



## Industrial Relations Commission New South Wales

### 2022/00009840 Australian Salaried Medical Officers' Federation (New South Wales) v Health Secretary in respect of the Sydney Children's Hospitals Network

#### STATEMENT

- 1 These proceedings arise from a notification of an industrial dispute filed by the Australian Salaried Medical Officers' Federation (New South Wales) ("ASMOF") pursuant to s 130 of the *Industrial Relations Act 1996* ("Act"). The dispute centres on the patterns and hours of work of staff specialists working in the Department of Anaesthesia and the Paediatric Intensive Care Unit ("PICU") at The Children's Hospital at Westmead ("Hospital").
- 2 Put simply, ASMOF contends that the staff specialists are performing work in a manner which does not comply with the Staff Specialists (State) Award 2022 ("Award"), a contention which is disputed by the Health Secretary.
- 3 The dispute was the subject of arbitration before me from 26 to 28 July 2022.

#### Factual context

- 4 Clause 4 of the Award is relevantly in these terms:

##### 4. Normal Duties

##### Part A - General

- (a) Normal Duties will be worked for:
  - (i) Not less than 40 hours per week; or
  - (ii) 10 sessions per week  
over five days per week.

- (b) The Normal Duties hours set out in (a) above may be averaged over
- (i) four days per week; or
  - (ii) a longer roster period
- as agreed between the Staff Specialist and the Employer and specified in the Staff Specialist's performance agreement.
- (c)
- (i) With the exception of Staff Specialists working in accordance with paragraph (d) below, Normal Duties will be worked within the span of hours of 7.00 am to 6.00 pm Monday to Friday inclusive.
  - (ii) Where Normal Duties hours are averaged over a roster period longer than 1 week as provided for in (b) above, Normal Duties may be worked Monday to Sunday inclusive.
- (d) Shift Work
- (i) Staff Specialists who are employed in a specialty or category specified in Part C, Schedule 3, to this Award may be required to undertake shiftwork as part of their Normal Duties as specified in (a) or (b) above. This shiftwork may comprise day or evening shifts.
  - (ii) For Staff Specialists working shift work, Normal Duties will be worked within the span of hours of 7.00 am to midnight Monday to Sunday inclusive;
  - (iii) For Staff Specialists who undertake shiftwork, the normal rostered duties hours will be paid at ordinary time plus the appropriate penalty rate:
    - hours worked between 6.00 pm and midnight Monday to Friday - 12.5%;
    - hours worked between 7.00 am and midnight Saturday - 50%;
    - hours worked between 7.00 am and midnight Sunday - 75%;
    - and
    - all hours worked on Public Holidays - 150%.

The penalty rate will be calculated on the Staff Specialist's salary as set in Part B, Schedule 1, Rates of Pay, of this Award plus the Special Allowance and Level 1 Private Practice Allowance specified in the Salaried Senior Medical Practitioners Determination, as varied from time to time.
  - (iv) Additional specialties or categories may be included in Part C, Schedule 3 to this Award from time to time by agreement between the Federation and the Secretary of the NSW Ministry of Health. If agreement cannot be reached, either party may make application to the Industrial Relations Commission for a variation to Part C, Schedule 3.

(e) Staff Specialists will be available for reasonable on call and recall duties outside of Normal Duties.

- 5 For convenience, I will adopt the prefix “4.A” when referring to the provisions of Clause 4 Part A of the Award.
- 6 The Award defines “Normal Duties” as meaning the “clinical, teaching, research, administrative, quality improvement or other duties and responsibilities undertaken by the Staff Specialist”: cl 2.
- 7 Staff specialists working in the Department of Anaesthesia and the PICU (together, “the Departments”) are not “employed in a specialty or category specified in Part C, Schedule 3, to [the] Award”. Consequently, the shift work provisions in cl 4.A(d) ostensibly do not apply to them.
- 8 The staff specialists in each of the Departments work to rosters. The details of those rosters was not in dispute. As such it is convenient to adopt the summary provided in ASMOF’s written outline of submissions. In respect of the Department of Anaesthesia:

“29. ...

(b) The Department of Anaesthesia works on a rolling four-week roster, where each day is divided into two sessions, being a morning session, and an afternoon session, each session being for a 5 hour period. Each of these sessions can be categorised into either clinical or non-clinical sessions. In relation to each clinical session, a staff specialist will be allocated to either a particular operating theatre, a particular list, such as the cardiac list, or as relief.

(c) Staff specialists are nominally rostered for 10 hour days to work from 8am to 6pm on a working day. ...”

(Footnotes omitted)

- 9 In respect of the PICU:

“24. ...

(b) As a result of the increase in patients and the complexity of their condition, the PICU changed the model of care in 2018 to a model whereby patients within the PICU are now divided into two pods with a team of medical and nursing staff managing the patients in each pod.

In order to safely treat patients, it is necessary to have staff specialist supervision of each pod during the day and oversight at nights and weekends.

...

(d) Staff specialists within the PICU are rostered Monday to Friday on day shifts nominally between 7.30am-5pm and evening shifts/on-call shifts from 5pm-7am. The evening shifts require attendance onsite at least from 5pm-midnight. The work in that period involves clinical duties no different from work performed on day shift. For the remainder of the night, if there is nothing acute to manage, the staff specialist may leave the unit and be 'on-call' elsewhere onsite or at home.

(e) On weekends, two staff specialists are rostered for Friday, Saturday and Sunday with one working 7am-midnight on Friday, on-call thereafter and then 7am-5pm on Saturday and Sunday. The other staff specialist will work 7am-7pm Friday and then 7am-midnight Saturday and Sunday and on-call Saturday night and Sunday night."

(Footnotes omitted)

- 10 ASMOF led uncontested evidence that over the last 10 or more years there has been an increase in the complexity, acuity and number of patients being treated in the Departments. In her statement of 28 April 2022, Dr Sarah Johnston deposed:

"81. In the time I've been in the department, over the past two decades, the number of cases and the complexity of the cases has definitely increased. The number of patients presenting to CHW has increased for two reasons:

a. Firstly, due to the increasing population within NSW and the concept that paediatric patients should be treated at paediatric hospitals; and

b. Secondly, because surgical techniques and interventional radiological and cardiac catheter procedures have improved and innovated to offer help to babies and children who might have previously only received palliative care."

- 11 Dr Andrew Weatherall, in his statement of 27 April 2022, stated:

"22. In paediatric anaesthesia, changes in our work have arisen due to the increasing complexity of what we do to provide comprehensive perioperative operative care, compounded by the increasing complexity of the patients who attend the hospital for their care. There are multiple contributors to that complexity. Some of that complexity is related to the fact that the care offered to patients is itself more complex, including new technologies, new treatments and new options for surgery. Some of that complexity is related to changes to the overall health profile of children and young people.

23. There are children who now survive their perinatal period who would not have survived previously, even as recently as a decade ago. However, a proportion of those patients also end up with a range of complex health needs.

...

25. This is linked with the expectations of families and children as to what they expect from their care and what surgeons want and can offer. The services on offer are perpetually expanding. There are surgical programs that we now perform that did not exist 10 years ago. There are a range of procedures where we offer perioperative care that were not on offer 10 years ago. ...”

- 12 These changes have not only led to operational changes in the PICU, as described in par 24(b) of ASMOF’s submissions reproduced above. They are claimed to have resulted in a significant increase in the hours required to be worked by the staff specialists and a change to the times at which those hours must be worked.
- 13 Each of the staff specialists called to give evidence by ASMOF deposed as to the hours at which they are and have been required to work. Instances were provided of work extending well into the night and in some cases into the early hours of the morning. I will not reproduce or attempt to summarise all of that evidence. Suffice it to say, in her statement of 27 April 2022, Dr Andrea Christoff stated that 40% of clinical hours worked are “after hours”.
- 14 The evidence also revealed that staff specialists were regularly recorded as being “on call on site”. That is, while notionally on call, the staff specialist does not in fact leave the Hospital. A number of ASMOF’s witnesses gave evidence that they routinely slept at the Hospital when they were rostered “on call”. The Health Secretary conceded that such instances were not properly to be regarded as “on call and recall” for the purposes of cl 4.A(e) of the Award.
- 15 As the definition of “Normal Duties” in the Award suggests, staff specialists are required to perform non-clinical duties in addition to their clinical duties. The amount of non-clinical work which is required increases if they have head, or deputy head, of department roles. While allowance is generally made in the rosters for time for non-clinical duties, the staff specialists consistently deposed

that they are often required to perform these duties outside of their rostered hours.

- 16 In her written outline of submissions the Health Secretary contended that “the Commission would not find that the on call or recall duties worked by staff specialists in the Departments, or their work patterns generally, are unreasonable”. In large part, these submissions rested on an analysis that had been performed by Dr Joanne Ging, the Executive Director of Clinical Operations at the Hospital, as to the hours of work performed by staff specialists in the Departments.
- 17 Dr Ging’s analysis was the subject of considerable challenge by ASMOF. It must be said that Dr Ging’s task was not made easier by the fact that the staff specialists do not maintain time sheets (and have apparently resisted doing so). Even so, anomalies or inconsistencies in the figures provided by Dr Ging were identified under cross-examination. Questions were raised as to whether the data set on which she relied was representative of the hours regularly worked by staff specialists, including whether the period from which the hours were derived may have been impacted by COVID-19. It was also contended, in connection with the Department of Anaesthesia, that one of the sources relied on by Dr Ging as recording the hours for which the staff specialists work – the “SurgiNet database” – was confined to the hours spent in surgery, and did not reflect time spent by anaesthetists in preparing for surgery and providing post-operative care.
- 18 For these reasons, I consider that the figures provided by Dr Ging as to the hours of work performed by staff specialists in the Departments cannot be accepted at face value. It follows that I cannot readily accept the Health Secretary’s submissions, reliant on those figures, that “the average hours worked by these specialists over the roster period in evidence are not excessive”, even assuming that what is meant by “excessive” is capable of objective quantification.

- 19 What is abundantly clear on the evidence is that staff specialists in the Departments consistently work outside the hours of 7.00am and 6.00pm, Monday to Friday.
- 20 Moreover and significantly, it was common ground that the staff specialists could not and should not be confined to performing their duties between the hours of 7.00am and 6.00pm, Monday to Friday. For example, of ASMOF's witnesses, Dr Christoff deposed that "[c]ritical illnesses do not respect weekday 'normal hours' from 7am to 6pm, and on-site out of hours senior oversight is often what it takes to save the lives of critically ill children". Under cross-examination, Dr Christoff accepted that it was "essential" that staff specialists be rostered after 6.00pm. Dr Weatherall deposed as to the clinical need for services to be provided on a 24-hour basis.
- 21 Dr Ging, in her statement of 14 June 2022, stated:

"36. Both services need to provide a 24 hour a day service due to the unpredictability of sick children requiring emergency care. Both services provide lifesaving support for sick children.

...

38. Put simply, if the staff specialists only provided care 7am to 6pm Monday to Friday (or current hours were restricted in any way), the Hospital would be unable to provide lifesaving care for sick children and children would die."

### **Attempts to resolve the dispute**

- 22 The evidence reveals a history of considerable attempts by the parties to resolve this dispute, since approximately February 2021. This evidence came predominantly through the statements of Damien Lee, an Industrial Officer employed by ASMOF, and Salvatore (Sam) Gallucio, the Director People & Culture at the Sydney Children's Hospitals Network. I will not attempt to summarise that history. It is not significantly in dispute.
- 23 There are two matters in particular that I have had regard to. First, staff specialists in the Department of Anaesthesia have been in receipt of an "abnormal hours" payment of 5% pursuant to cl 6(e) of the Staff Specialists

Determination 2015 (“Determination”) since approximately 25 May 2021, but backdated to 31 January 2021. That payment was extended to staff specialists in the PICU from approximately 14 January 2022. The Health Secretary has continued to make those payments, according to Mr Gallucio, “as an act of good faith”.

- 24 Second, Mr Gallucio deposed that on 4 February 2022, “after discussions with the Ministry, the Network made ASMOF an offer, to the effect that the Network would seek the Ministry’s endorsement of a non-standard remuneration proposal which mirrored the wording and shift penalties at cl 4 Part A(d)(iii) of the Award”. That offer was declined.
- 25 I acknowledge that the “offer” described by Mr Gallucio, as contained in an attachment to his statement, was heavily conditional. It required a determination that “work patterns and service needs support alteration”, which was clearly not agreed. Even were such a determination made, the proposal was subject to the Health Secretary’s agreement, which apparently had not been obtained. Nevertheless, the fact of the offer and the lack of any apparent engagement by ASMOF to such an outcome is relevant in considering the relief sought by ASMOF.

### **The positions of the parties in overview**

#### *ASMOF*

- 26 ASMOF’s position was summarised in its written submissions as follows:

“3. ASMOF contends that staff specialists working within the Paediatric Anaesthesia Department and PICU are performing work in a manner that is inconsistent with the hours of work and rostering provisions of the *Staff Specialist (State) Award 2021* (**‘the Award’**). In summary, ASMOF contends that:

- (a) Staff specialists are performing work outside the span of hours for non-shiftworker in clause 4 Part A(c)(i) which does not constitute ‘*on call and recall duties*’ for the purposes of clause 4 Part A(e).
- (b) Staff specialists are performing work which involves them being required to perform shiftwork for the purposes of clause 4 Part A(d) in circumstances in which:



(i) the specialities are not included in Part C Schedule 3 and may not be required to undertake shift work; and

(ii) without payment of the penalty payments under clause 4 Part A(d)(iii).

(c) In the alternative, if the work performed by staff specialists outside the span of hours constitutes '*on call and recall duties*', the hours of work and the nature of the work performed in the Paediatric Anaesthesia Department and PICU are beyond what is reasonable and contemplated by clause 4 Part A(e) of the Award and without payment of shift penalties."

(Emphasis in original)

27 On 2 May 2022 ASMOF filed with the Industrial Registry a document titled "Amended Proposed Orders and Recommendations", setting out the relief it sought in the proceedings as follows:

"The Commission makes the following determinations and recommendation:

1. Pursuant to s 175 of the *Industrial Relations Act 1996* (NSW), the Commission determine that for the purposes of clause 4 of the *Staff Specialist (State) Award 2021*, staff specialists in the Anaesthetic and Paediatric Intensive Care Unit (PICU) of the Sydney Children's Hospital Network are being required to perform work outside the span of hours for non-shiftwork in clause 4 Part A(c)(i) of the Award which does not constitute '*on call and recall duties*' for the purposes of clause 4 Part A(e).

2. Pursuant to s 175 of the *Industrial Relations Act 1996* (NSW), the Commission determine that the staff specialists in the Anaesthetic and PICU Departments of the Sydney Children's Hospital Network are performing work which involves them being required to perform shiftwork for the purposes of clause 4 Part A(d) of the Award in circumstances in which:

(a) the specialities are not included in Part C Schedule 3 and may not be required to undertake shift work by reason of clause 4 Part A(d)(i); and

(b) without the staff specialists being paid the penalty payments under clause 4 Part A(d)(iii) payable to staff specialists undertaking shift work.

3. In the alternative, the Commission determine that, if the work performed by staff specialists outside the span of hours for non-shiftwork in clause 4 Part A(c)(i) of the *Staff Specialist (State) Award 2021* constitutes '*on call and recall duties*', the hours of work and the nature of the work performed by the Anaesthetic and PICU Departments are beyond what is reasonable and contemplated by clause 4 Part A(e) of the Award and without payment of shift penalties.

4. The Commission make a recommendations or directions, pursuant to s 136(1)(a) of the *Industrial Relations Act 1996* (NSW), that:

(a) the Sydney Children's Hospital Network cease requiring the staff specialists in the Anaesthetic and Paediatric Intensive Care Unit (PICU) to perform Normal Duties outside of the span of hours in clause 4 Part A(c)(i) of the *Staff Specialist (State) Award 2021*; and/or

(b) the Sydney Children's Hospital Network cease requiring staff specialists in the Anaesthetic and Paediatric Intensive Care Unit (PICU) to perform unreasonable on call and recall duties; and/or

(c) the Sydney Children's Hospital Network calculate and pay staff specialists the appropriate penalty payments under clause 4 Part A(d)(iii) of the *Staff Specialist (State) Award 2021* payable with respect to shift work performed by the staff specialists which has not been paid."

28 By the conclusion of the arbitration, the position of ASMOF had changed. It pressed only for the determinations at pars 1 and 2 of the above document, and for a recommendation in the form of par 4(c). Mr M Gibian SC, who appeared for ASMOF, submitted:

"I think at this point there's obviously a recommendation for a payment which I'll come back to but we do think that, cutting to what we say the Commission should do, is it should determine the dispute in relation to the award question and, perhaps leaving the payment recommendation to one side, do no more at this point and also not determine the counterapplication, as it were, for reasons that I will come to for inclusion of the specialties generally in the shift work schedule and rather the parties should be afforded the opportunity to consider what the appropriate solution is to the fact, as we submit it at least, that the work arrangements have evolved and involve requirements which are not consistent with the award and how that can be properly addressed."

#### *Health Secretary*

29 The Health Secretary's position was summarised in her written outline of submissions as follows:

"2. The Secretary's primary position is that cl 4 of the *Staff Specialists (State) Award 2021 (Award)* accommodates the work patterns of staff specialists in the Anaesthetics Department and the Paediatric Intensive Care Unit (PICU) at the Hospital (together, **Departments**) without amendment to the Award. ASMOF's construction of cl 4 does not reflect its textual, historical or industrial context and is contrary to a common understanding of its operation that has prevailed between the parties for many years.

3. Alternatively, if the Commission finds that the Award does not accommodate the relevant staff specialists' work patterns, or does so only with their agreement which could be withdrawn at any time, the Commission should

vary the Award to include the relevant specialties at the Hospital in Part C Schedule 3 to the Award. This would mean the Secretary can require staff specialists in the Departments to perform shift work within the meaning of cl 4A(d) of the Award, in exchange for the payment of shift penalties. That is a fair and reasonable outcome where the evidence on both sides is that 'after-hours' work is required in the Departments to meet the clinical needs of sick children."

(Emphasis in original)

- 30 The Health Secretary resisted ASMOF's suggestion that the Commission determine the construction of cl 4.A of the Award, with the parties then to consider how the remaining matters in dispute might be resolved. Mr D Fuller of counsel, who appeared for the Health Secretary, submitted:

"Can I come immediately to what Mr Gibian has suggested would be the appropriate way to resolve this proceeding in the event that you agree with ASMOF's interpretation of the award. The difficulty with my learned friend's proposal is that it would leave the [S]ecretary in a position on that view of continuing to breach the award in circumstances where everyone seems to accept that there's a necessity for a variation to occur and the [S]ecretary would be left in a position on my friend's approach of potentially exposing herself to continuing civil penalties. The situation is that there's clearly a dispute between the parties about the construction that the award - I'll come to my submissions about that, but in the event that ASMOF's construction is right, the [S]ecretary is presenting you with what we say at least is a fair and reasonable option for varying the award to accommodate the current work patterns. Just to be clear, and I think I've said this before, there's no proposal to change the work patterns that is, to superimpose some different form of roster on the anaesthetists in particular, that's part of their concern, no proposal to do that.

All that the [S]ecretary's doing is proposing an option to in effect, allow these specialists to work their current patterns with the addition of penalties for performing that work. Now everyone might accept that there are other issues that are involved in this dispute, issues of retention, recruitment, so on. The parties have differing views about that. You've been presented really with evidence of one side on that issue, there's been some response to that from the [S]ecretary but those are still presumably going to be matters in dispute, whatever the [C]ommission does. The facts though that do face the [C]ommission are that if [ASMOF] is correct, there is a fundamental problem with the award that means these doctors cannot work the span of hours that they say is necessary to provide patient care and the appropriate response to that in our submission is it make the variation that we've proposed and not just to determine the issues and leaved *[sic]* it for the parties to negotiate over some length of time on an appropriate outcome would be while the [S]ecretary is left to breach the award on that view in the meantime."

*Submissions received following the arbitration*

- 31 Following the conclusion of the arbitration, on 22 August 2022 the Commission received an email attaching a document titled “Secretary’s Note on Further Cases” (“Secretary’s Note”). In that document the Health Secretary stated that she had identified two cases “that were not referred to in her written submissions or at the hearing but that she considers to be directly relevant to the issues before the Commission”. The Secretary’s Note stated that the parties had agreed as to the way the cases were to be brought to the Commission’s attention.
- 32 The first case was *Australian Salaried Medical Officers’ Federation (NSW) v The Secretary, NSW Health (No 1)* [2021] NSWIRComm 1047, with particular reference to [37]-[52] of that decision. The Secretary’s Note stated that the parties had “agreed to provide this case to the Commission without further submissions”, although submissions could be made if that would assist the Commission. The second case was *State Transit Authority of New South Wales v Australian Rail, Tram and Bus Industry Union, New South Wales Branch, Bus and Tram Division* [2014] NSWIRComm 41 (“*State Transit Authority*”), about which the parties had “agreed to each provide a short note to the Commission”.
- 33 The Secretary’s Note set out submissions as to the principles to be derived from *State Transit Authority* and the consequences of those principles in the circumstances of this case, particularly in light of the relief sought by ASMOF.
- 34 On 25 October 2022 ASMOF filed a document titled “Supplementary Note for the Notifier”, which responded to the Secretary’s Note.
- 35 As it transpires, given the approach that I have determined to take it is not necessary to explore these issues.

## The need for changes to the Award

- 36 The Health Secretary's primary position is that the arrangements under which staff specialists in the Departments work are contemplated by and are in conformity with the Award. She contended that the Commission would only consider making a variation to the Award if it found in favour of ASMOF's construction of cl 4.A of the Award. In that case the variation would be limited to adding the staff specialists in the Departments to Pt C Sch 3 to the Award, so that they became expressly covered by the shift work provisions in cl 4.A(d).
- 37 There was, however, considerable support in the evidence for changes to the Award, even were I to adopt ASMOF's the interpretation of cl 4.A.
- 38 Of ASMOF's witnesses, in addition to the evidence of Drs Christoff and Weatherall referred to at [20] above:

- (1) In her statement of 27 April 2022 Dr Christoff stated:

"53. The increase in complex patient admissions has necessitated that there is Staff Specialist onsite presence outside of the normal working hours provided by the Award. This is in order to maintain continuity of patient care and ensure that the patients are safe. The onsite Staff Specialist presence is necessary to enable safe patient care and for ongoing supervision of the junior medical staff and to support the nursing staff.

54. One of the key changes, as a result of the increase in patient number, complexity and acuity, is that there has been a big shift away from the Staff Specialists being able to go home from work at 6:00pm and just be available by phone to take a phone call. It is necessary for Staff Specialist to remain on-site, more than 50% of admissions to PICU occur between 5pm and 7am. This requires Staff Specialist presence onsite after 5.00pm in order to safely manage the patients late into the evening."

- (2) In her statement of 15 July 2022, Dr Ramanie Jayaweera stated:

"87. The Award is not fit for purpose and is out of date. The Award has not kept up with the advances in medicine and technology that we have today and as such cannot account for the workload, complexity, and acuity of the work as it is now performed. What was appropriate and reasonable for a staff specialist when the Award was crafted is not

applicable to the kind of work done in the present day and the nature of paediatric anaesthetics.”

(3) Dr Stephen Jacobe, in his statement of 27 April 2022, stated:

“202. The nature of paediatric critical care has evolved a lot over the past 20 years, and I’ve witnessed much of this evolution.

203. Over this same period, however, the Award has changed little, and in fact, local arrangements to address local needs have even been prohibited. Given the change to our work that has occurred, we are actually a lot worse off due to the lack of change to the Award.”

39 Of the Health Secretary’s witnesses, in addition to the evidence of Dr Ging referred to at [21] above:

(1) Melissa Collins, in her statement of 12 June 2022, stated (at par 27) that there has been no work value case in relation to staff specialists as a whole since 2006. This evidence has to be considered in light of ASMOF’s uncontested evidence as to the increase in patient load, complexity and acuity in the Departments over the last 10 years or more.

(2) Dr Justine Harris, in her statement of 14 June 2022, stated:

“30. If staff specialists were not available outside of the hours of 7am to 6pm Monday to Friday, it would be unsafe for patients, and there would be limited supervision of junior medical officers which means that they would be working outside of their scope of practice.

31. An intensive care unit cannot safely operate without oversight of patients by a specialist daily. The need for a flexible roster for these specialists is state-wide as every intensive care unit is the same in respect to the clinical need to roster staff specialists on duty every day of the week, and every day of the year. I make this comment on the basis of my medical administrator experience, as I have worked with various other districts including South Eastern Sydney Local Health District.

32. There is also a need for afterhours anaesthetics services to run emergency theatres, trauma lists manage acute pain, perform epidurals, and to deal with complex lines as mentioned at paragraph 26.

33. If these specialists were not available outside of the hours of 7am and 6pm Monday to Friday, and it was not possible to implement a VMO model where there is no restriction on hours, in my view the only other option to ensure patient safety would be to allow the specialists to

be classified as shift workers so that they could be rostered on evenings, weekends and public holidays to meet the clinical need. Otherwise, I do not see how intensive care units and anaesthetics departments across NSW could continue to function safely.”

(3) Dr Brett Oliver, in his statement of 14 June 2022, stated:

“26. If it were determined that staff specialists could not be rostered outside these hours in the SWSLHD, in my view it would be clinically necessary to be able to implement shift work arrangements for those specialties where clinical need dictates that specialists must be available on a regularly rostered basis outside those hours (such as the specialties I referred to in paragraph 7 above). If this did not occur, there could be serious implications for patient welfare and safety.”

40 At the arbitration of these proceedings I had the following exchange with Mr Gibian:

“COMMISSIONER: So either way. Because nobody is saying that - sorry, nobody seems to be saying that the work can be done between the hours of 7am and 6pm Monday to Friday, or even Monday to Sunday for that matter. Nobody wants to be confined to working those hours because of the nature of the work. But if I’m with you on your construction of cl 4 in that it’s 7am to 6pm Monday to Sunday at best, the award needs changing somehow, doesn’t it?”

GIBIAN: I agree that the award needs changing somehow. What I would urge upon the Commission is that what we have to look at is what is the practical way in which to go forward to try and resolve what the Commission well knows from the material is a broader dispute than just - a broader issue than just the precise hours that won’t be resolved by simply adding these particular specialties to the shift work schedule and indeed on the evidence that doesn’t appear to be challenged, these senior people think may in fact exacerbate those issues. The parties should be provided, for the reasons that I’ve said, with an opportunity to consider how to address the fact that on our submission the working arrangements have arisen in a way which is not contemplated for or provided for in the award and how best to address that.”

### **Observations on the relief sought**

#### *The variation proposed by the Health Secretary*

41 I acknowledge at the outset that the variation proposed by the Health Secretary – that staff specialists in the Departments be added to Pt C Sch 3 to the Award, and so become expressly covered by cl 4.A(d) of the Award – is very much put by the Health Secretary in the alternative to her primary position. The Health Secretary did not make a counter-application under s 17 of the Act, and she did not positively mount a case for a variation to the Award. When I refer in this

Statement to the “Health Secretary’s proposed variation” or similar, it is on the clear understanding that it is proposed in the alternative.

42 ASMOF opposed the Commission making the variation proposed by the Health Secretary. This was for essentially four reasons:

- (1) cl 4(d)(iv) of the Award contemplates that the parties would attempt to reach agreement on the inclusion of additional specialties or categories to Pt C Sch 3, prior to the matter being referred to the Commission. The parties have not had those discussions;
- (2) the introduction of shift work would require a significant increase in the number of staff specialists in the Departments. Absent such an increase, shift work would not improve, but may exacerbate, work and related pressures faced by the staff specialists. Further, the introduction of shift work may have a detrimental impact on the retention and attraction of staff specialists, impacting on the ability to recruit to the required level;
- (3) the shift work provisions of the Award would not entirely address the work pattern problems that had been identified. Under the terms of the Award, shift rosters do not contemplate hours of work between midnight and 7.00am; and
- (4) there may be implications flowing from the introduction of shift work beyond the Departments. There was insufficient evidence on which the Commission could identify such implications or to consider them prior to making any changes to the Award.

43 I add that it was clear that for personal reasons a number of the staff specialists who gave evidence did not wish to work on a shift roster.

44 The Health Secretary has not put forward a sufficient basis on which I could be satisfied that its proposed variation would result in fair and reasonable conditions for the staff specialists in the Department. To the extent that such a



variation is pressed, it would require more detailed evidence and submissions from the parties, to allow for proper consideration by the Commission.

- 45 I raised with Mr Fuller reservations as to whether the Commission could make the proposed variation, given the terms of cl 6(1)(a) of the Regulation. Even on the current work arrangements in the Department, the application of the shift work provision would increase costs.
- 46 The Health Secretary's position, in summary, is that the variation is contemplated in the terms of cl 4.A(d)(iv) of the Award. Mr Fuller described that provision as "inherently ambulatory" in the sense of being "capable of expansion inherently in the way that it is drafted, either by agreement or by the Commission". He submitted that cl 6(1)(a) of the Regulation should not be construed as referring to a situation where an award expressly builds in the capacity for change.
- 47 I am not wholly persuaded by these arguments. Clause 4.A(d)(iv) of the Award provides that if the parties cannot agree on changes to Pt C Sch 3 to the Award, "either party may make application to the Industrial Relations Commission for a variation". It is difficult to see how this language would not bring ss 17 and 146C of the Act, and cl 6 of the Regulation, into play.
- 48 I also have some doubts as to whether the Health Secretary's proposed variation would properly be said to "resolve all issues the subject of the proceedings", as required by cl 6(1)(d) of the Regulation.
- 49 For these reasons, I have determined that the Commission ought not at this stage of the proceedings vary the Award so as to include staff specialists in the Departments in Pt C Sch 3 to the Award. Whether such a variation ought or ought not to be made requires a more detailed and considered analysis of the issues arising than is possible on the available evidence and submissions.

*The Determinations sought by ASMOF*

50 Despite the Health Secretary's submissions as to the effect of *State Transit Authority*, I am comfortably satisfied that it is within my powers to take the approach suggested by ASMOF – to determine the construction of cl 4.A of the Award and whether the arrangements under which the staff specialists work are in conformity with the Award, and to recommend or direct the parties to confer with a view to reaching consensus on the outstanding matters in dispute between them, informed by that determination. However, I do not consider that is the appropriate approach to take in this case. This is for two reasons.

51 First, I accept the Health Secretary's submissions that were I find in favour of ASMOF's construction of the Award, she would be placed in the position of being knowingly, and thereafter continuously, in breach of the Award. That is an untenable position in which to place the Health Secretary, particularly as she would enter any future discussions or negotiations with the proverbial Sword of Damocles hanging over her head.

52 This leads to the second reason. Whichever construction of cl 4.A I preferred, any determination is unlikely to assist in the ultimate resolution of the dispute. The party whose construction was accepted would be emboldened by that outcome, and have little incentive to move from their position. As I have already stated, it appears to be common ground that the Award needs to change, albeit there is no consensus on what that change may entail. In those circumstances, any result which may entrench a party in its position is to be avoided.

*The recommendation sought by ASMOF*

53 ASMOF seeks a recommendation which on its terms requires the Sydney Children's Hospital Network to pay to staff specialists in the Departments "the *appropriate penalty payments under clause 4 Part A(d)(iii) of the Staff Specialist (State) Award 2021 payable with respect to shift work performed by the staff specialists which has not been paid*" (my emphasis). I will put to one side whether any recommendation ought to be directed to the Sydney Children's Hospital Network as opposed to the Health Secretary. My concern lies in the

suggestion in the proposed recommendation that the penalty rates in cl 4.A(d)(iii) of the Award are “payable” to the staff specialists and “have not been paid”.

- 54 One of the bases on which ASMOF’s case proceeded, which reflected a grievance expressed by some of the staff specialists who gave evidence, was that staff specialists are effectively being required to perform shift work despite not receiving penalty rates. The premise of this position is that there is presently no entitlement for staff specialists in the Departments to receive those rates, although I acknowledge that in his oral submissions Mr Gibian suggested that there may be an argument that an entitlement arises despite the strict terms of the Award.
- 55 In any event, I am loath to make a recommendation that might be said to suggest an existing Award entitlement where that is very much in issue between the parties.
- 56 As already observed, ASMOF and the staff specialists are in strong opposition to the introduction of shift arrangements in the Departments. An earlier offer to afford them shift penalties in accordance with the Award was rejected.
- 57 A number of the staff specialists who gave evidence described the impact of their hours of work on their health and wellbeing, and family relationships. They described the risk of fatigue from working unreasonable hours and their consequential concerns as to the possibility of this impairing their clinical judgement, potentially impacting on the level of patient care that they are able to provide. At one level, additional payments may not be said to address those concerns.
- 58 I also have regard to the considerable evidence led by the Health Secretary as to the income derived by staff specialists under the Award and the Determination. To my mind, this is of little immediate assistance. In circumstances where there is broad consensus that the Award needs to

change, it does little to assert – in effect – that under the current instruments the staff specialists are “doing alright”.

- 59 Having regard to all of these matters, I have determined not to make the recommendation sought by ASMOF.

### **Concluding remarks**

- 60 The Health Secretary maintains a position that the Award contemplates the arrangements by which the staff specialists in the Departments are presently working. Even so, the evidence suggests a need to revisit the Award, if only to allow for the 24/7 services that appear now to be required.

- 61 With respect, neither party suggested a way forward that would either resolve the dispute between them or facilitate such a resolution. It is to my mind necessary that the question as to what, if any, changes to the Award are required in respect of staff specialists in the Departments be dealt with expeditiously, comprehensively and finally.

- 62 Given the position that I have determined to take in respect of the relief and alternative relief sought by the parties, I have deliberately refrained from expressing what might be regarded as considered decisions in respect of the parties' legal positions. Such matters, particularly the proper construction of cl 4.A of the Award, are more properly determined as part of the final resolution of the dispute, and not as an interim measure.

- 63 In taking the approach that I have adopted, including by issuing a statement as opposed to publishing a decision, I have had regard to the observations of Walton J in *Secretary of the Ministry of Health v Australian Paramedics Association (NSW)* [2022] NSWSC 1431 at [200]-[202].

- 64 Finally, I appreciate that the parties, and in particular the witnesses, must have expended a significant amount of time and effort in preparing their respective cases. Due to the position I have reached, it has not been necessary to traverse at length or in detail all of the evidence and submissions advanced by the

parties. This is in no way intended, and should not be construed, as a slight on the parties, their witnesses or Counsel, or be seen in any way to diminish their efforts.

### **Further progress of the matter**

65 The matter will be listed for directions so as to allow for the parties to be heard as to the steps necessary to progress the matter. This will include whether either party wishes to make an application pursuant to either s 10 or s 17 of the Act, or whether the Commission ought to move of its own motion under s 11 to vary the Award under s 17.

This statement was issued on 2 November 2022.

**Damian Sloan**

Commissioner

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