the tribunals to the fact that their awards did not provide for a regulation of working hours, for overtime payments or payments of special rates for work at weekends or on public holidays. Presumably, had these factors been separately compensated for, the salaries would have been fixed at somewhat different levels. To attempt to quantify the monetary amounts which should be included in the salaries to compensate for these factors is quite impracticable." (at 81)*

- (b) *"It needs to be borne in mind that the salaries are intended to compensate for all incidents of employment, including the fact that the working hours of the specialists will not be regulated and that no extra payments by way of overtime or other penalty rates will be provided."* (at 85)
9. In *Re Medical Officers – Hospital Specialists’ (State) Award* [1978] AR 321, the Commission took into account an increase in the overtime rate in the *Public Hospital (Medical Officers) Award* in fixing salaries for Staff Specialists (at 328 – 329).
 10. In *Re Medical Officers – Hospital Specialists (State) Award & Other Awards* (1990) 33 IR 79, Fisher P approved a consent award variation increasing the salaries of Staff Specialists by 15 percent (%).
 11. In *Re Staff Specialists (State) Award* (2006) 152 IR 405; [2006] NSWIRComm 124, ASMOF submitted that *"in setting rates for Staff Specialists, the Commission has taken into account that the Award does not contain provisions relating to hours, overtime, or work on weekends and public holidays"* and *"[t]he figure of 55 hours per week (on average) has been mentioned on a number of occasions"* (at 419 [38]). The Commission increased Staff Specialists’ salaries by 14 percent (%) on work value grounds (at 480 [233]).
 12. There has been no work value case in relation to Staff Specialists as a whole since 2006.

The 17.4 percent (%) allowance

13. An additional allowance of 17.4% is paid to all Staff Specialists, outside the Award structure. This is known as the "special allowance". A summary of its history is below.
14. The allowance was first paid on 1 January 1985 after negotiations between the then-Department of Health (**Department**) and the Public Medical Officers’ Association (**PMOA**) (which was the union then representing Staff Specialists). At that time it was referred to as the "on-call/recall allowance". It was originally 20 percent (%) of the Award salary, and was designed to compensate Staff Specialists for regularly being required to be on-call or available for recall outside of normal duties, including on weekends. However, it was agreed that the allowance would be paid to all Staff Specialists regardless of their level of on-call / recall obligations.
15. The name of the allowance changed in 1987 to the "call back/special allowance". This resulted from a dispute with the PMOA about whether the allowance was subject to superannuation, which was addressed before the Commission by way of compulsory conference before McArdle CC.
16. On 2 December 1987, the Department published Circular 87/194A, implementing the recommendations made by McArdle CC.
17. In 1989, Fisher P assisted the parties with further conciliation. This resulted in another name change from the "call back/special allowance" to the "special allowance". With the name change, the Department and the PMOA agreed that the total amount would be regarded as superable. The purpose and intent of the allowance did not change.
18. In 1989, Fisher P awarded a 15 percent (%) salary increase to Staff Specialists but determined the increase should not be applied to allowances, including to the

special allowance: *Re Medical Officers – Hospital Specialists (State) Award & Other Awards* (1990) 33 IR 79 at 90 – 91. Fisher P also observed that the special allowance was “*plainly a salary enhancement intended as such*” and that it involved “*double counting the compensation for [on-call and recall] by adding it to a salary rate which was already compensated for ‘on-call/re-call’*” (at 90). To reflect the intent of the judgement, the Department reduced the allowance was reduced from 20 percent (%) to 17.4 percent (%) of the Award salary.

19. The allowance today is still described as the “special allowance” and remains at 17.4 percent (%) of Award salary, pursuant to clause 2(a)(ii) of the Determination.

Entitlements in the Determination relating to abnormal working hours and recall

20. Clause 6 of the Determination includes a mechanism to address and provide additional compensation for staff specialists who work abnormal hours in certain circumstances.
21. This provision was included in the Determination as a result of the negotiations between ASMOF and the Department that resulted in the 1997 consent Award: see *Re Staff Specialists (State) Award* (2006) 152 IR 405; [2006] NSWIRComm 124 at 420 [42] and Circular 98/5.
22. Clause 6(b) of the Determination records the agreement between ASMOF and the Department (“*the parties*” to the negotiation referred to above) that “*some Staff Specialists may be required to work in excess of Normal Duties and reasonable on call/recall to provide direct patient care*”.
23. The mechanism for addressing those circumstances is, in summary:
 - (a) In the first instance, the relevant public health organisation (that is, the local health district or other health organisation in which the Staff Specialist works, including the Network) will make efforts to reduce the Staff Specialist’s hours in consultation with the Staff Specialist (clause 6(c) and (d)).
 - (b) In “*exceptional circumstances*” where hours cannot be reduced, the Determination provides for an additional payment of up to 5 percent (%) of the Level 1 salary to be made to the staff specialist, to be reviewed every six months (clause 6(e)) (**abnormal hours allowance**).
 - (c) The Chief Executive of the relevant public health organisation may seek approval for a higher rate (up to 10 percent (%) or, in cases where only a small number of staff specialists are engaged, a higher percentage above 10 percent (%)) from the Secretary of NSW Health, supported by a submission (clause 6(f) and (g)).
24. Appendix IV of Circular 98/5 includes guidelines in respect to the payment of the 10 percent (%) abnormal hours allowance. The guidelines state that the abnormal working allowance will generally only be considered where the average hours worked per week including recall is in excess of 60 hours. There have been very few applications for the payment of this allowance.

Rights of Private Practice (ROPP)

25. Staff Specialists can exercise rights of private practice (**ROPP**) within NSW public hospitals as a concomitant of their employment. Having ROPP enables a Staff Specialist to supplement their income and gives patients in NSW the choice to be treated privately in a public hospital.
26. Private patients are those who have elected to enter the NSW public hospital system as a private patient, including as an outpatient, or are covered by private health insurance or another form of insurance (such as motor vehicle insurance), or are self-funded.
27. A Staff Specialist exercising ROPP is essentially operating their own private business entity and not performing those services as an employee of NSW Health. This is necessary because employees of NSW Health (acting in that capacity) are prohibited from claiming Medicare benefits by reason of section 19(2) of the *Health Insurance Act 1973* (Cth). Medicare benefits are the main source of revenue for doctors engaging in ROPP. Staff Specialists have their own Medicare provider number which is used to bill private patients in accordance with the procedure set out in the Determination.
28. As all patients are prioritised based on clinical need as per the requirements of section 68 (principle 2) of *Health Services Act 1997* (NSW), services provided to "public" and "private" patients in a public hospital inevitably intersect with fluidity over any given working week.
29. The original ROPP scheme arrangements were established via Circular 77/15 (and subsequently amended via Circulars 85/4, 86/175, 87/194, 87/194a and 90/39).
30. The current arrangements governing private practice are set out in the Determination. The first version of the Determination came into effect on 27 November 1997 via Circular 98/5. The arrangements described below have not changed in substance.
31. Consistent with the Determination, staff specialists elect on an annual basis the level of the private practice scheme under which they will work, known as Level 1 to 5. The difference between the Levels is essentially that at higher levels, staff specialists have a lower "fixed" salary, but higher potential drawing rights (based on the private practice revenue they generate), with an overall higher potential income (see Schedule 1 of the Determination). In particular:
 - (a) A staff specialist who elects Level 1 assigns 100 percent (%) of any private practice billings to the relevant public health organisation. They are still obliged to exercise their ROPP to the fullest extent possible, but have no rights to draw from the private patient revenue they generate. The staff specialist receives an allowance of 20 per cent of their salary to compensate for the opportunity loss associated with assigning their private practice billings.
 - (b) A Staff Specialist who elects Levels 2 to 4 is entitled to the same base salary as a Level 1 Staff Specialist, but receives a lower allowance than 20 per cent (14%, 8% and 0% respectively), and a correspondingly higher maximum entitlement to "draw" from any private patient revenue they generate (up to 24%, 36% and 50% of the base salary respectively). There is also a level of supplementation if the Specialist generates below a particular amount of private patient revenue (equivalent to a specified percentage of the relevant base salary).

- (c) A Staff Specialist who elects Level 5 (the highest level) are paid 75 per cent of the base Award salary, but have an entitlement to drawing rights up to 100 per cent of their base salary, and an entitlement to take what is, in effect, leave without pay for 25 per cent of their full-time equivalent (FTE) commitment to undertake private practice services. Specialists who elect Level 5 have the highest maximum potential salary (see Schedule 2 of the Determination), but this is dependent on the Specialist generating sufficient private practice revenue to fund the maximum possible drawing rights – there is no supplementation as there is for Levels 2 to 4.
32. Which level they elect is a matter for the Staff Specialist based on their assessment of their own private practice earning potential. Staff Specialists may agree to group together to share the benefits of their ROPP (clause 2(a)(vii), (viii)).
33. Whilst NSW Health enables Staff Specialists to conduct private practice, it does not guarantee it is going to be profitable or that, for example, Level 4 or 5 can be sustained.
34. Most Staff Specialists elect Level 1. As at May 2024, there are approximately 4000 full-time equivalent Staff Specialists (6500 individual assignments) employed by NSW Health. The current level election percentage mix is:
- (a) Level 1 – 60.3 percent (%)
 - (b) Level 2 – 8.6 percent (%)
 - (c) Level 3 – 4.2 percent (%)
 - (d) Level 4 – 15.4 percent (%)
 - (e) Level 5 – 11.1 percent (%)
- [Scheme D, grandfathered consistent with Circular 98/5 – 0.4 percent (%)]
35. The way in which private patient billings are conducted and disbursed under the Determination for Staff Specialists who elect Levels 2 to 5 is as follows:
- (a) The relevant public health organisation issues accounts for services rendered to patients by a Staff Specialist exercising ROPP, as agent for the Staff Specialist (clause 2(a)(ix)).
 - (b) The resulting income is paid into an account called the “No 1 Account” (clause 2(a)(vi)). **The No 1 Account is a trust account (Practitioner’s money)** which forms part of the Organisation’s Special Purpose & Trust Account (clause 1). It contains separate sub-ledgers or cost centres for each Staff Specialist (or agreed group of Staff Specialists) who elects Levels 2 to 4 (clause 1). Private practice income is held on trust within the No 1 Account for the Staff Specialist/s, with monies only permitted to be disbursed consistent with the agreed terms of the Determination (including a specialist’s access via drawing rights).
 - (c) The relevant public health organisation is entitled an agreed monthly “infrastructure charge” or “facility fee” from the No 1 Account (clause 4). This is calculated as an agreed percentage of the gross fees received into the No 1 Account. This is effectively the consideration received by the public health organisation in exchange for allowing Staff Specialists to

conduct ROPP using its facilities, consumables and other resources. The public health organisation's entitlement to receive this fee is subject to:

- (i) there being sufficient funds in the No 1 Account to meet it (otherwise the entitlement operates as a charge on the Account: clause 4(b)); and
 - (ii) the right of supplementation for Levels 2 to 4 Staff Specialists as described above, which are funded from the infrastructure charges that the Organisation would otherwise have been entitled to receive (clause 2(b)(ii)(4), (iii)(4), (iv)(3)).
- (d) Levels 2 to 5 Staff Specialists are then permitted to draw out of the remainder in their sub-ledger of the No 1 Account, up to the maximum drawing rights for their elected level, on an averaged basis: clause 2(a)(xii). Subject to the supplementation arrangements for Levels 2 to 4 described above, these drawing rights are limited by the amount in the applicable sub-ledger of the No 1 Account. In other words, if the Staff Specialist (or their group) has not generated enough private patient revenue to fund their drawing rights, they cannot exercise those rights, or they are limited in their drawings by the amount in the relevant sub-ledger.
- (e) Any leftover money in the No 1 Account for a particular Staff Specialist or group (after payment of the monthly infrastructure charges, any other approved costs such as accounting or professional indemnity costs, and drawing rights) constitutes an "annual infrastructure charge" (clause 1) which is paid into the "No 2 Account" (clause 4(f)). **The No 2 Account is a Restricted Financial Asset of NSW Health (Government monies)**, with the relevant sub-ledger or cost centres used to fund training, education and study leave ("TESL") payments to Levels 2 to 5 Staff Specialists (clause 7(e) and other approved expenditure as per NSW Health Policy Directive PD2014_009).
36. Consistent with clause 2(b)(v)(3) of the Determination, Level 5 Staff Specialists are not permitted to undertake private practice during the 75 per cent of the time for which their salary is payable. This is treated in practice as an aggregate amount – in other words, a participating Specialist must not spend more than an average of 25 percent (%) of his/her total working time in the treatment of private patients. The total working time commitment as set out in the Award does not change with the Specialist's level election.
37. The Determination also requires that a Staff Specialist exercising ROPP does so on-site – that is, within the hospital or other institution where they are employed – and that their ROPP are exercised in the course of their employment (clause 2(a)(xi)(2)). Accordingly, under the Determination, Level 5 Staff Specialists are required to be on-site for the 25 percent (%) of their full-time commitment which they are permitted to devote to exercising their ROPP.
38. ROPP arrangements do not form part of the Award: see *Medical Officers - Hospital Specialists (State) Award* [1993] NSWIRComm 7. The Commission has also consistently disregarded private practice when determining the Award conditions: see *Medical Officers - Hospital Specialists (State) Award, Re* [1978] AR (NSW) 321 at 328 – 329; *Re Staff Specialists (State) Award* (2006) 152 IR 405; [2006] NSWIRComm 124 at 419 [37], 421 [47].