# Industrial Relations Commission
## New South Wales

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| **Medium Neutral Citation:** | **Australian Salaried Medical Officers' Federation (NSW) v Health Secretary in respect of the Western Sydney Local Health District [2021] NSWIRComm 1002** |
| **Hearing dates:** | 20 January 2021 |
| **Date of orders:** | 29 January 2021 |
| **Decision date:** | 29 January 2021 |
| **Jurisdiction:** | Industrial Relations Commission |
| **Before:** | Chief Commissioner Constant |
| **Decision:** | 1. I find that there is a dispute between the parties in respect of: the termination of the arrangements and purported agreements; whether such termination may be effected unilaterally; and if so, the terms of engagement including in respect of rosters and private practice rights which will apply. This dispute is within the meaning of "issue" in cl 3(b) of the Staff Specialists (State) Award 2019. The parties are required to maintain the status quo which existed before the emergence of the issue until the exhaustion of the Issue Resolution procedures in cl 3 of the Award.<br><br>2. I recommend that the parties continue to operate in accordance with the terms of the relevant work practices and procedures applying to the Radiologists immediately before 3 August 2020, including where relevant, the terms of the 2015 Westmead Agreement and the 2004 Blacktown Agreement, until the exhaustion of the Issue Resolution procedures in cl 3 of the Award. |
| **Catchwords:** | EMPLOYMENT AND INDUSTRIAL LAW – Award interpretation – relevant principles to be applied – meaning and application of status quo provision in the award – what is an "issue" pursuant to the award |
| **Legislation Cited:** | Industrial Relations Act 1996 (NSW), ss 12, 130, 135, 136, 175 |
| **Cases Cited:** | Australian Salaried Medical Officers Federation (NSW) v Ministry of Health [2019] NSWIRComm 1041<br>Fire Brigade Employees' Union of NSW v Fire And Rescue NSW [2020] NSWIRComm 1022 |

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| | New South Wales Nurses and Midwives' Association v Health Secretary on behalf of Western NSW Local Health District [2019] NSWIRComm 1025<br>Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary for Industrial Relations [2018] NSWIRComm 1061 |
| **Category:** | Procedural rulings |
| **Parties:** | Australian Salaried Medical Officers' Federation (NSW) (notifier)<br>Health Secretary in respect of the Western Sydney Local Health District (respondent) |
| **Representation:** | Counsel:<br>L Saunders (notifier)<br>D Fuller (respondent) |
| **File Number(s):** | 2020/316034 |

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## DECISION

1 In these proceedings the Australian Salaried Medical Officers' Federation (NSW) ("ASMOF") represents Staff Specialists employed by the Health Secretary ("Secretary") within the Western Sydney Local Health District ("WSLHD") to perform work as radiologists at Westmead, Auburn and Blacktown Hospitals ("the Radiologists").

2 On 5 November 2020, ASMOF, on behalf of the Radiologists, notified a dispute pursuant to s 130 of the *Industrial Relations Act 1996* (NSW) ("the Act") relating to the purported termination with notice by the Secretary of long-standing arrangements between the Secretary and the Radiologists ("the Notified Dispute"). The purported effective date for termination of the long-standing arrangements is 31 January 2021 [1].

3 I conciliated the Notified Dispute on 11 November 2020. On 23 December 2020, at the request of ASMOF, I issued a certificate pursuant to s 135 of the Act, and set down for arbitration an application by ASMOF that the Commission, pursuant to sub-s 136(1)(a) of the Act, recommend or direct the Secretary to maintain the "status quo" in respect of the Radiologists in accordance with cl 3 of the Staff Specialists (State) Award 2019 ("the Award") until the exhaustion of the Issue Resolution procedures in the Award ("the Status Quo Application"). ASMOF contends that the Secretary must, pursuant to sub-cl 3(h) of the Award, continue the long-standing arrangements "whilst [the Issue Resolution P]rocedures [in the Award] are being followed".

**Procedural matters**

4 The hearing of the Status Quo Application took place on 20 January 2021. A decision on the Status Quo Application is required on or before 31 January 2021.

5 Ms Lucy Saunders of counsel appeared at the hearing by video-conference of the Status Quo Application on behalf of ASMOF. The Secretary was represented by Mr Dan Fuller of counsel.

6 ASMOF read: two statements of Mr Robert John Morgan, a Senior Industrial Advisor at ASMOF, the first made on 11 January 2021 and the second made on 19 January 2021; a statement of Dr Philip Vladica, the Sectional Head of Uro-radiology at Westmead Hospital made on 12 January 2021 and 19 January 2021; and two statements of Dr George McIvor, the Clinical Director and Head of the Radiology Department at Westmead Hospital, the first made on 12 January 2021 and the second made on 19 January 2021. ASMOF tendered a bundle of 34 documents admitted as Exhibit "ASMOF 6" and relied on written submissions filed on 12 January 2021 ("ASMOF's Submissions in Chief"), and submissions in reply filed with leave on 20 January 2021 (ASMOF's Reply Submissions").

7 The Secretary read affidavits of Mr Nathan Rudd, Director Industrial Relations and HR Policy within NSW Ministry of Health sworn on 18 January 2021, and Ms Luci Anna Caswell, the Director of People and Culture at WSLHD, affirmed on 18 January 2021. The Secretary also tendered a bundle of 14 documents admitted as Exhibit "Health 2" and relied on a written outline of submissions filed on 18 January 2021 ("The Secretary's Submissions").

8 Dr McIvor and Ms Caswell were cross-examined.

**Background to the Status Quo Application**

9 For present purposes, Staff Specialists engaged by the Secretary are covered by the Award and the Staff Specialists Determination 2015 ("the Determination") [2] .

10 ASMOF submits that for some decades, the Radiologists have been paid and rostered in accordance with written agreements first codified in 1999. The latest of these agreements asserted by ASMOF is: "the Radiology Agreement between Westmead Hospital and the Staff Specialist Radiologists, Westmead Radiology Department" ("the 2015 Westmead Agreement") [3] . The 2015 Westmead Agreement refers to Radiologists providing services at Westmead and Auburn Hospital Radiology Departments. An earlier agreement [4] dated 24 May 2004 states at Part II, cl B 2: "WSAHS Division of Medical Imaging is to function in two axes: a Westmead – Auburn Hospital axis, and Blacktown – Mount Druitt Hospital axis" and appears to cover the Radiologists who provide services at Auburn, Blacktown and Mount Druitt Hospitals ("the 2004 Blacktown Agreement"). The 2004 Blacktown Agreement, other earlier agreements, and an extension of the terms document appear to be signed by Radiologists at Blacktown Hospital as well as Westmead and Auburn Hospitals. At

paragraph 11 of his affidavit, Mr Rudd appears to refer to the 2015 Westmead Agreement as the Westmead Agreement and the 2014 Blacktown Agreement as the Blacktown Agreement [5] .

11 The Secretary admits that the Radiologists "at the Westmead, Auburn and Blacktown / Mount Druitt Hospitals in the … WSLHD have worked pursuant to arrangements provided for in a series of "Networking Agreements" [6] . I have, for the purposes of this decision only, accepted that the purported agreements would, if they were enforceable, cover the relevant Radiologists at the relevant hospitals asserted by ASMOF. I have not, at this time, considered the proper or relevant Radiologist parties to the relevant agreements, as it is accepted by both parties that the Radiologists are covered by the Award and are subject to the arrangements, and this decision is in respect of an application to maintain the status quo in the context of an industrial dispute, it is not a contractual claim. Although the Secretary does not take issue with the relevant parties or coverage of the agreements, the Secretary asserts that the arrangements and the relevant agreements, including the 2015 Westmead Agreement, are unauthorised and unlawful, and that this is a matter relevant to the Commission's exercise of discretion, submitting:

> 2. … [t]hose arrangements are inconsistent in substantial respects with the Award and the Determination, including by providing for reduced hours of work, penalty rates for weekend work, more extensive rights of private practice, guaranteed 'Level 5' income without meeting the requirements in the Determination, and (from 2015) an arrangement in which radiologists effectively outsource public radiology work to themselves at private rates. The agreements were not authorised by the Health Administration Corporation or the Secretary as required by the Health Services Act 1997 (NSW), or by anyone holding a delegation to do so under s 21 of the Health Administration Act 1982 (NSW). The Secretary's position is that, as a consequence, the purported radiologists' agreements were ineffective from the start and any payments made under them were illegal as being outside parliamentary authority.
>
> (Footnotes omitted)

12 On 24 July 2020, Ms Caswell wrote to the Secretary of ASMOF, Dr Tom Karplus, formally advising him:

> … of WSLHD's intention to cease [the] current over award agreement (Agreement) that is held between the District and Radiologist[s] employed at Westmead and Blacktown Hospital.
>
> A meeting was held with the respective Radiologists on Friday 24 July 2020 (Meeting) verbally advising the staff of the District's intention and requesting their engagement during the notice period to establish a consultative process to implement the change.
>
> Affected Radiologist[s] will be provided notice of the cessation of the Agreement and associated employment arrangements effective 6 months from Monday 27 July 2020.
>
> WSLHD invites you to consult on the matter.
>
> …
>
> It is WSLHD's view that a return to the Award employment arrangements will not change or impede on the current appointments of Radiologist[s] with WSLHD as Staff Specialist at the applicable FTE or part thereof.

13 It is not in dispute that termination of the long-standing arrangements and the purported agreements will result in a change to the remuneration and rostering arrangements for at least some of the Radiologists.

14 On 3 August 2020, Dr Karplus, on behalf of the Radiologists, wrote to WSLHD providing a response to the letter of 24 July 2020 stating "ASMOF considers that the Radiology Agreement, which has been in place continuously since 1999 is an integral industrial instrument conferring entitlements to workplace conditions of employment

which form part of the Radiologists' contract of employment", invoking the status quo under cl 3(h) of the Award and seeking continuation of the current arrangements "while consultation regarding this matter continues".

15 On 5 August 2020, Dr Emma McCahon, Executive Director of Medical Services wrote, on behalf of WSLHD, to Mr Morgan informing ASMOF that "WSLHD is of the view that the Award provisions and the status quo does not apply".

16 On 5 November 2020, ASMOF filed with the Commission a Dispute Notification – Form 4, which set out the following "question, dispute or difficulty" in relation to the Notified Dispute:

> (i) Staff Specialist Radiologists employed by Western Sydney Local Health District (WSLHD) at Westmead, Blacktown and Auburn Hospitals work under agreements which provide a number of benefits to the Radiologists in consideration of significant flexibility in providing out of hours radiology services to the Local Health District.
>
> (ii) These agreements were initially negotiated in 1999, and have continued in varied form since that time, having been varied to adapt to changing circumstances.
>
> (iii) The agreement which applies to Westmead is attached and marked 1. The agreement which applies to Blacktown is attached and marked 2.
>
> (iv) On 24 July 2020 WSLHD advised that it was providing six months' notice to terminate the agreements (attached and marked 3).
>
> (v) Discussions between the parties on 16/10/20 [*sic 2/10/20*] have not led to a resolution of the matter.
>
> (vi) The Ministry of Health and WSLHD have refused to observe the status quo provisions of clause 3 (h) of the Staff Specialists (State) Award 2019 as requested by the notifier (see letters from ASMOF dated 3/8/20 and 18/8/20 marked 4 and 5 respectively.)

17 The Form 4 does not identify the relief sought through the Commission's processes; nor does the form require such identification.

18 The Notified Dispute is now before the Commission to determine the Status Quo Application. ASMOF says that the question for the Commission to answer in respect of the application of the status quo is:

> Is the dispute, or any part of it, raised by ASMOF a dispute within the meaning of cl. 3 of the Staff Specialists (State) Award 2019 such that NSW Health is required to maintain the status quo until the exhaustion of that dispute resolution procedure?

19 ASMOF says the answer to the above question is "yes" and the Commission should direct or recommend accordingly.

20 The Secretary says the Commission should not make a recommendation or direction that the Secretary maintain the status quo for three reasons:

(1) the dispute does not involve an "issue" within the meaning of cl 3(h) of the Award or fall within cl 8 of the Staff Specialists Determination 2015 ("Determination");

(2) if it applies, the issue resolution process in cl 3 of the Award has come to an end in relation to the substantive dispute; and

(3) the Commission should exercise its discretion not to grant any relief because the status quo sought by ASMOF would involve maintaining arrangements that were unauthorised and unlawful and that are fundamentally inconsistent with the conditions that should apply to radiologists under the Award and Determination.

**Relevant terms of the Award, the Determination and the 2015 Westmead Agreement**

21 In order to determine whether there is an "issue" within the meaning of cl 3(h) of the Award and/or, if required, a "disagreement" within the meaning of cl 8 of the Determination, it is necessary to consider the relevant terms of these instruments.

22 It is also useful at this point to set out relevant terms and matters arising from the 2015 Westmead Agreement.

*The Award*

23 Clause 3 of the Award is in these terms:

> 3. Issue Resolution
>
> (a) All parties must:
>
> (i) use their best endeavours to co-operate in order to avoid grievances and disputes arising between the parties or between the Employer and individual Staff Specialists; and
>
> (ii) abide by the procedures set out in this Clause to resolve any issue which might arise; and
>
> (iii) place emphasis on negotiating a settlement of any issue at the earliest possible stage in the process.
>
> (b) In this Clause, 'issue' means any question, issue, grievance, dispute or difficulty which might arise between the parties about the interpretation, application or operation of this Award.
>
> (c) The following procedures will be facilitated by the earliest possible advice by one party to the other of any issue or problem which may give rise to a grievance or dispute.
>
> (d) Any issue must be discussed in the first instance by the Staff Specialist and his or her immediate supervisor.
>
> (e) If the issue is not resolved within a reasonable time it must be referred by the Staff Specialist's immediate supervisor to the Chief Executive (however called) of the relevant Public Health Organisation (or his or her nominee). Discussions at this level must take place and be concluded within a reasonable time or such extended period as may be agreed.
>
> (f) If the issue remains unresolved the Staff Specialist may request the Federation to then confer with the Chief Executive of the Public Health Organisation or his/her nominee. The conclusions reached by those representatives must be reported to the parties involved in the grievance/dispute within a reasonable time or such extended period as may be agreed.
>
> (g) If these procedures are exhausted without the issue being resolved, either party may seek to have the matter mediated by an agreed third party being:
>
> (i) by way of preference, a person who is not employed as a Staff Specialist by the Employer and who has a knowledge of Staff Specialist arrangements, including this Award; or
>
> (ii) a suitably qualified mediator.
>
> If the matter remains unresolved either party may then:
>
> refer the matter to the Secretary of the NSW Ministry of Health; or
>
> refer the matter in accordance with the provisions of the *Industrial Relations Act 1996* (NSW) to the Industrial Relations Commission for its assistance in resolving the issue.
>
> (h) The parties agree that normal work will continue and there will be no stoppages of work or any other bans or limitations on the performance of work while these procedures are being followed. Unless agreed otherwise by the parties, the status quo before the emergence of the issue must continue whilst these procedures are being followed. For this purpose, 'status quo' means the work procedures and practice in place:
>
> (i) immediately before the issue arose; or
>
> (ii) immediately before any change was made to those procedures or practices which caused the issue to arise.

> (i) The Employer must ensure that all practices applied during the operation of these procedures are in accordance with safe working practices.
>
> (j) Throughout all stages of these procedures adequate records must be kept of all discussions.

24 Pursuant to sub-cll 4(a) and 4(e) of the Award, Staff Specialists are required to be available for "reasonable on call and recall duties" in addition to their ordinary hours of "not less than 40 per week".

25 The Award sets salaries for Staff Specialists based on six seniority levels: Grades 1-5 and "Senior". Sub-clause 5(g) of the Award provides:

> Except as provided for elsewhere in this Award and other relevant industrial instruments, the salary set out in Part B Schedule 1, Rates of Pay of this Award will be full compensation for all aspects and hours of work.

26 The Award uses the Special Allowance and the various levels of Private Practice Allowance specified in the Determination for the calculation of shiftwork rates of pay, and the cashing out of annual leave.

27 Clause 12 of the Award provides:

> (a) Each … Staff Specialist will have a written annual Performance Agreement developed jointly by the Staff Specialist and his/her designated supervisor and signed by the Chief Executive (however called) of the relevant Public Health Organisation or his or her nominee.
>
> …
>
> (c) In the event that agreement is not reached within a further 2 weeks, the matter must be resolved in accordance with the provisions of clause 3, Issues Resolution, of this Award.
>
> …
>
> (e) A Performance Agreement will include:
>
>> ….
>>
>> The anticipated on call frequency and roster.
>>
>> Private billing expectations for Level 1 Staff Specialists.
>>
>> …
>>
>> Any part-time working arrangement in accordance with clause 13 of this Award or outside practice approvals in accordance with clause 15 of this Award.

*The Determination*

28 The Determination deals with the interaction between the Award salaries and each Staff Specialist's Right of Private Practice ("ROPP") income. The ROPP income is the Staff Specialists' portion of the fee income generated from their work performed in-hospital for private patients.

29 Clause 2 of the Determination sets five levels of private practice arrangements. By way of examples, the Determination provides at sub-cl 2(b):

(1) at Level 1, a Staff Specialist: is guaranteed 100% of the relevant Award salary; is paid a private practice allowance of 20% of their salary; is required to have signed an undertaking to exercise his or her rights of private practice to the fullest extent possible (consistent with legislative requirements) with compliance being assessed annually; but has no drawing rights; and

(2) at Level 5, a Staff Specialist: is entitled to 75% of the relevant Award salary; has the right to draw down up to approximately 100% of the full-time Award salary; is entitled to leave without pay for 25% of the full-time commitment in that

speciality; and is prohibited from undertaking private practice during the 75% of time for which the salary is payable thus they must not spend more than 25% of their total working time in the treatment of private patients.

30 Clause 6 of the Determination acknowledges that some Staff Specialists may be required to work in excess of Normal Hours and sets out conditions under which an additional payment may be authorised by the Chief Executive where a Staff Specialist is required to work abnormal hours.

31 Clause 8 of the Determination applies the Issue Resolution process in cl 3 of the Award to a "disagreement in relation to matters contained within this Determination".

*The 2015 Westmead Agreement*

32 Under the 2015 Westmead Agreement, a full time Radiologist is:

(1) rostered to work normal duties 3.5 days per week (or 7 "sessions"),

(2) rostered to be on call one week in six, for all non-working hours including weekends;

(3) as a matter of practice, required to work unpaid overtime throughout the working week; and

(4) paid 80% of the minimum award salary for their level, and 100% of the maximum Level 5 draw for their level, regardless of fee income.

33 Page 1 of the 2015 Westmead Agreement refers to "Dr George McIvor" as the "author" of this document. The 2015 Westmead Agreement does not contain wet signatures but:

(1) the "Action Tracking Cover Sheet ITS" of the 2015 Westmead Agreement states that it was "registered by Crotty, Lynette" and contains the following notes:

> "Tuesday, 30 June 2015 at 11:07:37 AM … Tullett, Deborah:"
>
> This brief was approved by Richard Chrystal, Acting Chief Executive WSLHD.
>
> These documents have been forwarded to Dr R Crampton, Chief Medical Advisor, C Fozzard, Director Allied Health WSLHD.
>
> "Tuesday, 30 June 2015 at 9:59:36 AM … Currie, Sara:"
>
> Approved by the A/CE. Author notified and coming to collect the originals.

(2) page 1 of the 2015 Westmead Agreement states:

> Approved by:
>
> 1. Roslyn Crampton, Divisional Manager of Clinical Support / Chief Medical Advisor Date: 23/6/15
>
> 2. Andrew Newton, General Manager, Westmead / Auburn Hospitals Date: 28/6/15
>
> 3. Leena Singh, Director Strategic Business Development WSLHD Date: 24/6/15
>
> 4. Danny O'Connor, Chief Executive WSLHD Date: 30/6/15

**Principles of award construction**

34 I will apply the principles of award construction set out by Chief Commissioner Kite SC in *Fire Brigade Employees' Union of NSW v Fire And Rescue NSW* [2020] NSWIRComm 1022 in which he said:

7 The principles for the interpretation of awards are reasonably well settled: *Health Services Union New South Wales and Ambulance Service of New South Wales* [2017] NSWIRComm 1057 at [10] – [16]. The last decision referred to by Commissioner Seymour in that review of the authorities was *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWIRComm 23. In that decision, after an extensive review of the authorities Walton J, President, provided the following summary at [115]:

> "Putting aside for one moment the refinements applicable to award interpretation to which Street and French JJ alluded, these statements of principle may be synthesised as follows:
>
>> (1)The legal meaning of 'a provision of an award' is to be ascertained through a process of construction by which the intention of the provision is deduced. It is the duty of the court to give the words of the award a meaning that the authors of the award are taken to have intended them to have;
>>
>> (2) The process of construction must begin with a textual analysis of the words of the provision, that is, a consideration of the ordinary and grammatical meaning of the words;
>>
>> (3) Whilst the surest guide to the meaning of an award provision is language used in a provision of an award, the meaning of the text may require consideration of the context (which includes, inter alia, consideration being given to the instrument as a whole). Thus, the initial step to construction may involve construing the words of an award provision in context;
>>
>> (4) The consideration of the words of the provision of an award in context includes examining the general purposes and the policy of the provision derived from a statement of policy in the award or from the terms of the award. Thus, the legal meaning may be ascertained by reference to general purpose, consistency and fairness, although, again, the purpose of a provision derives in its text and structure. A relevant consideration in this respect is the mischief remedied by a provision. (See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47].);
>>
>> (5) An examination of the purpose of an instrument is very much part of the traditional approach to award interpretation. It was accepted by Kelleher J in *Re Dispute between Broken Hill Pty Co Ltd and the Federated Ship Painters and Dockers' Union of Australia, New South Wales Branch, Re Tank Tops* [1961] AR (NSW) 312 at 314 that it is proper to pay regard to "the purposes for which a provision is intended" (as quoted in *Bryce v Apperley* at 452 and *Kingmill* at [63]). An application of this approach may be found in the judgment of Hill J in *Australian Workers Union (NSW) v Pioneer Concrete (NSW) Pty Ltd* (1991) 38 IR 365 at 380, where it was stated that provisions in awards must be construed reasonably and realistically, "having regard to their purposes and objectives". I will add further to this consideration when returning to the notion, developed in the dicta of Street and French JJ, that a generous construction should be adopted in the interpretation of awards;
>>
>> (6) The determination of the purpose or intention of a provision of an award neither permits nor requires a search for what those who drafted or made the award had in mind when the award was made: see *Construction, Forestry, Mining and Energy Union (NSW Branch) v Delta Electricity* [2003] NSWIRComm 135; (2003) 146 IR 360 at [44] and *NSW Fire Brigades* at [47]. Further, it is not for the court to construct its own idea of a desirable policy, import it to the award maker and then characterise it as the purpose of the provision: see *Brown* at [40] (Bathurst CJ)."

(Emphasis added)

8 The "refinements referred to by Street and French JJ" were those in their Honours' decisions in *George A. Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 and *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813; (2006) 153 IR 426 [3] respectively. In Bond Street J said:

> Now speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relations as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship

which one expects to find in an Act of Parliament. I think, therefore, in construing an award one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.

(Emphasis added)

In *City of Wanneroo* French J said to like effect at [53] and [57]:

53 The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to "... the entire document of which it is a part or to other documents with which there is an association". It may also include "... ideas that gave rise to an expression in a document from which it has been taken" - *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518; 46 IR 128 at 134 (Burchett J); *Australian Municipal, Administrative, Clerical and Services Union v Treasurer of Commonwealth* (1998) 82 FCR 175; 80 IR 345 (Marshall J).

...

57 It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities - City of Wanneroo v Holmes (1989) 30 IR 362 at 378-379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned - see eg *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies.

(Emphasis added)

9 The last decision warranting specific recognition in this matter is the decision of Madgwick J in *Kucks v CSR Ltd* (1996) 66 IR 182. In an oft quoted passage his Honour said:

"It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading.

But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

(Emphasis added)

**Is there an "issue" within the meaning of cl 3(6) of Award?**

35 The procedures in cl 3 of the Award, including the status quo provision in cl 3(h), apply where there is an "issue" between the parties. "Issue" means "any question, issue, grievance, dispute or difficulty which might arise between the parties about the

interpretation, application or operation of this Award": cl 3(b). The text of the clause does not limit what may be an "issue" to matters set out in a Dispute Notification – Form 4.

36 ASMOF submits that cl 3 of the Award should be given a broad interpretation and relies on Commissioner Sloan's interpretation of cl 3 in *Australian Salaried Medical Officers Federation (NSW) v Ministry of Health* [2019] NSWIRComm 1041 ("*ASMOF 2019*") to support its submission.

37 ASMOF submits that whether there is a dispute as to the actual interpretation as a strict legal question of the effect of the terms of the Award does not matter, as the Radiologists know how the Award will operate and consider it to be inadequate; and that is, in itself, a dispute in the context of cl 3 of the Award. ASMOF asserts that cl 3 requires that a disagreement of this type, which, in its submission, is an issue, grievance, or question about the inadequacy of the Award terms, must be progressed through the issue resolution process before the Commission can be requested to vary the Award or make any other final order, and the status quo must be maintained until the issue resolution process is complete.

38 Paragraphs 22 and 23 of ASMOF's Submissions set out in greater detail what ASMOF says is in dispute:

> 22. What is between the parties is:
>
> a. a disagreement as to both the correct interpretation and practical application of the ROPP provisions of the Determination in respect of the Radiologists;
>
> b. an issue as to how salary arrangements set by the Award are to be interpreted and applied to radiologists, in light of the established custom and practice;
>
> c. present inability to agree on individual rostering and on-call requirements, which per cl.12(c) not only may but must be progressed through cl.3; and
>
> d. a plain dispute as to whether NSW Health has complied with its consultation obligations under cl.30, in respect of the changes it proposes.
>
> 23. All four clearly fall within the remit of cl.3. Given how classic an industrial dispute this is, it would be surprising if they did not. Discussions in respect of these matters are, as set out in Mr Morgan's affidavit continuing. While they are ongoing, or until the matter is resolved by arbitration if necessary, cl.3(h) of the Award restrains NSW Health from implementing its proposed changes.

39 ASMOF submits that, in any event, there are disputes about the interpretation underpinning the Notified Dispute which are identified in the Form 4. ASMOF asserts that the Secretary's position that she can unilaterally change the current rostered working hours of an employee, as long as the hours comply with the Award, is not correct. ASMOF submits: hours of work, in this context, are set via the Performance Agreement process, and if agreement is not reached, then ultimately arbitration by the Commission will be required; and this is not addressed by the Secretary in her submissions. Further, according to ASMOF it is incorrect to say that the Radiologists are not remunerated for overtime under the relevant industrial instruments, as the Determination describes the process by which that can happen, and this situation may well fall within that process. This process is referred to at [30]. Consequently, the dispute may turn on some of these questions of interpretation. However, on ASMOF's submission, the key is that there is a substantive disagreement about whether the arrangements are maintained, either because the Secretary must maintain these, or because the Secretary should maintain these and if so, the Award should be varied.

40 The Secretary submits:

5. 'About' in cl 3(b) implies that the interpretation, application or operation of the Award must be the subject matter of the dispute, or that the dispute must be with regard to or in reference to or concerned with one of those matters. It implies a connection between the subject matter of the Award and the subject matter of the dispute that is meaningful and more than tangential. The connection must be more than the mere fact that the Award applies to employees involved in the dispute. If that were sufficient, any dispute relating to the employment of an employee covered by the Award would be 'about' the Award, which would give no effect to what are evidently intended to be words of limitation in cl 3(b). This conclusion is supported by the fact that cl 3 implements the requirement in s 14 of the *Industrial Relations Act 1996* (NSW) (IR Act) that an award contain 'procedures for the resolution of industrial disputes under the award', a word that usually signifies a need for direct connection.

6. A corresponding interpretation should be given to the words 'in relation to' in cl 8 of the Determination. The extent of the connection required by those words depends on their context, although a tenuous connection is normally insufficient. The context of cl 8 is a Determination that provides for a limited range of rights and obligations supplementing those under the Award. In that context, 'in relation to' should not be read as encompassing disputes without a real connection to the content of the Determination. The mere fact that the Determination applies to an employee cannot supply a sufficient connection with a dispute that is in reality about extraneous matters.

7. No issue is raised in ASMOF's evidence about how the Award or Determination should be interpreted or how they operate or apply to the radiologists. Rather, the evidence raises what are said to be implications of applying the provisions of the Award or Determination (about which no disagreement is expressed) without the overlay of an over-award arrangement. For example, the concerns raised by Dr McIvor and Dr Vladica about rostering, working hours and on-call are not about the interpretation, application or operation of cl 4 of the Award, but about asserted implications for service delivery and their financial positions if those provisions operate in accordance with their terms (about which there is no apparent dispute). Neither witness raises any question about how the Level 5 provisions in the Determination will operate or apply; rather, they are concerned about the financial consequences of their application, which they evidently understand. The concerns expressed about consultation do not fall within cl 30 of the Award, the requirements of which apply only to changes in 'organisation, structure, health service delivery, or technology', and in any event have been met, even on ASMOF's evidence.

8. The true character of the dispute as being about over-award entitlements is confirmed by the fact that the issues raised in ASMOF's evidence could not be resolved by any alternative interpretation or application of the Award or Determination. They are, in reality, issues extraneous to the Award and the Determination, which are no more connected with the Award or Determination than a dispute about extra-award conditions in an employment contract. It defies ordinary language to say that a dispute about whether an employee should receive conditions falling outside the Award or Determination is a dispute 'about' or 'in relation to' what is contained in the Award or Determination.

9. Even if the Commission considered that some aspects of the dispute fell within cl 3 of the Award or cl 8 of the Determination, it would not follow that the Secretary must maintain the whole of the arrangements under the proposed radiologists' agreements. The requirement to maintain the 'work practices and procedures' in place immediately before the issue arose does not mean that there is a 'freeze in time'. Clause 3(h) is not intended to restrict an employer in the ordinary exercise of prerogatives falling outside the scope of the dispute being dealt with under the clause, or which reflect the employer's practice. Otherwise a dispute notification could be used as a device to preserve work practices that could not themselves be the subject of the dispute resolution process.

(Footnotes omitted)

41 I agree with the Secretary that no specific issue is raised in ASMOF's evidence about how the Award or Determination is to be interpreted; rather, the evidence raises what are said to be implications of applying the provisions of the Award or Determination without the overlay of an over-award arrangement.

42 Further, on the evidence of Mr Morgan, Dr Vladica and Dr McIvor, I accept that the Radiologists' preference is a continuation of the current arrangements or similar arrangements on an ongoing basis. The substantial and most immediate issue for the Radiologists is whether the over-award entitlements should continue.

43 However, I do not accept the Secretary's submissions that sub-cl 3(h) does not apply because the Notified Dispute or the broader dispute are about matters which are extraneous to the Award and the Determination, which are no more connected with the Award or Determination than a dispute about extra-award conditions in an employment contract.

44 There is a dispute between the parties as to whether the agreements are enforceable such that they prevent the minimum terms of the Award and Determination being applied in the manner proposed by the Secretary. This is a dispute about the application or operation of the Award and whether it applies or must apply in the way urged by the Secretary. This is a matter which is yet to be determined and which falls within the definition of "issue" in cl 3 of the Award.

45 There are other aspects to the dispute that will arise depending on how the first matter is resolved, such as what the terms for the Radiologists should be as set out at paragraphs 22(b), and (c) of ASMOF's Submissions, as well as issues about consultation.

46 Under cl 12 of the Award, all Staff Specialists "will have a written annual Performance Agreement developed jointly by the Staff Specialist and his/her designated supervisor". Sub-cl 12(e) of the Award sets out the matters that must be included in a Performance Agreement which include: "[d]etails of the time and place that the normal duties are to be worked; …[t]he anticipated on call frequency and roster; [a]ny specific call back requirements; [and] [p]rivate billing expectations for Level 1 Staff Specialists…". In the event that agreement cannot be reached about the Performance Agreement the matter must be resolved in accordance with cl 3 of the Award.

47 If the substantive matter progresses to arbitration before the Commission, the Commission may make a variety of determinations. However, even if the Commission determines that the Secretary may unilaterally terminate the long-standing arrangements and agreements so that the Radiologists' conditions revert to the Award and Determination, there may remain issues between the parties about matters such as on call frequency which would be resolved in accordance with cl 3 of the Award.

48 *ASMOF 2019* considered the application of cl 3 of the Award in circumstances where the Notifier asserted that Staff Specialists were entitled under cl 24 of the Award to be provided with an office for the performance of their work and the Secretary asserted that cl 3 had not been properly invoked. In that context, Commissioner Sloan determined at [56] – [58] and [72]:

> 56. Overall, and on balance, having regard to the totality of the language in cl 3 of the Award, and the regulatory context in which the Award has been made, I am not satisfied that the strict, literal and legalistic construction of the clause advanced by the Ministry would give effect to the meaning intended by the framers of the Award.
>
> 57. It follows that I find:
>
> > (1) that the process outlined in cll 3(d) and 3(e) should not be construed as limiting ASMOF's ability to use the clause to seek to resolve issues, as that term is defined in cl 3(b), that may arise from time to time; and
> >
> > (2) that an "issue" for the purposes of cl 3 should not be read as being confined to a question, issue, grievance, dispute or difficulty which has arisen about the interpretation, application or operation of the Award involving an individual staff specialist which is capable of being resolved within a reasonable time in discussion at a local level between the staff specialist and his or her immediate supervisor.
>
> 58. Consistent with those findings, and with the factual background to this dispute as outlined above, I do not accept the Ministry's submissions that cl 3 was not invoked, or properly invoked, by ASMOF.
>
> …
>
> 72. In this sense, the matters at issue in the present case are in a different category to the facts in *Western NSW Local Health District and Western NSW LHD Appeal*. As this case concerns an alleged Award entitlement, it is not an instance of a status quo provision being used, as the Full Bench noted in Western NSW LHD Appeal at [47], to "effectively stop the other from doing what they would otherwise be legally and contractually entitled to do". Whether the Ministry was legally and contractually entitled to rescind the Policy Directive and replace it with the Workspace Accommodation Policy is very much a live issue.

49 It is not for the Commission to construct its own idea of a desirable policy in respect of the continuation of the arrangements and impute this to the interpretation of cl 3 of the Award, particularly at this point in the proceedings. The Issue Resolution clause sets out procedures for the resolution of issues about the interpretation, application or operation of the Award. The purpose of sub-cl 3(h) includes the continuation of work practices and procedures while the procedures in the Issue Resolution clause are being followed. The Secretary does not assert that the arrangements and purported agreements are not work practices or procedures, although the authorisation or approval of these remains at issue.

50 I agree with the Secretary that cl 3(h) is not intended to restrict an employer in the ordinary exercise of prerogatives falling outside the scope of the dispute being dealt with under the clause, or which reflect the employer's practice. However, in this matter, not dissimilar to the circumstances in *ASMOF 2019*, whether the Secretary is legally and contractually entitled to terminate the long-standing arrangements and agreements with the Radiologists and revert to the Award is a "live issue". This is not an instance of a status quo provision being used, as the Full Bench noted in *New South Wales Nurses and Midwives' Association v Health Secretary on behalf of Western NSW Local Health District* [2019] NSWIRComm 1025 at [47], to "effectively stop the other from doing what they would otherwise be legally and contractually entitled to do".

**Has the Issue Resolution process come to an end?**

51 I do not accept the Secretary's submissions that the Issue Resolution process is at an end in relation to the substantive dispute. Although the Form 4 focuses on the application of the status quo provision to the Radiologists' circumstances, it is clear from the evidence before the Commission that ASMOF and the Secretary have been in dispute since 3 August 2020 and ASMOF has had cause to bring the Status Quo Application in order to enforce the status quo while working through the Issue

Resolution procedures in respect of the broader dispute. ASMOF has not abandoned the Issue Resolution process with respect to the substantive dispute simply because it has asked the Commission to recommend or direct the Secretary to observe the status quo.

**Should the Commission exercise its discretion not to grant relief?**

52 I agree with Commissioner Sloan who said in *ASMOF 2019* at [87], "the Award is binding on the parties by force of s 12 of the Act. It cannot realistically be suggested that being aware of the possibility of a party acting, or purporting to act, in breach of an award the Commission would, as a matter of "discretion", sit idly by".

53 In this instance, the Secretary argues that the status quo sought by ASMOF would involve maintaining arrangements that were unauthorised and unlawful and that are fundamentally inconsistent with the conditions that should apply to the Radiologists under the Award and Determination. At this point in the proceedings, whether the arrangements were authorised also remains a live issue. The copy of the 2004 Blacktown Agreement provided to the Commission contains wet signatures of various parties and the copy of the 2015 Westmead Agreement contains what appears to be electronic approval (see [33] above). However, the Secretary says neither document has received proper approval or authority.

54 The evidence given on behalf of the Secretary by Ms Caswell about her search for copies of agreements in respect of the Radiologists, including the 2015 Westmead Agreement and the 2004 Blacktown Agreement, is set out at paragraphs 34 and 35 of her affidavit.

55 Ms Caswell was cross-examined about her search process. I am not convinced, at this point in the proceedings, that Ms Caswell's searches were exhaustive, nor that because Ms Caswell could not find the agreements, the agreements were not authorised and are unenforceable. This is particularly so, in light of the fact that for a significant period of time, the relevant Radiologists have been rostered and paid in accordance with the arrangements and agreements, including receiving the benefits of the contentious private practice drawing rights in the 2015 Westmead Agreement which according to Mr Rudd [7] amounted to up to $270,677 per annum.

56 Ms Caswell was also cross-examined on the matter of proper authorisation. Ms Caswell was asked by me whom she considered had the proper authority to enter into the purported agreements. Ms Caswell responded that "[t]he approving officer would be the Secretary of New South Wales Health or somebody that she had delegated with that authority, so in certain circumstances that would be the Director of Workplace Relations in the Ministry". Ms Caswell was taken to the Delegation Manual [8] which sets out that the "Delegates approved for negotiation of industrial agreements" are: "Deputy Director-General Governance, Workforce and Corporate; Director Workplace Relations; Deputy Director Workplace Relations; and Associate Director Workplace Relations, provided that the approval of the Director-General [now Secretary] or Deputy Director-General [now Deputy Secretary] Governance, Workforce and Corporate is given in each particular case to the final settlement". Ms Caswell gave evidence that neither the Secretary nor her Deputy Secretary were asked to give evidence in these proceedings

and that of the four roles cited in the Delegation Manual as delegates approved for negotiation of industrial instruments, only Mr Rudd, a Director of Workplace Relations was asked to give evidence in these proceedings.

57 The evidence before the Commission is insufficient for me to accept, at this point in the proceedings, that the arrangements and agreements were unauthorised and unlawful such that I would refuse to exercise discretion to grant relief, particularly in light of the fact that the arrangements have been in place for many years and the latest agreement has operated for over five years.

58 Accordingly, I answer the question posed by ASMOF and set out at [18] as follows:

> Yes, there is a dispute between ASMOF, representing the Radiologists, and the Health Secretary. This dispute is in respect of the termination of the arrangements and purported agreements and whether such termination may be effected unilaterally, and if so, the terms of engagement including in respect of rosters and private practice rights which will apply. This dispute is within the meaning of "issue" in cl 3(h) of the Staff Specialists (State) Award 2019 and the parties are required to maintain the status quo which existed before the emergence of the issue until the exhaustion of the Issue Resolution procedures in cl 3 of the Award.

**Direction or recommendation?**

59 Although ASMOF pressed the Commission for a direction to the Secretary pursuant to sub-s 136(1)(a), it conceded that a recommendation would not be inappropriate if the Commission is not satisfied that the power to make a direction extends to the direction sought.

60 In *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary for Industrial Relations* [2018] NSWIRComm 1061, the Full Bench at [86] and [87] distinguished between the directions that the Commission can make which have coercive force, being the force coming from the ability to launch contempt proceedings, which are customarily of an administrative and facilitative nature, and a direction that an employer pay money to an employee. The Full Bench said "the legislature did not intend the directions power in s 136(1)(a) to extend" as far as the latter. ASMOF accepts that this decision limits the Commission's power to issue directions, but submits that it is seeking a direction as to ongoing conduct of an employer during an issue resolution process in an industrial context which is facilitative.

61 I am not satisfied that a direction of the kind sought by ASMOF is facilitative. I consider that a recommendation in a form similar to that made by Commissioner Sloan in *ASMOF 2019* is appropriate in these circumstances.

**Findings and recommendation**

62 Pursuant to s 175 of the Act, I find that there is a dispute between the parties in respect of: the termination of the arrangements and purported agreements, whether such termination may be effected unilaterally; and if so, the terms of engagement including in respect of rosters and private practice rights which will apply. This dispute is within the

meaning of “issue” in cl 3(b) of the Staff Specialists (State) Award 2019. The parties are required to maintain the status quo which existed before the emergence of the issue until the exhaustion of the Issue Resolution procedures in cl 3 of the Award.

63 Pursuant to s 136(1)(a), I recommend that the parties continue to operate in accordance with the terms of the relevant work procedures and practices applying to the Radiologists immediately before 3 August 2020, including where relevant, the terms of the 2015 Westmead Agreement and the 2004 Blacktown Agreement, until the exhaustion of the Issue Resolution procedures in cl 3 of the Award.

**Nichola Constant**

**Chief Commissioner**

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## Endnotes

1. The letter from Ms Luci Caswell to Dr Tom Karplus dated 24 July 2020 (Tab 14 of ASMOF 6) which notified WSLHD’s “intention to cease [the] over award agreement (“Agreement”) between the Radiologist[s] employed at Westmead and Blacktown Hospital” provided “notice of the cessation of Agreement and all associated employment arrangements effective 6 months from Monday 27 July 2020”. However, on 30 December 2020, Ms Caswell wrote to Mr Morgan by email and informed him, amongst other things, “a return to Award arrangements will occur on 1 February 2021 (being the next full week commencing after 25 January 2021)”.
2. Where the Award is silent, the conditions set out in the Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009 apply. However, nothing falls for consideration in respect of this award in this decision.
3. Tab 8 of ASMOF 6.
4. “The WSAHS Networking Agreement” dated 24 May 2004, Tab 2 of ASMOF 6.
5. The references are unclear as the order is reversed in the text of the paragraph.
6. The Secretary’s Submissions filed 18 January 2021 refer to the 2015 Westmead Agreement, the 2004 Blacktown Agreement and an earlier agreement dated 18 December 1998.
7. Affidavit of Nathan Rudd dated 18 January 2021 at par 20.
8. Health 2 at p 152.

## Amendments

18 February 2021 - Correction of Notifier's name in the title of the decision within the cover sheet.

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Decision last updated: 18 February 2021