ARBITRATOR APPOINTED PURSUANT TO SECTION 29L(1) OF THE PUBLIC HOSPITALS ACT 1929

# VISITING MEDICAL OFFICERS CASE 1991-1993

## APPENDICES TO REASONS

25 March 1993

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APPENDIX "A"

# PUBLIC HOSPITALS ACT 1929 No. 8

[Reprinted as at 28 October 1992]

NEW SOUTH WALES

An Act to incorporate, regulate, and otherwise promote the objects of public hospitals; to repeal the Public Hospitals Act 1898 and certain other Acts; to amend the Local Govemment Act 1919 and certain other Acts; and for purposes connected therewith.

* * * * * * *

## PART 5C-VISITING MEDICAL OFFICERS

### Division 1-Preliminary

**Definitions**

**29K.** In this Part:

**"arbitrator"** means a person appointed under section 29L(1) or (3) to be an arbitrator;

**"Association"** means the New South Wales Branch of the Australian Medical Association;

**"fee-for-service contract"** means a service contract under which the services of a medical practitioner are provided on a fee-for-service basis;

**"honorary contract"** means a service contract under which the services of a medical practitioner (to be referred to as an honorary medical officer) are provided to a specified class of patients otherwise than for monetary remuneration;

"**service contract**" means an agreement between:

(a) an area health service, an incorporated hospital or a separate institution (or its governing body); and

(b) a medical practitioner,

under which the practitioner agrees to provide (as a visiting practitioner) medical services specified in the contract, or medical services of a kind so specified, to:

(c) all patients at a specified hospital or specified hospitals under the control of that area health service; or

(d) all patients at that incorporated hospital or separate institution,

or, if the contract so provides, to a specified class of those patients;

"**sessional contract**" means a service contract under which a medical practitioner is remunerated on the basis of services performed over a specified period or specified periods, but not on a fee-for-service basis;

"**standard service contract**", in relation to a class of service contracts (such as fee-for-service contracts, honorary contracts or sessional contracts), means a contract which, when entered into, contains the set of conditions (if any) approved for the time being under section 29RB for those service contracts, whether or not it contains other conditions which are not inconsistent with the approved set of conditions;

"**visiting medical officer**", in relation to an area health service, incorporated hospital or separate institution, means a visiting practitioner appointed to perform work, as a medical practitioner, under a service contract with that area health service, incorporated hospital or separate institution or the governing body of that separate institution.

## Division 2-Arbitration of disputes involving certain service contracts

### Appointment of arbitrator

**29L.** (1) The Attorney-General shall, upon receipt of an application in the prescribed form made by:

(a) the Association and the Minister jointly; or

(b) either the Association or the Minister,

appoint a member of the Industrial Commission of New South Wales to be the arbitrator for the purposes of making a determination under section 29M (1).

(2) * * * * *

(3) The Attorney-General shall, upon receipt of an application in the prescribed form made by:

(a) the Association and the Minister jointly; or

(b) either the Association or the Minister,

appoint a member of the Industrial Commission of New South Wales to be the arbitrator for the purposes of making a determination under section 29M(IA).

(4) An application under this section which seeks to obtain a determination:

(a) In relation to a class of contracts for which there is a standard service contract; and

(b) which, if made, would be at variance with a condition approved under section 29RB,

cannot be made before the expiry of a period of 5 years from the last date on which the condition concerned was included, by force of an order under section 29RB, in the standard service contract.

**Nature of determination**

**29M.** (1) The arbitrator shall, as soon as practicable after his appointment under section 29L (1), determine:

(a) the terms and conditions of work, the amounts or rates of remuneration and the bases on which those amounts or rates are applicable, in respect of medical services provided by visiting medical officers under sessional contracts; and

(b) the date or dates, not being a date or dates earlier than the date of the determination, on and from which any determination made under paragraph (a) shall have effect.

(1A) The arbitrator shall, as soon as practicable after his appointment under section 29L (3), determine:

(a) the rates on a fee-for-service basis of remuneration in respect of medical services provided by visiting medical officers under fee-for-service contracts; and

(b) the date or dates, not being a date or dates earlier than the date of the determination, on and from which any determination made under paragraph (a) shall have effect.

(2) The arbitrator shall endeavour to bring the persons appearing before him to agreement regarding the matters in respect of which he is required to make a determination under subsection (1) or (1A).

**Manner of exercise of arbitrator's functions**

**29N.** (1) The arbitrator in making a determination:

(a) is not bound by the rules of evidence and may inform himself on any matter as he sees fit; and

(b) shall act judicially and be governed by equity and good conscience without regard to technicalities and legal forms.

(2) The arbitrator in making a determination shall have regard to:

(a) the economic consequences of the proposed determination;

(b) the most recent determination of the Industrial Commission of New South Wales under section 57 of the Industrial Arbitration Act 1940 of-

(i) the amount; or

(ii) the method by which an amount may be determined, by which rates of wages in awards made under that Act shall be varied; and

(c) the principles of wage fixation for the time being adopted as a general ruling or declaration of principle, by that Commission, in connection with awards made under that Act.

**Rights of appearance, administration of oaths, legal representation**

**290.** (1) The Minister and the Association may appear and be heard by their respective representatives in any proceedings before the arbitrator.

(2) Any other person may by his representative appear before and be heard by the arbitrator with his leave and subject to such conditions as he determines.

(3) The arbitrator shall not grant leave under subsection (2) unless he considers that the person concerned has a special interest in the outcome of the proceedings.

(4) The arbitrator may administer an oath to any person appearing as a witness in any proceedings before him.

(5) A person appearing before the arbitrator may be represented by counsel or solicitor.

**Conduct of proceedings and protection of arbitrator**

**29P.** (1) Subject to this Act and the regulations, proceedings before the arbitrator shall be conducted in such manner as he may determine.

(2) The arbitrator may conduct any proceedings under this Part or any part of any such proceedings in public or in private as he thinks fit.

(3) The arbitrator shall in the exercise of his duty as arbitrator have the same protection and immunity as a judge of the Supreme Court.

**Notification of determination and finality thereof**

**29Q.** (1) The arbitrator shall notify, in writing, the Association and the Minister of his determination.

(2) Except as provided in section 29QA, a determination made under this Part shall be final and shall not be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed or called into question by any court of judicature on any account whatever.

(3) No judgment or order under section 69 of the Supreme Court Act 1970 granting any relief or remedy or doing any other thing in the nature of prohibition or certiorari shall be given or made in respect of a determination by the arbitrator in the exercise or purported exercise of the jurisdiction, powers or functions conferred or imposed on him by this Part.

**Appeals**

**29QA.** (1) In this section, **"Commission"** means the Industrial Commission of New South Wales.

(2) An appeal lies from a determination made under this Part to the Commission in court session, by leave of the Commission in court session, where the Commission in court session is of the opinion that the matter raised on appeal is of such importance that an appeal should lie.

(3) For the purposes of an appeal under this section:

(a) the Industrial Arbitration Act 1940 applies to and in respect of the determination appealed against as if it were a decision of a member of the Commission sitting alone and as if the appeal were authorised under section 14 (8) (b) of that Act; but

(b) the Commission in court session shall be constituted by not less than 3 members of the Commission chosen by the President of the Commission.

(4) If the Commission varies the determination on appeal, the determination as varied shall be final and shall be deemed to be the determination of the arbitrator who made the determination appealed against.

(5) An appeal does not lie in respect of a determination made before the commencement of this section.

**Determination contractually binding**

**29R.** Where a determination has been made under this Part, any provision of a fee-for-service contract or a sessional contract which is inconsistent with the determination shall, to the extent of the inconsistency, be of no effect on and from the date or dates that the determination is to take effect and the fee-for-service contract or the sessional contract, as the case may be, shall, on and from that date or

those dates, be deemed to be varied so as to include the terms of the determination.

### Division 3-Service contracts with standardised provisions

#### Conditions of appointment of visiting medical officers

**29RA.** (1) After the commencement of this section, a visiting medical officer must not be appointed unless the terms and conditions to which the officer is to be subject are reduced to the form of a written service contract between:

(a) the officer; and

(b) the relevant area health service, incorporated hospital or separate institution (or its governing body).

(2) An appointment made in contravention of this section is void and of no effect.

#### Approval of standard conditions

**29RB.** (1) The Minister may, by order in writing, approve of sets of conditions recommended by the Association for inclusion in service contracts of a class specified in the order, being contracts entered into on or after the day on which the order takes effect.

(2) An order under this section takes effect on the day the order is made or, if the order so provides, on a later day specified in the order.

#### Standard service contracts to be used

**29RC.** (1) A service contract of a class for which there is a standard service contract must not be entered into unless it is an appropriate standard service contract.

(2) A service contract entered into in contravention of this section is void and of no effect

(3) This section does not apply to honorary contracts.

NEW SOUTH WALES
ATTORNEY GENERAL

SYDNEY

The Honourable Mr Justice Hungerford
Industrial Commission of New South Wales
Chambers
50 Phillip Street
SYDNEY NSW 2000

15 FEB 1991

Dear Judge

Following the receipt of an application from the Australian Medical Association, and with the advice of the President of the Industrial Commission, I have appointed you to be the Arbitrator pursuant to the provisions of Section 29L of the Public Hospitals Act 1929 to determine the matters raised in the application.

I have informed the Minister for Health and the Australian Medical Association accordingly, and a copy of the Association's application is attached for your information.

I would like to take this opportunity to thank you for your assistance in this matter.

Yours sincerely

(John Dowd)
Attorney General

AMA
NEW SOUTH WALES

ALL COMMUNICATIONS TO
THE MEDICAL SECRETARY

Please Quote Number .....

The Attorney General,
SYDNEY

PUBLIC HOSPITALS ACT, 1929
(SECTION 29L(1))

The New South Wales Branch of the Australian Medical Association hereby makes application to the Attorney-General to appoint a member of the Industrial Commission of New South Wales to be the arbitrator for the purposes of making a determination under Section 29M(1) of the Public Hospitals Act, 1929.

The terms, conditions, rates, etc. which the applicant seeks to include in sessional contracts are set out in the attached schedule.

.....
APPLICANT

Signed for and on behalf of the,
New South Wales Branch of the
Australian Medical Association
by Dr. M.J. Nicholson, Medical
Secretary

DATE: 13th November, 1990

THE NEW SOUTH WALES BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION
(INCORPORATED IN NEW SOUTH WALES)
33-35 ATCHISON STREET, ST LEONARDS, NEW SOUTH WALES 2065 AUSTRALIA
TELEPHONE (02) 439 8822 FACSIMILE (02) 438 3760
Postal Address: P.O. Box 121, St Leonards, N.S.W. 2065 Cable & Telegraphic: 'ARTICULATE' Sydney

## SCHEDULE

1. The terms and conditions which the applicant seeks to include are those terms and conditions which are specified in the document entitled:

> "Determination of the Terms and Conditions of Work and the Hourly Rates of Remuneration in Respect of Medical Services Provided by Visiting Medical Officers Under Sessional Contracts as defined in Section 29K of the Public Hospitals Act, 1929, as Amended"

with an effective date of January 1986 ("the determination").

2. The rates which the applicant will seek to include are the rates in the determination increased by such amounts as to the arbitrator shall seem fit.

**APPENDIX "C"**

DM:SZ:JG.2

ARBITRATOR APPOINTED PURSUANT TO SECTION 29L(1) OF THE PUBLIC HOSPITALS ACT 1929

MR JUSTICE HUNGERFORD

28 October 1991

APPLICATION BY THE NEW SOUTH WALES BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION FOR A DETERMINATION PURSUANT TO SECTION 29M(1) OF THE PUBLIC HOSPITALS ACT 1929.

JUDGMENT (On application for intervention)

HIS HONOUR: I have before me an application by the Doctors Reform Society to intervene in these present proceedings. The application for intervention is not an application at large but seeks to enable the Society to put submissions at the appropriate time in writing with the opportunity to speak to those submissions.

The Society does not envisage in its present application to call witnesses nor to cross-examine witnesses called by either the Minister or the AMA. The application for intervention on the basis indicated is opposed by the AMA. The Minister does not oppose the application. The question of the rights and powers of intervention in this Arbitration are covered by section 29O of the Public Hospitals Act, 1929. In terms sub-section 1 thereof gives to the Minister and to the AMA the right to appear and be heard before the Arbitrator. Sub-section 2 enables any other person to appear before the Arbitrator and be heard by leave and subject to such conditions as the Arbitrator may determine. The criteria for granting intervention is set out in sub-section 3 such that intervention shall not be granted unless the Arbitrator considers that the applicant has a special interest in the outcome of the proceedings.

With that statutory scheme in mind I propose to consider the present application. Although the AMA as its primary position opposed intervention, during the course of submissions it was put that the application should at least be deferred until the completion of the evidence in order that the proceedings would not be complicated nor prolonged.

The intervention application is to be on the basis that the Doctors Reform Society has indeed a special interest in these proceedings. It was indicated that the Society has in New South Wales some 300 to 400 members and nationally some 1000 members. Of the members in New South Wales they comprise a range of occupations and classifications from intern to registrars in training through to general practitioners, staff specialists and visiting medical officers.

It was conceded that of the 300 to 400 members in the State a smaller number would be VMO's and the larger numbers would be staff specialists. On questioning it became clear that certainly not as much as 30-odd per cent would be VMO's.

Nevertheless the Society maintained its significant interest as it stated in the proceedings on the basis that it was a society which had standing in the community to make representations on health and health related issues to various inquiries and committees. In that respect reference was made that the Society has been in operation since 1974 as a corporate entity.

It made representations to the Public Accounts Committee in the State in 1989, latterly to the Senate Standing Committee on health issues and I am informed it has participated more recently in the working party advising the Minister of Health Commonwealth on what is known as the Medicare co-payment issue. I gather from what has been said about the Society that it has been engaged

in various other Government inquiries and committees other than those explicitly mentioned.

Emphasis was placed by the Society in its application that it was considered that as a result of those proceedings and any judgment made there may well be some effect on staff specialists and other medical classifications. Not only is this suggested in New South Wales but in other States as well.

It is not for me in considering the present application to make any kind of conclusion as to whether or not what I might do is relevant to those other proceedings. That is a matter for others but it seems on the submissions put that it is a considered and formally held view by the Society and indeed it was put that in 1985 and subsequently the determination made by his Honour Macken J was a special matter referred to in relation to such other proceedings as I have referred to them.

Against the application thus made the AMA's position was essentially three-fold. Firstly it said that the Society had not made out special interest to justify intervention. In that respect counsel emphasised the small number of VMO members of the Society. It was put that the AMA as a matter of statutory right represents the VMO's and no reason was advised why those VMO's would not be adequately represented.

It seems that although the figure is not precise there is something like 2,500 visiting medical officers in the State under sessional contracts.

The second point made by the AMA was to the effect that any question of leave should be deferred until the completion of the evidence because the Society only wished to participate at that point of time and not during the evidence.

It was said therefore that I would be in a position to make an informed decision on the question of intervention. The third and final point advanced by counsel for the AMA was that its motivation in opposing the application was the possibility that if granted it would unnecessarily complicate and prolong the proceedings.

That was illustrated by the scenario where the submissions made by the Society could well raise issues, perhaps of a peripheral nature, which may well need the response of the AMA not merely by submissions but perhaps by further witnesses and the recall of witnesses who had already given evidence.

In that respect I note that the clear basis for the application by the Society is to make submissions and I think the Society must recognise that by not participating in evidence it is limited in its submissions to submissions which might properly be based on the evidence otherwise given in the proceedings and even if it has not participated in that evidence it would, it seems to me, therefore be of no surprise that any submission which was not based upon evidence given by the Society nor supported by evidence otherwise in the proceedings but requiring evidence to support it would fail.

During the course of the debate this morning on the question of intervention I indicated that prima facie my view was that the application was in its term unexceptional. I have had emphasized to me this afternoon the terms of sub-section 3 of section 290 which requires a special interest to support intervention to the outcome of the proceedings.

Much of what was put on behalf of the Society, and this is pointed out from the numbers of persons who may be VMO's who were members, was indeed what I might call repercussive effects. Those

repercussive effects thus asserted by the Society have not been the subject of challenge by the AMA at all. Therefore I am prepared to accept the submissions made by the Society in that respect which are directly relevant to considering its application as to the outcome of these proceedings.

In addition to that I am persuaded that the Doctors Reform Society with its long-standing existence of some seventeen years and all of its participation in various Government Inquiries, Committees and reports concerning health and health-related matters would be of assistance in the decision which I have to come to in determining the matter presently before me.

It was put by senior counsel for the Minister that the application for intervention should be decided at this stage and not deferred. Quite apart from any inconvenience which deferral might have for the Society a deferral could well affect the course of these proceedings in terms of procedure which should be adopted and I was pressed to give an indication now.

I propose to do so. I grant leave to the Doctors Reform Society to intervene in the proceedings limited to the making of submissions in writing and speaking to those submissions at the appropriate stage.

Should in the course of developments in this matter the Society wish to have a more extended involvement in the proceedings then of course that would require a further application to be made.

oOo

APPENDIX "D"

ARBITRATOR APPOINTED PURSUANT TO SECTION 29L(1) OF THE PUBLIC HOSPITALS ACT 1929

CORAM: HUNGERFORD J.

2 August 1991

NEW SOUTH WALES BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION v. MINISTER FOR HEALTH

Application by the New South Wales Branch of the Australian Medical Association for a determination pursuant to s.29M(1) of the Public Hospitals Act 1929 relating to visiting medical officers under sessional contracts.

INTERLOCUTORY DECISION

On 13 November 1990 the New South Wales Branch of the Australian Medical Association (the AMA) made an application to the Attorney-General pursuant to s.29L(1)(b) of the Public Hospitals Act 1929 (the Act) to appoint a member of the Industrial Commission of New South Wales (the Commission) to be the arbitrator for the purposes of making a determination under s.29M(1) of the Act relating to the terms and conditions of work, the amounts or rates of remuneration and the bases on which those amounts or rates are applicable, in respect of medical services provided by visiting medical officers (VMOs) under sessional contracts, including the date or dates on and from which any determination made shall have effect. By letter dated 15 February 1991 the Attorney-General, on the advice of the President of the Commission, appointed me, a member of the Commission, to be the arbitrator. The matter was listed for preliminary hearing on 6 March 1991 to receive appearances and to prepare it for hearing. In accordance with the rights given by s.29o(1) of the Act, the AMA and the Minister for Health (the Minister) entered appearances by their respective counsel to be heard in the arbitration; Mr. Sperling Q.C. with Ms.Bergin of counsel appeared for the AMA and Mr. Kenzie Q.C.with Mr. Kimber of counsel appeared for the Minister. No other person sought leave to be represented in the proceedings. After hearing the parties, directions were made for them to file and serve according to a timetable documents setting out the determinations sought together with the grounds and reasons in support; further, and consistent with s.29M(2) of the Act, the parties were directed to confer in relation to the issues to ascertain if any agreement could be reached. The matter then proceeded unexceptionally in accordance with the directions, and

mentions to facilitate the preparation of the matter were held before me on 20 May and 27 June 1991.

However, by letter dated 9 July 1991 to my associate, the solicitors for the AMA advised as follows:

> We are instructed to make application that his Honour:-
>
> (a) Hold that he should not hear and determine these proceedings; and
> (b) So advise the Attorney General and request that his appointment as arbitrator pursuant to Section 29L of the Public Hospitals Act be withdrawn.
>
> Affidavits in support of the application will be filed this week.
>
> It is requested that the application be heard at the directions hearing appointed for 3.30 p.m. on Monday, 15 July next or at such other time as his Honour may direct.

At the directions hearing on 15 July 1991, arrangements were made for the AMA's application to be heard on 19 July 1991; the hearing proceeded accordingly, following which I reserved my decision.

Having considered the evidence relied upon and the submissions made by the parties, I have reached the conclusion that no case has been made out which would support the application by the AMA that I should disqualify myself from conducting the arbitration on the ground of apprehended bias. My reasons for so concluding follow.

I should immediately observe that the question of judicial disqualification raises important and serious issues for consideration as to the proper conduct of proceedings, and it is perhaps trite, as Lord Hewart C.J. said in The King v. Sussex Justices; ex parte McCarthy[1], that "it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done." Of equal importance, in the view I take, is that a judge duly allocated or appointed to hear and determine a matter has a responsibility, indeed a duty, to so proceed; in Re J.R.L.; ex parte C.J.L.[2], Mason J., as he then was, put the position this way:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have

their case tried by someone thought to be more likely to decide the case in their favour.

I approach the present problem having firmly in mind the principle for the need for justice to be seen to be done together with the requirement to properly discharge my duty, and, I might add, in accordance with the judicial oath to "do right to all manner of people after the laws and usages of the State of New South Wales without fear of favour, affection or ill-will": see per Walters J., with whom King C.J. and Mohr J. agreed, in R. v. Russell; ex parte Reid[3]. In determining whether disqualification should occur, the judicial officer must balance as best as he is able the seeming competing concepts of the appearance of justice and adherence to the discharge of duty in the context of all of the circumstances by addressing the question whether the parties or the public might entertain a reasonable apprehension that he will not be impartial and unprejudiced in the resolution of the issues for determination in the proceedings. In a real sense, that very question encapsulates the dual concepts of justice and duty to which I have referred.

In moving the application for disqualification, Mr. Sperling relied upon the affidavit of Richard Bruce Melrose Ottley, solicitor for the AMA, who relevantly deposed:

> 2. The Minister claims that the granting of a "Medicare Effect Loading" by Mr. Justice Macken in the 1985 Arbitration was a vice and accounted for a large part of the increase which he awarded (Exhibit B, p.42).
>
> 3. The Minister claims that the loading appears to be based on principles of income maintenance and nothing else (Exhibit B, p.42).
>
> 4. The Minister in his grounds relies on the Public Accounts Committee Report on Visiting Medical Officer Remuneration ("the PAC Report"). In particular, the Minister claims:-
>
> "F. The Determination sought by the Minister incorporating the proposed sessional contract for visiting medical officers, addresses and remedies the abovementioned vices and:-
>
> (a) achieves the objectives set out in paragraph E above; and

(b) gives effect to or otherwise addresses significant recommendations of the PAC Committee."

(Exhibit B, p.49)

5. The AMA will maintain at the hearing that there is a real question whether any part of the PAC report should be received into evidence. However, there is reference throughout the grounds contained in the Minister's claim to various parts of the report and at page 86 of the PAC report the following appears:-

"The Commonwealth Department of Health maintained in its submission to the 1985 Macken Determination that the claim for compensation by the NSW VMOs was "spurious" and not supported by principle."

6. The Minister claims that the Medicare Effect loading is a vice by reason of its inclusion in the on call and call back calculation (Exhibit B, p.44-45).

7. The Minister in his claim seeks to remove the Medicare Effect as a component claiming that:-

"The justification for the insertion of the Medicare Effect Loading in New South Wales in 1985 was that the Visiting Medical Officers were allegedly entitled to income maintenance following changes introduced by the Commonwealth Government."

(Exhibit B,p.88)

8. It is clear that the Minister will seek to attack the 1985 Determination by impugning the evidence called by the AMA in the 1985 case as appears from the following:-

"Quite apart from the above there appears to be little doubt that there is a substantial basis for criticism of the force and effect of the evidence called by the AMA in support of the Medicare Effect in 1985."

(Exhibit B,p.89)

9. Exhibited to me and marked "RBMO1" at the time of swearing this affidavit are pages 655-683 of the transcript of the proceedings before Mr. Justice Macken in 1985 in which His Honour, Mr. Justice

Hungerford (hereinafter referred to as "His Honour") appeared for the Commonwealth of Australia. Exhibit "RBMO1" contains His Honour's final submission in the matter.

10. His Honour made submissions including:-

"The nature of the inquiry and the basic approach to the task before Your Honour, in our submission, is that this arbitration is not an inquiry into doctors' incomes but is an inquiry into the quantum of the sessional rate...

It is our submission that there should not be a "Medicare Effect" built into the existing sessional rate arrangements...

These proceedings, in our submission, should not be predicated on the basis of any notion of (sic) income maintenance..."
(p.656 and 657)

11. The Minister claims in effect that His Honour Mr. Justice Macken fell into error for not accepting His Honour's submissions as outlined in exhibit "RBMO1".

12. His Honour cross examined a number of doctors called by the AMA and did not cross examine other doctors called by the AMA. The cross examination of the doctors includes:-

(a) Dr. Beattie (p.144-145);
(b) Dr. Baldwin (p.191);
(c) Dr. Jensen (p.211-214);
(d) Dr. Williams (p.228);
(e) Dr. Finney (p.255-257);
(f) Dr. Piper (p.272-272A);
(g) Dr. Francis (p.332-333);
(h) Dr. Morgan (p.371-372).

Exhibited to me and marked "RBMO2" at the time of swearing this affidavit are copies of the pages of the transcript referred to above.

13. It is intended that some of the witnesses referred to in paragraph 11 (sic) will be called in these proceedings.

14. It is apparent from the Minister's claim that any arbitrator hearing this matter would have to evaluate the force and effect of the cross examination referred to above. The AMA would have to make

submissions in relation to His Honour's cross examination including a submission that the aim of what His Honour was seeking to prove was not achieved.

15. In the circumstances, it has now been decided by those who appear for the AMA that the totality of the evidence will be tendered in the proceedings. Such an approach will be in support of a claim by the AMA that His Honour, Mr. Justice Macken did not fall into error and will place the AMA in the position of requesting His Honour to reject the submissions made by His Honour in the 1985 proceedings. It will also involve His Honour having to evaluate the effectiveness of his own cross examination.

(The above references in the affidavit to "Exhibit B" refer to the document tendered for the Minister in the present arbitration setting out the grounds relied upon in support of the determination sought by him; the document marked "RBM01" was admitted in the present proceedings as Exhibit 5; and the document marked "RMB02" was admitted in the present proceedings as Exhibit 6.)

It will be clear that the basis for the AMA's application for disqualification is my appearance as counsel for the Commonwealth Department of Health as an intervener during the immediately prior arbitration relating to VMOs under sessional contracts conducted by Macken J. in 1985; in that arbitration, the Commonwealth Department specifically addressed the so called "Medicare effect" for the purpose of excluding any compensation for it in the rates of remuneration to be fixed by Macken J. for VMOs. His Honour declined to accept the submissions so put and included a Medicare effect component in the sessional rates determined; in the present arbitration, the AMA seeks to continue the Medicare component as a basis on which the sessional rates should be fixed. The Minister, on the other hand, seeks sessional rates for VMOs to be fixed for the future by excluding compensation for the Medicare effect as it was based upon the erroneous principle of income maintenance in doctors' remuneration. Therefore, so the AMA put, because I as counsel in the 1985 proceedings put submissions and cross-examined witnesses for the purpose of persuading Macken J. to the contrary view I should not now sit in judgment on the question whether compensation for the Medicare effect should continue to be included in any new determination. It is emphasised by the AMA that the arbitrator in the present proceedings will be required necessarily to review and rule upon the very issues debated in 1985, including an evaluation of the cross-examination of the submissions made by me in 1985. The process so stated was said by the AMA to lead to a

reasonable apprehension that I would not be able to bring to the task an impartial and unprejudiced mind.

It is necessary to refer to what Macken J. said about the Medicare effect on the sessional rate for VMOs in his Honour's reasons for determination as follows[4]:

> The A.M.A. sought considerable increases in the sessional rates paid to V.M.O.'s because the introduction of Medicare in 1984 had depressed the incomes of V.M.O.'s in public hospital practice. The reason Medicare had this effect has its origins in the principles that have been applied to V.M.O.'s salaries in the Rogers' Determination of 1976 and in all the Determinations made since that time.
>
> The changes to public hospital medical practice which have come about as a result of the Medicare scheme have been of such a character that very little of the previous wage-fixation history is relevant for purposes of this Determination. Furthermore, it has made the application of wage-fixation principles stemming from State Wage Cases all but impossible to apply, other than in accord with their general philosophy of restraint.
>
> ...
>
> Sessional rates of pay for V.M.O.'s have always been based upon an assumption that there was a reasonably consistent mix of public and private patients so that the remuneration per hour for attending upon public patients could be subsidised by a number of factors including the right of the V.M.O. to have his private patients admitted to the hospital and charged on a fee for service basis. Ever since the time of the Rogers' Recommendations this anomalous basis for the salary fixation of V.M.O.'s has been known as the "Robin Hood" principle. In the ten years since the Rogers' Recommendations were made the "Robin Hood" principle has provided the background for all salary arbitrations.
>
> The introduction of Medicare had a dramatic impact on the incomes of V.M.O's because it increased the proportion of public as against private patients. The "Robin Hood" principle fell to pieces under the strain as there was now no means by which private patients could subsidise public patients. A galling side-effect of Medicare was the fact that public patients now included the very wealthy as well as the indigent. It was upsetting to V.M.O's to know that they were treating on a reduced

sessional rate a patient who could buy and sell them many times over.

The evidence of the Medicare effect was voluminous and as it was largely unchallenged I need only refer to examples to indicate its effect on V.M.O. practices. One V.M.O. said that where previously he had charged a rebated fee to only 7% of his patients this had now risen to 40%. Another said that in his western suburbs teaching hospital the proportion of private to public procedures had fallen from 50% to 13%. Another claimed that his 73% private patients had fallen to 53%. Other evidence proved equivalent reductions in every specialty. It is this abnormal difficulty which makes application of the Wage Fixation Principles quite impossible.

...

It will no doubt be asked as to how these adjustments could be made within the framework of the State Wage judgments given the rigid guidelines which have flowed from those decisions and the underlying doctrine of restraint applicable to wage levels throughout the community. The answer to this question is to be found in the fact that the rate paid to V.M.O's in the New South Wales hospital system has never been accepted by the parties, nor by tribunals, as truly reflecting the income of the V.M.O.'s receiving it. To apply Wage Fixation Guidelines to such incomes is to attempt to preserve a fiction.

From as far back as the first application for an award for staff specialists the Industrial Commission has recognized that the award rate of pay is supplemented by private practice earnings of various kinds. It has always refused to enter into the arena so far as private practice earnings are concerned. V.M.O's have similarly looked on their hospital payments as a small part of a private practice income. Indeed many V.M.O.'s refused to accept any payment at all. V.M.O.'s were concerned with their total incomes, not with the components that went to make it up. It was only when their total incomes fell so dramatically as the result of the introduction of Medicare that they felt it necessary to press for the fixation of a more realistic rate per hour for public hospital service.

Certainly, since the Rogers' Recommendations were implemented and the first arbitration of rates took place in 1981, variations flowing

from State Wage Case decisions have been applied to them, but that is not to say that, in making a Determination under such different conditions, I should attempt to squeeze into the confines of the quidelines a situation with which they were never designed to deal.

...

...The right which attached to being accredited to a teaching hospital viz: of having one's private patients admitted to the hospital(a quid pro quo which led to acceptance over recent years of a sessional rate that was underpinned by the "Robin Hood" principle) is no longer seen by V.M.O.'s as having any value. There was said to be a number of reasons for this but included amongst them are the nursing shortage, which has led to bed closures and the consequent restriction on the admission of patients and to some long waiting lists for admission. The restriction on admissions has, for all practical purposes, abolished the most important right which attached to being accredited to a public hospital as a V.M.O. and makes the existing hourly rate, fixed as it was, in the light of that right, inappropriate. It would not seem in anyone's interest to canvass the evidence given of the experiences of V.M.O.s in this regard. It is sufficient to say that the premise upon which their hourly sessional rates have formerly been based no longer exists. It would be most unfair and against the public interest to attempt to confine this case to guidelines which can have application only where a base rate has been struck appropriate to their operation. The very offer of the governments of an interim increase of $12.50 per hour and the re-introduction of modified "fee-for-service" contracts at non-teaching hospitals, together with the post-Penington changes made to staff specialists' salaries, is sufficient indication that, on this occasion, hourly rates for V.M.O.'s have to be fixed in money terms, ignoring elements of professional status, hospital admissions and the like.

...

...Apart from the private practice loading, which has been fixed without regard to the performance of work (being composed of wages paid by the V.M.O. to other staff, rent, telephone, motor vehicle payments and the like) I propose to continue the practice of awarding a "rolled up" rate and to include within it the Medicare interim payment of 1985. I propose to

do this notwithstanding that it betrays to an idle observer a rate per hour which appears to be high in comparison with hourly rates paid to allied groups.

It will be apparent from his Honour's reasons that the Medicare effect played a not insignificant part in the conclusions then reached in 1985, and it will be further apparent that it required a consideration of complex circumstances in the fixation of appropriate sessional rates for VMOs, including economic considerations and the consequent impossibility of applying the Wage Fixation Principles as laid down by the Commission in State Wage Cases. In the result, his Honour determined sessional rates for VMOs as including a Medicare effect loading but in money terms considered to be appropriate in the circumstances "on this (1985) occasion"; further, his Honour found that the circumstances were such "that the premise upon which their (VMO's) hourly sessional rates have formerly been based no longer exists." It may immediately be emphasised, therefore, that the reasons for the determination made by Macken J. in 1985, and although his Honour accepted the AMA's arguments as to the Medicare effect, were conditioned by the then existing facts as they had developed from what the position had been in previous inquiries and as being unaffected by the Wage Fixation Principles.

Following the 1985 determination, which took effect on and from 1 January 1986, the Act was amended by the Public Hospitals (Amendment) Act 1986 (Act No.51 of 1986) in various respects relating to the remuneration of VMO's. Specifically, Pt.Vc, Visiting Medical Officers, was amended as to the manner of the exercise of the arbitrator's functions (s.29N) and by the insertion of a right of appeal by leave from a determination made by the arbitrator to the Commission in Court Session (s.29QA); the new provisions provide:

> 29N.(1)...
>
> (2) The arbitrator in making a determination shall have regard to-
>
> (a) the economic consequences of the proposed determination;
> (b) the most recent determination of the Industrial Commission of New South Wales under section 57 of the Industrial Arbitration Act 1940 of-
>
> (i) the amount; or
>
> (ii) the method by which an amount may be determined,

by which rates of wages in awards made under that Act shall be varied; and

(c) the principles of wage fixation for the time being adopted as a general ruling or declaration of principle, by that Commission, in connection with awards made under that Act.

29QA. (1) In this section, "Commission" means the Industrial Commission of New South Wales.

(2) An appeal lies from a determination made under this Part to the Commission in court session, by leave of the Commission in court session, where the Commission in court session is of the opinion that the matter raised on appeal is of such importance that an appeal should lie.

(3) For the purposes of an appeal under this section-

(a) the Industrial Arbitration Act 1940 applies to an in respect of the determination appealed against as if it were a decision of a member of the Commission sitting alone and as if the appeal were authorised under section 14 (8) (b) of that Act; but

(b) the Commission in court session shall be constituted by not less than 3 members of the Commission chosen by the President of the Commission.

(4) If the Commission varies the determination on appeal, the determination as varied shall be final and shall be deemed to be the determination of the arbitrator who made the determination appealed against.

(5) An appeal does not lie in respect of a determination made before the commencement of this section.

It is against that background that the AMA's application falls for consideration. Mr. Sperling submitted that the situation was very unusual in that it was not merely that a different result could be reached in the present arbitration according to current evidence or purposes but that the Minister wished to present a case that the determination made by Macken J. in 1985 was wrong on the then evidence; it followed, therefore, that Macken J. could not be the arbitrator in the present matter because he would in effect be sitting on an appeal from his own decision. The Minister's claim was for

hourly sessional rates for VMOs at levels existing prior to the determination made in 1985 so that the whole of the Medicare effect compensation granted by his Honour was sought to be removed. Effectively, the Minister's case was to adopt the case presented by me as counsel for the Commonwealth Department in the 1985 proceedings, a case which Macken J. wrongly rejected in 1985. For identification of the case to be put by the Minister, Mr. Sperling referred to the grounds relied upon in support of the determination sought by the Minister as follows:

> (6) The Clause also has the effect of removing the current "Medicare Effect" as a component of the normal hourly rate as it is not a legitimate or reasonable component thereof. The justification for the insertion of the Medicare Effect loading in New South Wales in 1985 was that the Visiting Medical Officers were allegedly entitled to income maintenance following changes introduced by the Commonwealth Government. Furthermore, even if the correctness of the figures (accepted by Macken J in the 1985 determination as to the impact of the Medicare Effect at that time) be assumed, the legitimacy of the retention in 1991 of any Medicare Effect payment let alone one that is payable on an indefinite ongoing basis, cannot be established.
>
> (7) Furthermore, if the Medicare Effect (as granted by Macken J.) was to continue it would have the effect of benefiting Visiting Medical Officers who were not part of the system in 1985 and who, by definition, suffered no loss thereby. There are significant difficulties in justifying the continuation of the Medicare Effect in circumstances where it does, and will, cover an increasing percentage of Visiting Medical Officers who were not practising as such at the time it was introduced - already 6 years ago
>
> (8) Quite apart from the above there appears to be little doubt that there is a substantial basis for criticism of the force and effect of the evidence called by the AMA in support of the Medicare Effect in 1985.

The essence of the submission thus put by Mr. Sperling was succinctly summarized by him as follows:

> So what has now occurred is this - and we do suggest that this is indeed a most unusual situation - it is now being asserted that the

> determination of Mr Justice Macken was wrong in that he failed to accept the case which your Honour presented on behalf of the Commonwealth. It is now raised as an issue in the present proceedings whether Mr Justice Macken was right or whether the case presented by your Honour was right and a decision between those alternatives is a question to be decided. So that in effect your Honour is being asked to sit in judgment on the very case which your Honour presented in 1985. That, your Honour, is in effect being asked to review it in no different character in the way in which an appellant court would review a prior determination.
>
> ...
>
> Now it is the nature of the process which must now be undertaken in response to that issue which gives rise to the problem. The process which must now be undertaken in response to that issue is to decide whether Mr Justice Macken was right or wrong on the evidence before him, which in turn involves the question of whether the case that was put by your Honour to Mr Justice Macken was right or wrong. So the implications of what I now put and I understand, of course, that must be now explored, we would submit that it is established at this stage of the argument that one of the issues that will arise in these present proceedings is whether the case put by your Honour to Mr Justice Macken was right and your honour will be asked to, in effect, sit in judgment on whether the case that your Honour put was right. Now, the implications of that are another matter, but we say it is established at that point in the argument.

Reference was made by Mr. Sperling to the decision of the High Court of Australia in Livesey v. The New South Wales Bar Association[5] as to the proper principle to apply in deciding the present question as follows:

> It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in Reg. v. Watson; Ex parte Armstrong[6]. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and

> unprejudiced mind to the resolution of the question involved in it....
>
> ....
>
> ...If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting.

Reference was made also to two recent judgments of the Commission in Caltex Refining Co. Pty. Limited v. Australian Workers' Union, New South Wales Branch[7] (Fisher P., Bauer and Hungerford JJ.) and Brake and Service Centre Drummoyne Pty. Limited v. Majik Markets Pty. Limited[8] (Hungerford J.) which stand as authority for the proposition that the fact that a judge has previously acted as counsel for one of the parties is of itself no bar and for the further proposition that merely because the judge has, on a prior occasion, given advice to a particular party does not provide a basis on which that judge should disqualify himself where the advice was of a general nature rather than in relation to the particular matter in question. And, so senior counsel submitted, those cases are important as showing the purpose of the apprehended bias as requiring such apprehension to be reasonable and that counsel in acting for clients does not become infected with a bias on behalf of those persons. Senior counsel referred to the most recent decision of the High Court (Brennan, Gaudron and McHugh JJ.) on the question of apprehended bias in Re Polites; ex parte The Hoyts Corporation Pty. Limited[9], and specifically to the following passage[10]:

> A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond the exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending

> that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on the nature of his or relationship with the client, the ambit of the advice given and the issues falling for determination.

Particular reliance was placed by Mr. Sperling upon the decision in Polites, in terms that it stood for the proposition that a judge should not sit on a case where he has a personal interest in the outcome such as the correctness or quality of the advice which he had given as a lawyer; there would be reasonable grounds to apprehend, so senior counsel submitted, that an impartial mind could not be brought to bear on the resolution of the question by that judge. Applying that reasoning to the instant case, it was put that there were grounds for a reasonable apprehension that I may indeed have formed an opinion on the merits of the very issue to be decided being that upon which I had made submissions in the 1985 proceedings. Further, it was put that a reasonable apprehension existed that I would have advised the Commonwealth Department on the merits of the case to be put to Macken J. Mr. Sperling's submission on this aspect was summarized by him thus:

> What we say is that there is reason to apprehend and to reasonably apprehend that counsel who has appeared in a case may well have formed an opinion about the merits and that arises from the consideration that it is both unusual that counsel may have advised and that the presentation of the case is in accordance with that advice and accordingly, one reasonably apprehends from the facts that a case is presented in a certain way, that that approach is one that accords with the view of the counsel presenting it or may accord with the view of the counsel presenting it.
>
> There are also constraints upon counsel which your Honour would be only too aware, namely that counsel does not present a case which in his opinion is not bona fide argument, that he does not present a case which he does not believe is supported in the evidence, without, of course, himself necessarily forming a view as to whether the evidence is right or wrong, so that in a minimal way, the mere conduct of a case by counsel shows that he has some view about its merit to the level at least of it being bona fide arguable. So that we do say that there is a bias upon which to submit that there is reason to apprehend that your Honour may well have been of the opinion that the case presented in 1985 was right and accordingly, there is reason to apprehend that your Honour's

view on that issue might be influenced by that prior opinion.

The final submission advanced by Mr. Sperling was to the effect that the personal interest as referred to in Polites also arose in the case before me in that, as Mr. Sperling said - " your Honour has a motive to vindicate the position that your Honour advocated in 1985. Now we say with the greatest respect that is a motive that no human being could avoid having." I can immediately deal with this submission. It is rejected. Nevertheless, the submission having been put I think it should be dealt with, and the most appropriate way to do that is by reference to the debate which I had with Mr. Sperling during the hearing as recorded in the transcript as follows:

> SPERLING: I trust your Honour will receive this submission on the basis that it is not suggested for a moment by me that your Honour would actually be influenced by such a motive, but the question is whether there may be any reasonable apprehension that your Honour may be so influenced.
>
> HIS HONOUR: I would not like to think that your clients would think that I was so motivated. That would be as an industrial party, a very extreme position if they thought I was a person - or indeed any judge hearing the matter - could be motivated to vindicate or to take the opportunity of being able to vindicate an argument that they were unsuccessful in putting six years earlier, that is pretty extreme.
>
> SPERLING: I understand the sensitivity of the matter.
>
> HIS HONOUR: I think I should point out that such a submission you are now putting is very extreme and is really, if I may say so, moving to actual bias. If you are going to desist in this submission on apprehended bias, I think I would need some authority in this and I think I would need you to direct me to evidence.
>
> SPERLING: First may I make it plain this is not the attitude of my client. Secondly, may I say that the question arises from a consideration of what might appear to the public to be the possibility of impartiality. It arises in this way that the fact of the matter is that you present a certain case in 1985 which was not accepted by his Honour Mr Justice Macken and which the Minister now says was right and your Honour is invited in these

proceedings to come to a view and to determine that that case that was presented in 1985 was indeed correct and that his Honour Mr Justice Macken was wrong to have rejected it. The submission we put is that there is a personnel interest in the outcome of these proceedings, in the sense that if they are resolved one way, the case presented by your Honour is established by your Honour's decision to have been right, if they are decided another way, the case that was presented by your Honour in 1985 is said or established to have been incorrect, the submission is that one could not help but have a personal disposition in favour of one outcome rather than the other. That is not to say that your Honour would be swayed by that disposition, it is only to say that there may be a reasonable apprehension in the public that your Honour had been.

Now, that is a submission not about your Honour, it is a submission about the public, whether the public would or would not have that apprehension. We say, that it is reasonable to suppose that they may well and it is on that basis on which we now ask you Honour to rule for the purpose of this application not on the question of whether your Honour would truly be influenced because no submission is put to that effect.

Now that, we say, is an approach which we are entitled to make and are oblige to make on the authority of the recent case in the High Court in Polites because the principle which the court there was that if a judge has a personal interest in that case about the correctness of advice given, he should not sit on the question of whether that advice was right or wrong. Here, if a judge has a personal interest in whether a case he put was after all correct, and is asked to sit in judgment on that, then the same consequence in our submission follows as a matter of principle.

Your Honour that is the way the submission is put and that is all I wish to put in support of it, your Honour.

I must say that on my reading of the decision of the High Court in Polites I find no support at all for the submission so put by senior counsel. Polites was a case concerned with the correctness or appropriateness of advice given to the client as being a live issue for determination in the later proceedings; not, I would emphasise, an assumption that a judge on appointment to the bench may be moved, on an opportunity presenting itself, to decide an issue in a way consistent with

earlier submissions in another case put by him and so as to justify those submissions. Mr. Sperling made it plain that it was not the attitude of the AMA that I would be so motivated but that the public may see the possibility of impartiality. I am not prepared to accord to the public such a possibility as being reasonable, and, after all, any apprehension of bias must meet the test of reasonableness. If it were otherwise, then it would be my view that questions of judicial disqualification would be decided by attributing to the public a view that judges decide issues before them not on the basis of the evidence presented by the parties but according to their own views and prejudices. I do not doubt that the public does not have that view. Importantly here, neither does the AMA.

Mr. Kenzie did not submit that the AMA's application for disqualification be refused but rather he adopted the more neutral role of identifying the precise way in which the Minister's case would be put during the arbitration, thereby taking issue with Mr. Sperling's proposition that it was simply a matter of deciding whether what Macken J. decided in 1985 was either right or wrong. Further, Mr. Kenzie helpfully referred to the principles applicable in a consideration of judicial disqualification and related them to the facts of the present case. As to the way in which the Minister's case was to be put in terms of the 1985 proceedings, Mr. Kenzie's submissions are best seen by quoting what he stated as follows:

> My instructions are very clear. At no point in time is the Minister contending as my leaned friend submitted, nor does the Minister so contend. The Minister's contentions are as per the document and it will need to be arbitrated an appropriate figure for background practice costs. And ditto for salary rates. There is a position there that the matter will have to be arbitrated by the Commission. But this is not the Minister's position we are looking for a reversion of pre-1985. The matter is different enough in the sense it is a true review and the 1985 decision in determination is there and as a matter of practice what is in it might in the absence of argument as a matter of common sense be expected to remain but the approach in the present case is for an entirely different form of prescription.
>
> The present exercise like all such exercises is one which the existing determination as a matter of practice might be looked to and rated if no one says anything about it but to the extent people say something about it and seek to change it it has no more validity than any other form of prescription, your Honour. The reviews contemplated, the arbitration is

different enough, but different occasion, the field is open as it were.

That is the first thing we have to say about identification of issue.

The second think we need to say is that we agree with our learned friend that the issue before Mr Justice Macken in 1985, that is an issue that is as to whether it was appropriate at all that there be an allowance for a Medicare effect is an issue which exists clearly in the present proceedings so that there is an identification of issue in relation to the appropriateness of the Medicare effect.

We also agree, your Honour, that as part of the total reviewing exercise in the 1991 - I hope I am categorizing it as 1991 in the present determination - we also agree that as part of the whole reviewing exercise the Minister contends that Justice Macken was wrong as a matter of principle in relation to the evidence in the manner that Mr Sperling contended.

But again, your Honour, that has to be seen as taking its place in the entirety of the contentions that the Minister advances.

The Minister says there ought to be an entirely new prescription as per the claim and that will be affected by considerations which are present in 1991 and not present in 1985. One of the things the Minister says is that the prescription should not have been made in 1985. Whether or not that is a matter which is required to be addressed or is deemed by the arbitrator to be deemed to be addressed is very much a matter for the arbitrator. I mention this because it is not to be thought that the contention that Mr Justice Macken should not have inserted the Medicare effect in 1985 as a matter of evidence is in any way critical or essential to the result that the Minister seeks in the present arbitration, but in order to identify issues we are at one with our learned friend in saying that that is an issue, but it is part of the reviewing process.

The third think we have to say, your Honour, is that as to the process itself we say that it is an arbitration containing necessarily a mechanism for review. This is not a common law case in which there is a once and for all result which will be the subject of estoppels and the like. It is an arbitration to be carried out pursuant to legislation. It contemplates the continued relationship between

> the Crown and visiting medical officers no doubt represented by their appropriate Association and not surprisingly one has a situation where the same and on frequent occasions the arbitrator has changed his mind in his approach. I do not want to deal with the occasions, they are known generally to those in the courtroom but on frequent occasions you found Mr Justice Macken saying we have adopted that approach in 1978 or '79 and there have been further contentions put forward and now is the time to say it is appropriate it should not be continued. That is the one example of that which might be put to be background practice costs. In one sense in 1979 it was an acceptance that there should not be anything other than a nominal allowance and in 1985 you have a different approach by the same arbitrator and on the basis of mechanism that is presented to the arbitrator in a different arbitration. But again, I do not want to make too much of this but it is a review mechanism, it contemplates no doubt that there will be an arbitrator selected who will have some experience and as a matter of practicality you would think the parties would require or prefer the participation of someone who knew something about the industry.

Mr. Kenzie's propositions as to the authorities may be summarized thus-

(1) A prior relationship of legal adviser - client does not generally disqualify the former adviser on appointment to the bench from sitting in proceedings in which the former client is a party. In any event, here the Commonwealth is neither a party nor an intervener: Polites[11].

(2) For the purposes of the proposition addressed in Polites, the position of legal adviser includes counsel or an advocate.

(3) The principle is no different merely because the relationship is one of regular client with counsel/adviser or whether there was but a single circumstance: S. & M. Motor Repairs Pty. Limited v. Caltex Oil (Australia) Pty. Limited[12].

(4) The question to be determined is whether the interested observer faced with the material disclosed in the proceedings would have the reasonable apprehension that the arbitrator might not bring an impartial and unprejudiced mind to the resolution of the issues involved: Livesey[13]. There is a qualification that where a specialised tribunal is involved that the principle cannot be taken too far: Polites[14].

(5) Mere speculation is not a ground to establish a reasonable apprehension of bias, and it is speculation which becomes relevant when consideration is being given to the role of counsel

or advocate as opposed to an adviser. Apprehension of bias must be reasonably held and that is to be determined objectively: Grassby v. R[15].

(6) The views expressed by counsel in a case on behalf of his client are not necessarily those of the counsel concerned but those of the client: Caltex Refining Co.[16]; Majik Markets[17]; Russell[18];and S. & M. Motor Repairs[19].

It was common ground that although I was acting as arbitrator pursuant to an appointment by the Attorney-General under s.29L of the Act that nevertheless I was still bound to act judicially and in accordance with the principles of natural justice; if otherwise grounds were made out to show the presence of a reasonable apprehension of bias I should disqualify myself from conducting the arbitration and advise the Attorney-General accordingly to enable a new appointment to be made. That position, which I accept as being correct, makes it unnecessary to consider the exceptions to disqualification because of interest by way of statutory requirement and necessity to act as referred to by Isaacs J. in Dickason v. Edwards[20]. In any event, s.29N(1)(b) of the Act requires the arbitrator in making a determination to "act judicially and be governed by equity and good conscience". Support for the proposition, if more be needed, that in exercising an arbitral or quasi-judicial function the law requires judicial fairness is established by the High Court in The Queen v. Commonwealth Conciliation and Arbitration Commission;ex parte The Angliss Group[21] and the cases cited therein.

The principles applicable in a determination of the present question are well settled: see Livesey[22] and Polites[23]. However, any difficulty which may arise is in applying the circumstances of a particular case to those principles; the present case is no exception. Essentially, the AMA's case is that I acted for an intervener in the previous 1985 proceedings and advanced a case, unsuccessfully, which is to be the subject of direct challenge in the present proceedings. Accepting that that be so, which I do not think it is as I will later demonstrate, my view is that without more the AMA's submission is not made out. The proposition as so stated by the AMA erroneously assumes that counsel advocating a client's case necessarily has the opinion or view of the client; that is plainly not so. Even if it were so, the ground for disqualification for apprehended bias by reason of counsel holding an opinion and carrying that opinion forward on his appointment to the bench does not mean that he is to be presumed unable to decide issues between parties contrary to that opinion and according to the evidence and material presented by those parties. In The Queen v. Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co. Pty.Limited[24], the High Court observed in following the dicta of Charles J. in Reg v. London County Council; ex parte Empire Theatre[25],

that "preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded." So too, it seems to me, the AMA's proposition strikes at the very function of counsel as an advocate in acting as an independent professional, albeit it for a client, by imputing to him a position contrary to his professional responsibilities. In The Ethics of Advocacy[26], Barry dealt with the function of the advocate and observed:

> The fundamental misconception which affects the public approach to the art of the advocate and which supplies the basis for the mistrust with which the ordinary man views the profession is the inability of the public to realize the sincerity of the advocate is not in question; that in the exercise of his duties an advocate is not, and is not thought to be, expressing his own opinions, he is merely urging to the best of his ability all those matters which are relevant to the cause of his client, so that those whose business it is to judge should not pronounce judgment without having had the advantage of hearing all that can be said from the client's point of view. It is, of course, to enable this duty adequately and properly to be discharged that utterances by an advocate in his professional capacity are absolutely privileged.(see per Brett M.R. in Munster v. Lamb[27])

If no more be established than that counsel put a submission in a case and on his appointment to the bench he was required to rule upon the correctness of that submission, then, in my view, it could not reasonably be said that he may be biased. Certainly not that counsel had any motivation or relevant interest in justifying his earlier submission. In the case before me, that is precisely the position, and there is no suggestion in the evidence or in the submissions made of any statement, conduct or behaviour of mine during the 1985 case or otherwise which would provide any reason to even suspect bias.

In any event, I am far from persuaded that the issue to be decided in the present arbitration as to the Medicare effect is as stark as Mr. Sperling would have it. It is true that the Medicare effect necessarily will fall for consideration, but, I would emphasise, in the conditioned way as outlined by Mr. Kenzie in his submissions as quoted above. In other words, the Medicare effect is not to be considered in 1991 as being merely proper for inclusion or exclusion in any sessional rates fixed for VMOs according to whether the submissions I made in 1985 were right or wrong and notwithstanding that Macken J. rejected those submissions, but rather

whether in a current and up-to-date review of all the circumstances a component for the Medicare effect should be continued in any new determination of sessional rates for VMOs. It is to be observed that in the reasons for determination by Macken J. in 1985 that his Honour, according to the circumstances then existing, fixed the sessional rates in money terms thought to be proper "on this occasion." Whether that 1985 assessment and its basis are thought to be appropriate in 1991 must, in the view I take, be determined according to the evidence and submissions yet to be presented in this arbitration. It is to be noted also that his Honour, for the reasons then stated, found it impracticable in considering the evidence of the Medicare effect to apply the Wage Fixation Principles as laid down by the Commission in State Wage Cases; following the 1986 amendments to the Act the arbitrator in making a determination now is required according to s.29N(2) of the Act to "have regard to" a number of specified matters including those very Wage Fixation Principles. That is a further and important distinguishing feature of the task before me in 1991 compared to that before Macken J. in 1985.

It will be seen from the extracts which have been set out above from his Honour's reasons for determination that a wide range of circumstances justified the inclusion of a Medicare component in the sessional rates fixed for VMOs. Those circumstances invclved a consideration by his Honour of earlier fixations of the sessional rates either by his Honour or by Mr. Rogers Q.C., as he then was. And so too in 1991 will I, as arbitrator, no doubt be required to review in an arbitral manner the earlier arbitrations and the history of the fixation of the sessional rates for VMOs. It is that aspect of review which, in my view, represents the very nature of this arbitration in determining for the future, and as s.29M(1) of the Act requires, "the amounts or rates of remuneration and the bases on which those amounts or rates are applicable...and the date or dates, not being a date or dates earlier than the date of the determination, on and from which any determination made.... shall have effect." In a very real sense, it seems to me, that is no more than a statutory statement as to the nature of an arbitration in reviewing a matter in much the same way as the Commission regularly performs its function in fixing just and reasonable rates of wages for work done in proceedings under the Industrial Arbitration Act 1940. As to that function, and the manner in which it should be performed in a particular industry from time-to-time, the Commission has long settled the proper approach to be applied. As long as sixty years ago in In re Gas Meter Makers (State) Conciliation Committee[28], Cantor J. stated the position thus:

> Since the passing of this section it is accordingly the duty of a conciliation committee, and of this Commission also, in the

> event of the committee failing to make an award upon the application before it, if requested, to inquire itself into the nature of the work done by employees in the industry covered by the application, the conditions under which the work is done, and all other relevant circumstances, and notwithstanding that no special circumstances exist, or that no change in the industry has taken place since the last award was made (whether it was made after inquiry under the Principal Act or the Act of 1926), to make such award as the Commission itself or the Committee itself, as the case may be, according to its own judgment is satisfied is a proper award to be promulgated in the industry. But when exercising this jurisdiction the tribunal is not bound to disregard the provisions of previous awards or industrial agreements that have been made from time to time covering the industry. Those awards and industrial agreements, together with the provisions of such other awards and agreements as the tribunal thinks are relevant and will guide or aid it in arriving at a proper determination, may be taken into account. Indeed, it is open to the tribunal, as a result of its own examination and consideration of all the material before it, to come to the conclusion that the provisions of the existing award are proper to be re-adopted and to make a new award embodying the same terms. Nothing in the section prevents such a course being followed. Or the tribunal may think that in all or some respects the existing terms and conditions should be altered; the section directs that, if applied for, the conditions of the industry shall be reconsidered, but the result of the reconsideration is entirely a matter for the Commission, and, in the case of a hearing by a conciliation committee, a matter in the first instance for the committee, subject to appeal to the Commission.

The approach so stated has been consistently followed: see In re Crown Employees (Professional) Conciliation Committee[29] and In re Crown Employees (Scientific Officers - Division of Science Services, Department of Agriculture)Award[30]. In In re Dispute - Broken Hill Proprietary Co. Limited re Bonus Payments(No.2)[31] the Commission in Court Session (Beattie P., McKeon, Kelleher, Sheehy and Cahill JJ.) relevantly stated as to the approach in fixing the remuneration of employees in an industry:

> We are unable to understand the notion that, upon the making of the Steel Works Award in

> 1968, s.23A had the effect of exhausting the Commission's jurisdiction in relation to the fixation of the remuneration of employees in the industry. In our opinion the mandate imposed on the tribunal by s.23A is one that is to be complied with on each and every successive occasion when the tribunal comes to exercise its powers, being powers relating to the fixation of prices for work done and rates of wages. It is a mandate which, as the Commission in Court Session said in the Scientific Officers Case[32] deals with the processes of the mind which are to be adopted by the tribunal in exercising its powers under the Act. The fact that one judge in 1968 deemed certain rates to be just and reasonable to award did not make those rates just and reasonable for the term of his award or any other period of time in the sense that it would not be open either to the same judge or another judge, when asked to exercise his powers under the Act, to deem other and different rates to be just and reasonable. Were it necessary to rule on the argument based on s.23A we would reject it.(my emphasis)

The words emphasised from that case are directly apposite to the case before me in that they provide clear authority for the proposition that a judge who had earlier fixed certain rates as being just and reasonable was able, in the proper exercise of his powers under the Industrial Arbitration Act, to fix other and different rates in a later review. That position must be a fortiori as to whether there has been a reasonable apprehension of bias in the present situation where I am required to determine new sessional rates for VMOs having acted as mere counsel in the 1985 arbitration rather than as the then arbitrator.

In terms of industrial arbitration, analogous to the task I have as arbitrator here, it has been long recognised that arbitrators may be expected to act impartially and to the best of their ability notwithstanding knowledge which they might have of the subject matter concerned and even some industrial connection with the parties; indeed, that has been recognised as being an advantage rather than a vice. In Australian Railways Union v. Victorian Railways Commissioners[33], Isaacs C.J. reasoned it this way:

> It is also unquestionably evident that as used and understood in relation to industrial disputes from 1860 continuously to the present day, the ambit of the term "arbitration" is large enough to include decisions by persons selected either voluntarily or compulsorily as arbitrators who represent the viewpoints of the disputants, and even if they are directly

interested in the dispute itself as members or employees of the disputing parties. It is expected of them that they will act impartially. It is presumed that they will do so to the best of their ability, and the course of industrial history on this point shows that it is often safer in the interests of industrial peace to trust to the members of the tribunal recognizing not only the duty of conscientiously considering opposing views, but also the advantage to the parties with whose interests they are industrially connected or identified, not to persist in refusing what is reasonable. This, according to the authorities I refer to, has obviously been considered a more satisfactory method of arbitration than confining the term to the decision of persons whose personal ignorance of the conditions of the industry is a sine qua non of their eligibility as arbitrators. Instances of the last-mentioned class of arbitrator are given by Lord Amulree at pp. 100, 101. He says:- "One distinguished counsel, who afterwards became a Judge, so completely failed, that a witness at a subsequent inquiry (voicing the views of many people) declared with reference to the case decided by this arbitrator that 'that one settlement did more harm to the arbitration question than any other thing that I know of.' Another so failed to apprehend the technical expressions and technical points at issue that the parties quietly ignored his award and effected a settlement in another way." One cannot fail to notice that if individuals selected as persona designata to be arbitrators in an industrial dispute were to be legally considered impossible because they were interested in the result, as officials or members of an organisation or as employees or as one of several contending employers, voluntary industrial arbitration and perhaps even compulsory industrial arbitration would be almost impossible. For instance, if voluntary arbitration be resorted to in a coal dispute, would a wholesale boot manufacturer or a director of a gas company, be excluded because he was deeply and directly interested pecuniarily in settling the dispute and, indeed, in settling it on the basis of a low wage rate? Almost any member of the public, and even Judges on the Bench, might be held to be personally interested in securing a low price for coal, or a resumption of coal production at all costs, for home purposes or travel. The very nature of the subject differentiates it in this respect from an ordinary arbitration. A mercantile dispute, or, indeed, any individual dispute, concerns

> the parties only, and the public are without interest in the result. But as to an industrial dispute, there are always three parties more or less directly interested, the immediate disputants and the public, the latter variously affected, but always in fact affected by the interruption of services. The quotations above made are only recognitions of this important consideration.

I have gone to some little length in this matter to provide detailed reasons for my conclusions, principally because the question of judicial disqualification raises important considerations and also because the forthcoming arbitration will be concerned with complex and far-reaching issues for the parties requiring a lengthy hearing. The question of an apprehension of bias being raised in such circumstances should, in my view, be dealt with in a complete way so that the parties may be fully aware of the reasons for my deciding to continue to act as arbitrator. Further, Mr. Kenzie for his client suggested this was such a case where full reasons were desirable particularly having in mind the likelihood, as he said, "that depending upon the result there might be other proceedings." In that respect, I am conscious of the observations of the High Court in Polites[34] to the effect that a reviewing court did not place too much weight on the views of the tribunal at first instance because its decision may be prone to be deprived of the objectivity necessary: see also per Moffitt P. in Sankey v. Whitlam[35]. Nevertheless, their Honours in Polites[36] also made the observation that "the views expressed by the tribunal may be of assistance to the reviewing court not only in understanding the issues that are alive in the case but in appreciating the connection between those issues and what is advanced as the disqualifying factor."

For the foregoing reasons, I decline to disqualify myself from this arbitration; the AMA's application is refused.

REFERENCES


[1] [1924] 1 K.B. 256 at 259
[2] [1986] 161 C.L.R. 342 at 252
[3] [1984] 35 S.A.S.R. 417 at 422
[4] Macken J. - Reasons for Determination 19 December 1985 at 6,8,9,12,14 and 15
[5] [1983] 151 C.L.R. 288 at 293,294
[6] [1976] 136 C.L.R. 248 at 258-263
[7] [1990] 35 I.R. 100
[8] [1990] 35 I.R. 351
[9] High Court of Australia - unreported - 20 June 1991
[10] ibid at 8,9
[11] supra
[12] [1988] 12 N.S.W.L.R. 358
[13] supra at 294
[14] supra at 7,8
[15] [1989] 87 A.L.R. 618 at 631
[16] supra at 102
[17] supra at 356
[18] supra at 422
[19] supra at 378, 380
[20] [1910] 10 C.L.R. 243 at 259
[21] [1969] 122 C.L.R. 546 at 552,553
[22] supra
[23] supra
[24] [1953] 88 C.L.R. 100 at 116
[25] [1894] 71 L.T. 638 at 639
[26] [1941] 15 A.L.J. 166 at 168,169
[27] [1883] 11 Q.B.D. at 603,604
[28] [1932] A.R.(N.S.W.) 341 at 346
[29] [1937] A.R.(N.S.W.) 603 at 612,613
[30] [1962] A.R.(N.S.W.) 250 at 273
[31] [1971] A.R.(N.S.W.) 754 at 776
[32] supra at 273
[33] [1930] 44 C.L.R. 319 at 361,362
[34] supra at 9
[35][1977] 1 N.S.W.L.R. 333 at 346
[36] supra at 10

APPENDIX "E"

# VISITING MEDICAL OFFICERS CASE 1991-1992

## LIST OF WITNESSES

### MINISTER FOR HEALTH

| Name | Occupation |
|---|---|
| Mr. K.R. Barker | Executive Director, Finance & Administration of NSW Department of Health. |
| Dr. E.R. Barrett | Regional Director of Central Western Health Region, NSW Department of Health. |
| Mr. C.J. Berry | Director of Human Resources of NSW Department of Health. |
| Dr. J. Breheny | Consultant and Partner for Health Services of Deloitte Ross & Tohmatsu. |
| Mr. C.J.S. Brown | Acting Associate Director, Industrial Relations of NSW Department of Health. |
| Dr. D.S. Child | Medical Consultant to NSW Department of Health. |
| Mr. T.J. Clout | Director of Corporate Services, South Western Sydney Area Health Service. |
| Ms. K.J. Crawshaw | Director, Legal Branch of NSW Department of Health. |
| Dr. D.G. Horvath | Director of Health Services, Eastern Sydney Area Health Service. |
| Dr. P. Leslie | Principal Consultant, Health Economics of Deloitte Ross & Tohmatsu. |
| Mr. J.C. Lynch | Chief Executive Officer, Bathurst Base Hospital. |
| Dr. C.G.C. MacArthur | General Manager, Liverpool Health Service, South Western Sydney Area Health Service. |
| Dr. S. Spring | Chief Executive Officer, Northern Sydney Area Health Service. |
| Mr. J.J. Taylor | Executive Officer & Director of Administration Services, Lidcombe Hospital. |
| Mr. S.J. Teulan | Chartered Accountant and Partner of Deloitte Ross & Tohmatsu. |
| Mr. B. Vogel | Management Consultant and Partner of Deloitte Ross & Tohmatsu. |
| Ms. E. Wang | Manager, Workforce Planning Unit in Human Resources Branch of NSW Department of Health. |

AUSTRALIAN MEDICAL ASSOCIATION (NSW BRANCH)

Visiting Medical Officers:

| Name | Hospital Appointment |
|---|---|
| **General practitioners - with at least 10 years' experience or F.R.A.C.G.P. -** | |
| Dr. M.C. Beatty | Murwillumbah |
| Dr. A.R. Buhagiar | Westmead |
| Dr. B. Gerard | Goulburn and St. John of God |
| Dr. P.L. Renshaw | Queanbeyan |
| **Specialists -** | |
| Dr. K. Howard (physician) | Maitland |
| Dr. W.S. Mackie (surgeon) | Bathurst |
| Dr. G.S. Oldfield (physician) | John Hunter |
| Dr. L.A. Pressley (physician) | Royal Prince Alfred |
| **Senior specialists -** | |
| Dr. J.E. Barnett (surgeon) | Grafton |
| Dr. J.C. Beattie (physician) | Auburn and Ryde |
| Dr. A. Brooks (surgeon) | Westmead, Blacktown and Mt. Druitt |
| Dr. L.E. Budd (physician) | Coff's Harbour, Grafton and Dorrigo |
| Dr. P.J. Burke (surgeon) | Western Suburbs |
| Dr. J.W. Burkhart (anaesthetist) | Bankstown |
| Dr. T.P. Cassidy (anaesthetist) | Bathurst |
| Dr. B.G. Courtenay (surgeon) | St. Vincent's, Waverley War Memorial and Sacred Heart Hospice |
| Dr. R.C. Edwards (physician) | Royal North Shore, North Sydney Community and Royal Sydney Rehabilitation Centre |
| Dr. L.J. Fingleton (surgeon) | Bathurst |
| Dr. P.A. Hales (anaesthetist) | Westmead |
| Dr. A.G.M. Harris (anaesthetist) | Albury, Tumbarumba, Holbrook and Culcairn |
| Dr. H.P.B. Harvey (physician) | Bathurst |
| Dr. W.J. Herlihy (anaesthetist) | St. Vincent's |
| Dr. G.N. Howsam (surgeon) | Albury |
| Dr. R.S. Hyslop (surgeon) | Liverpool |
| Dr. D.J. Itzkowic (surgeon) | Royal Women's and St. Margaret's |
| Dr. M.J. Jensen (surgeon) | St. Vincent's |
| Dr. M.C. Kennedy (physician) | Manly |
| Dr. W.J. Kidson (physician) | Prince Henry, Prince of Wales and Royal Women's |

| | |
|---|---|
| Dr. A.C. King (surgeon) | Mona Vale |
| Dr. E I. Korbel (surgeon) | Sutherland and Prince Henry |
| Dr. J. Mitchell (physician) | Bathurst |
| Dr. J.P. Moloney (physician) | Wagga, Temora, Griffith and Young |
| Dr. D.L. Mulcahy (physician) | Orange, Parkes, Cowra and Forbes |
| Dr. D.G. Pennington (surgeon) | Royal Prince Alfred |
| Dr. C.S. Reed (physician) | Sydney |
| Dr. J.W. Riley (physician) | Royal North Shore |
| Dr. S.J. Ruff (surgeon) | Royal North Shore and Bone and Joint Diseases Centre |
| Dr. P.A. Russell (physician) | Westmead and Mt. Druitt |
| Dr. B.J. Springthorpe (physician) | Royal Newcastle, John Hunter, Belmont and Mater Misericordiae |
| Dr. W.A. Stening (surgeon) | Prince of Wales and St. George |
| Dr. P.A. Trew (physician) | St. George and Sutherland |
| Dr. P.R.C. Wakeford (physician) | Tamworth |
| Dr. A.B. Watson (physician) | Royal Newcastle, Mater Misericordiae and John Hunter |

**Others:**

| **Name** | **Occupation** |
|---|---|
| Mr. R.M. Borthwick | Chartered Accountant and Partner of Duesburys. |
| Mr. D.R. Chapman | Senior Lecturer in Economics, University of New South Wales. |
| Dr. G.W. Eather | Staff Specialist (physician) John Hunter Hospital. |
| Mr. R.K. Heinrich | Senior Partner of Tress Cocks & Maddox, Solicitors for Australian Medical Association (NSW Branch). |
| Mr. J.J. Popplewell | Director of Fees Section, Australian Medical Association. |
| Mr. L.G. Pincott | Executive Director of Australian Medical Association (NSW Branch). |

DOCTORS REFORM SOCIETY

| Name | Occupation |
| --- | --- |
| Dr. M.L. Cohen | Senior Staff Specialist (rheumatology), St. Vincent's Hospital. |
| Dr. T.A. van Lieshout | Resident Medical Officer, Royal Alexandra Hospital for Children. |

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APPENDIX "F"

ARBITRATOR APPOINTED PURSUANT TO SECTION 29L(1) OF THE PUBLIC HOSPITALS ACT 1929

CORAM: HUNGERFORD J.

11 March 1992

NEW SOUTH WALES BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION v. MINISTER FOR HEALTH AND COMMUNITY SERVICES

Application by the New South Wales Branch of the Australian Medical Association for a determination pursuant to s.29M(1) of the Public Hospitals Act 1929 relating to visiting medical officers under sessional contracts.

INTERLOCUTORY DECISION

The tender into evidence on 11 February 1992 by the Minister for Health and Community Services (the Minister) of the Public Accounts Committee's Report on Payments to Visiting Medical Officers: No. 45 of June 1989 (the PAC Report) was objected to by the New South Wales Branch of the Australian Medical Association (the AMA) on various legal and discretionary grounds. The argument on those grounds has largely been completed. However, at the point when senior counsel for the AMA desired to examine and comment upon the contents of the PAC Report in support of the objection he raised the question that the PAC Report may be a proceeding in the New South Wales Parliament so as to attract Parliamentary privilege.

On 27 February 1992 I ruled, contrary to the submissions of the Minister but with the acquiescence of the AMA, that the Attorney-General would be invited to arrange for representation as amicus curiae in the arbitration to assist me in resolving the issue of Parliamentary privilege which had arisen. I formed then the clear view, having heard counsel as to the use and the manner of treatment to which the PAC Report was sought to be put, that the question of the privileges of the Parliament may well be involved. I concluded it to be necessary, and certainly desirable in the interests of all concerned, for that question to be resolved as soon as possible and so that the arbitration could otherwise proceed in a timely and orderly way. I thereupon settled, in conjunction with counsel for the Minister and for the AMA a document setting out the said issue of Parliamentary privilege and the specific questions arising in relation thereto; a copy was forwarded to the Attorney-General, together with copies of my ruling, the

PAC Report and relevant extracts from the transcript of the argument thus far on the question.

In the result, on 5 and 6 March 1992 I had the benefit of submissions by Mr. Mason Q.C., Solicitor-General, as amicus curiae; by Mr. Booth, solicitor for the Speaker of the Legislative Assembly of New South Wales; and by Mr. Kenzie Q.C.(with Mr. Kimber) and by Mr. Sperling Q.C.(with Ms. Bergin) senior counsel respectively for the Minister and for the AMA. May I immediately express my gratitude for the very considerable assistance thereby given to me in deciding what is manifestly an important and complex issue.

Shortly stated, the issue of Parliamentary privilege arose in this way. The PAC Report was prepared by a committee of the Legislative Assembly known as the Public Accounts Committee (the Committee), the membership of which comprised five Members of the Legislative Assembly; it was based upon evidence and submissions from various interested and concerned persons and organisations, and contained facts, opinions and recommendations relating to the general subject matter of payments to visiting medical officers in public hospitals throughout the State. The relevant connection and relationship of the subject matter of the PAC Report to the arbitration which I am conducting is patent, even from a cursory examination of its contents, having in mind my duty to make a determination prescribing the terms and conditions of work, and the amounts or rates of remuneration and the bases thereof, in respect of medical services provided by visiting medical officers under sessional contracts. The Minister through his counsel tendered the PAC Report for two purposes: firstly, as an event; and secondly, as evidence of the truth of the facts and correctness of the opinions stated therein. The AMA through its counsel objected to the tender on grounds which included that the admission into evidence of the PAC Report would be unfair; to make out its objection the AMA considered it necessary to examine and comment upon the contents of the PAC Report and to make submissions which might be construed as being critical of the reasoning, opinions, findings, conclusions and procedures of the Committee. If the PAC Report were admitted into evidence, the AMA considered it would be necessary to lead evidence to contradict or qualify certain statements of fact and opinion in it and to make submissions critical of its reasoning, opinions, findings and conclusions. It followed, so the AMA contended, that I as Arbitrator would be required to examine and evaluate the contents of the PAC Report and to decide whether to accept or reject statements of fact and opinion therein. In summary, then, the Minister tendered the PAC Report to support and corroborate the direct evidence otherwise called by him and the AMA sought to attack the PAC Report so as to weaken and rebut the Minister's case.

I should observe that on 2 March 1992 the President of the AMA petitioned the Speaker and the Members of the Legislative Assembly for the Parliament to waive its privilege to the extent necessary to avoid the AMA, its solicitors and counsel being in breach of Parliamentary privilege by their engaging in an examination of and comment upon the PAC Report as outlined above. The Solicitor-General stated that on 5 March 1992 the question whether Parliamentary privilege was involved had come to the attention of the Leader of the House. Mr. Booth for the Speaker of the House helpfully advised that the petition was to be presented to the Parliament that afternoon and it was expected to be considered by the Legislative Assembly on 17 March 1992. Of course, there could be no certainty when the petition would be actually debated nor when it and what may be decided. Both the Solicitor-General and Mr. Booth raised the convenience of my awaiting any decision of the Legislative Assembly on the petition, but no adjournment of the proceedings before me was sought; the AMA made no submission on that aspect, whereas the Minister asked me to hear and determine the question. In the result, I heard full argument from all of those appearing.

Notwithstanding that the question of whether or not Parliamentary privilege was involved has arisen not only before me but also in the Parliament, I have formed the view that I should consider and determine it. It has been raised in support of an objection made to the tender of a document, the PAC Report, into evidence in the arbitration. I accept as correct the submission by the Solicitor-General to the effect that I have a right and a duty to make my own determination as to the admission of evidence in proceedings before me. I consider the parties have an entitlement to expect nothing less, and, although my determination of the question arising may not be the last word, I feel bound to deal with it. In adopting that approach, I am mindful of what the learned authors of Erskine May, Parliamentary Practice said as follows[1]:

> After some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House in matters of privilege is still not entirely determined.

And in Blackstone's Commentaries on the Laws of England it is said[2]:

> ...whatever matter arises concerning either House of Parliament, it ought to be examined, discussed, and adjudged in that House to which it relates and not elsewhere.

However, Erskine May also observed[3]:

> In the 19th century, a series of cases forced upon the Commons and the courts a comprehensive review of the issues which divided them, from which it became clear that some of the earlier claims to jurisdiction made in the name of privilege by the House of Commons were untenable in a court of law, that the law of Parliament was part of the general law, that its principles were not beyond the judicial knowledge of the judges, and that it was the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive.

Two of the leading cases no doubt included as part of the "series of cases" in the above extract were Stockdale v. Hansard[4] and Bradlaugh v. Gossett[5] in which the exclusive control by the House of Commons of privilege was recognised insofar as its own internal proceedings were concerned. Since then, of course, the courts both in England and in Australia have had not infrequently to rule upon questions of Parliamentary privilege in relation to the admissibility of evidence in proceedings before them. Many of those cases were cited during the argument before me and it is unnecessary for present purposes to particularise them. It is sufficient to refer to what was said by Dixon C.J. in delivering the unanimous judgment of the High Court in R. v. Richards; ex-parte Fitzpatrick and Browne[6] as follows:

> It is unnecessary to discuss at length the situation in England; it has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.

The Chief Justice continued by observing that so far as Australia was concerned that settled principle was established authoritatively by the Privy Council in Dill v. Murphy[7] and in Speaker of the Legislative Assembly of Victoria v. Glass[8]. To a similar effect, Blackburn C.J. in Comalco Limited v. Australian Broadcasting Corporation[9] followed the decision of the Court of Appeal (Moffitt P., Reynolds and Samuels JJ.A.) in Mundey v. Askin[10] by admitting Hansard into evidence. The Chief Justice in Comalco[11] stated that the courts complied with the law of the privileges of Parliament "not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what was said in Parliament to be the subject of any submission or inference. The court upholds the privileges of Parliament, not by a rule as to the admissibility of evidence, but by its control over the pleadings and the

proceedings in court":cf. Finnane v. Australian Consolidated Press Limited[12] per Needham J.

In approaching the present problem I have had in mind, and respectfully adopt what Popplewell J. said in Rost v. Edwards[13] as follows:

> The courts must always be sensitive to the rights and privileges of Parliament and the constitutional importance of Parliament retaining control over its own proceedings. Equally, as Lord Radcliffe put it in Attorney-General of Ceylon v. De Livera[14], the House will be anxious to confine its own or its members' privileges to the minimum infringement of the liberties of others. Mutual respect for and understanding of each other's respective rights and privileges are an essential ingredient in the relationship between Parliament and the courts.

The Minister submitted that the tender of the PAC Report was not the subject of Parliamentary privilege, essentially because it was not a "proceeding in Parliament"; therefore, and if otherwise admissible, it should be received into evidence for the two purposes stated. The AMA objected that the PAC Report was a "proceeding in Parliament" and as to which it desired to challenge the facts and opinions contained therein; necessarily, that would require it to examine and comment upon in a critical way the PAC Report, as it was said, in breach of Parliamentary privilege, and, so, the tender should be refused. The Speaker submitted that the PAC Report was properly described as a "proceeding in Parliament" so as to bring the privilege of the Parliament into operation by prohibiting its admission into evidence for the purpose of establishing the facts and opinions stated therein; however, and whilst privilege may technically apply, no objection was taken to the tender and admission of the PAC Report for the purpose of establishing it as an event - such a course was strongly supported by the authorities and was unobjectionable. The Solicitor-General outlined the nature of Parliamentary privilege by reference to the cases both in England and in Australia, and stated the relevant principles as they had been developed. That is perhaps an all too brief statement of the submissions made, but it is, I consider, sufficient to crystallise the point at issue.

The source of Parliamentary privilege is of ancient origin and for high ideals. Equally, however, it seems to me, stands the principle that parties to litigation (and, I would add, inquiries such as this arbitration) have the right to present their cases in a complete and free manner in order to protect their own interests and to ensure a just result. Where the balance of principle lies in any particular case, of course, may be a complex

dilemma. As it happens, however, I am unable in this case, even if it were thought to be desirable, to even suggest a solution to those apparently conflicting principles. Parliamentary privilege is part of the law I am required to administer, and to do so in accordance with developed authority and settled principle. "The privileges of Parliament", according to the cases referred to me, "have evolved by custom, resolutions of Parliament, by decisions of the courts and by Acts of Parliament": per Popplewell J. in Rost v. Edwards[15].

The privileges of the Parliament of New South Wales are based upon the following provision in art.9 of the Bill of Rights 1688(UK), as preserved as part of the law of New South Wales from 25 July 1828 by s.6 of and Pt.1 of the Second Schedule to the Imperial Acts Application Act 1969:

> That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

I think it fair to observe that all of the parties here accepted the submissions made by the Solicitor-General as to the general principles applicable, although the departure between them occurred in terms of the application of those principles to the circumstances of this case as they related to the PAC Report and the purposes for which it was tendered. One of the difficulties in that respect facing me is that the settled authorities both here and in England concerned cases of a criminal nature involving the freedom of the subject and defamation cases in which a Member of Parliament was a party. In this arbitration, of course, there are not strict parties as such and I am required as the Arbitrator in making a determination, in effect, to inquire into all relevant issues and to "inform himself on any matter as he sees fit": see s.29N(1)(a) of the Public Hospitals Act 1929; nevertheless I am required also as Arbitrator to "act judicially and be governed by equity and good conscience without regard to technicalities and legal forms: see s.29N(1)(b) of the Public Hospitals Act. A wide discretion too is granted to the Arbitrator in conducting the proceedings by s.29P(1) of that Act which provides that "proceedings before the arbitrator shall be conducted in such manner as he may determine." However wide those provisions may appear to be, no one submitted I was thereby enabled to disregard art.9 of the Bill of Rights. It was common ground, as the Solicitor-General submitted, that as Arbitrator I was within the expression in art.9 "any court or place out of Parliament". I agree; it would be unthinkable if it were to the contrary having in mind that I am required to act judicially, and, therefore, in accordance with law.

The pivotal part of art.9, and indeed in respect of which the argument mainly focussed, was whether or not the material sought to be tendered into evidence, here the PAC Report, was comprehended within the phrase "proceedings in Parliament". If it was, then, as a matter of the construction of art.9, the admission into evidence of such material would be a breach of Parliamentary privilege where the intention or result of the tender would be to impeach or question such proceedings. On the authorities, as the Solicitor-General submitted, "proceedings in Parliament" have been held to include a report of the proceedings of a Parliamentary committee. He referred to the judgment of Pearson J. in Dingle v. Associated Newspapers Limited[16] where it was held that the report of a Select Committee of the House of Commons, especially one which had been accepted as such by the House by being printed, was covered by the privilege set out in art.9 of the Bill of Rights and that no attempt to impugn its validity could properly be made outside Parliament; it was simply not relevant for comment to be made on the report nor on the proceedings leading to its publication. The reasoning in Dingle was followed and applied by Browne J. in Church of Scientology of California v. Johnson-Smith[17] in which it was held that the scope of Parliamentary privilege was not limited to the exclusion from evidence of what was said or done in the House itself but extended to the examination of proceedings in the House for the purpose of supporting a cause of action even though the cause of action arose out of something done outside the House. It was held also in Church of Scientology that extracts from Hansard must not be used in any way to question what was said in the House of Commons.

The meaning and scope of "proceedings in Parliament" was commented upon in Erskine May as follows[18]:

> The Bill of Rights 1689 and the Parliamentary Papers Act 1840 both use the word 'proceedings' without further definition, in a context where such definition is likely to be important. The primary meaning, as a technical parliamentary term, of 'proceedings' (which it had at least as early as the seventeenth century) is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision.
>
> An individual Member takes part in a proceeding usually by speech, but also by various recognized kinds of formal action, such as voting, giving notice of a motion, etc, or presenting a petition or a report from a committee, most of such actions being time-saving substitutes for speaking. The Select

> Committee on the Official Secrets Act in 1938-39 argued that 'proceedings' covered both the asking of a question and the giving of written notice of such question, and includes everything said or done by a Member in the exercise of his functions as a Member in a Committee of either House, as well as everything said or done in either House in the transaction of Parliamentary business. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also can take part in the proceedings of a House, eg by giving evidence before it or before one of its committees, or by securing the presentation of their petitions. (my emphasis)

Mr. Booth in his submissions was emphatic that the PAC Report was properly described as a "proceeding in Parliament" so as to bring into operation art.9. He drew my attention to s.54 of the Public Finance and Audit Act 1983 which deals with the constitution of the Committee, and provides:

> 54. (1) As soon as practicable after the commencement of each Parliament, a committee of members of the Legislative Assembly, to be known as the Public Accounts Committee, shall be appointed.
>
> (2) The Committee shall consist of 5 members.
>
> (3) The appointment of members of the Committee shall be in accordance with the practice of the Legislative Assembly with respect to the appointment of members to serve on select committees of the Legislative Assembly.
>
> (4) A member of the Legislative Assembly is not eligible for appointment as a member of the Committee if the member is a Minister of the Crown or a Parliamentary Secretary.
>
> (5) A member of the Committee ceases to hold office-
>
> (a) when the Legislative Assembly is dissolved or expires by the effluxion of time;
>
> (b) if the member becomes a Minister of the Crown or a Parliamentary Secretary;
>
> (c) if the member ceases to be a member of the Legislative Assembly;

(d) if the member resigns the office by instrument in writing addressed to the Speaker of the Legislative Assembly; or

(e) if the member is discharged from office by the Legislative Assembly.

(6) The Legislative Assembly may appoint one of its members (not being a Minister of the Crown or a Parliamentary Secretary) to fill a vacancy in the office of a member of the Committee.

(7) Any act or proceeding of the Committee is, notwithstanding that at the time when the act or proceeding was done, taken or commenced there was-

(a) a vacancy in the office of a member of the Committee; or

(b) any defect in the appointment, or any disqualification, of a member of the Committee,

as valid as if the vacancy, defect or disqualification did not exist and the Committee were fully and properly constituted.

Section 56 sets out the procedure of the Committee and sub-s.(1) thereof empowers the Committee to determine the procedure for the calling of meetings. Significantly, and as Mr. Booth submitted, sub-s.(8) provides that "(t)he Committee may sit and transact business notwithstanding any prorogation or adjournment of the Legislative Assembly". On the basis that a Select Committee of the Parliament generally may not sit after a prorogation or adjournment of the House had occurred, sub-s.(8), on Mr. Booth's submission, identified the Committee with "proceedings in Parliament" because without such a provision the Committee, like a Select Committee, would not be able to sit and transact business after a prorogation or adjournment of the House. In the result, Mr. Booth put that it was to be undoubted that the PAC Report was comprehended within the phrase "proceedings in Parliament" so as to be covered by art.9 of the Bill of Rights and therefore attractive of Parliamentary privilege. If more be needed, Mr. Booth referred to s.63C of the Public Finance and Audit Act, as inserted by the Public Finance and Audit (Auditor-General) Amendment Act 1991, in relation to documents, such as the PAC Report, presented to the Clerk of the Legislative Assembly as follows:

63C. A document which is presented to the Clerk of the Legislative Assembly in accordance with a provision of this Act:

(a) is, on presentation and for all purposes, taken to have been laid before the Legislative Assembly; and

(b) is to be printed by authority of the Clerk of the Legislative Assembly; and

(c) is, for all purposes, taken to be a document published by order or under the authority of the Legislative Assembly; and

(d) is to be recorded in the Votes and Proceedings of the Legislative Assembly on the first sitting day of the Legislative Assembly after receipt of the report by the Clerk of the Legislative Assembly.

Mr. Sperling for the AMA adopted Mr. Booth's submissions and claimed Parliamentary privilege for the PAC Report. However, Mr. Kenzie for the Minister submitted that the PAC Report was not a "proceeding in Parliament" because the proceedings had to be "in" Parliament and not "of" Parliament or "in relation to" Parliament; he submitted that the PAC Report may well be a proceeding "of" Parliament but it was not "in" Parliament nor "in relation to" Parliament. Mr. Kenzie, for that proposition, relied upon Dingle[19] and Rost[20]. He relied also upon the comments of the learned authors of Halsbury's Laws of England[21] concerning the privileges of Parliament as follows:

> An exact and complete definition of "proceedings in Parliament" has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote the formal transaction of business in the House or in committees. It covers both the asking of a question and the giving of written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.
>
> In its wider sense "proceedings in Parliament" has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that it would be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the

House or a committee of it and while the House or committee is sitting.

I have reviewed carefully the authorities relied upon by Mr. Kenzie, including that of Attorney-General of Ceylon v. De Livera[22] and the decision of Hunt J. in R. v. Murphy[23], which was concerned also with whether the report of a Select Committee was a proceeding in Parliament, but I am quite unable to accept his submissions as being supported by those authorities. Indeed, in my view, they are all to the contrary effect. As I would understand the above extract from Halsbury, it expressly comprehends everything said or done by a Member of the Parliament in the exercise of his functions as being within the phrase "proceedings in Parliament", and that was so in the narrow sense of the expression; in the wider sense, the result is even clearer. Mr. Kenzie relied finally upon ss.3 and 10 of the Parliamentary Evidence Act 1901 for the proposition that there had to be a geographical nexus between the proceeding in question and with the House as being "in" that place. The Committee, so it was submitted, was not restricted to hearing witnesses and carrying out its functions within the walls of the House so that it could not be a proceeding in Parliament.

In my view, the construction which Mr. Kenzie sought to put on the PAC Report as not being a proceeding in Parliament has no substance, and, in my view, it is against the authorities which I have cited. The arguments put by the Solicitor-General and Mr. Booth are compelling in this respect and I accept them. I conclude, therefore, that the PAC Report is a "proceeding in Parliament".

The second issue argued concerned whether the purposes for which the PAC Report was tendered would infringe Parliamentary privilege as laid down in art.9 of the Bill of Rights by leading to it being "impeached or questioned". That argument has relevance bearing in mind the two separate purposes for which the PAC Report was tendered: firstly, as an event; and secondly, as evidence to support the facts and opinions contained in it.

As to the first purpose, there was a consensus of view that the PAC Report may properly be admitted into evidence as simply establishing what was in fact said. The Solicitor-General referred me to Mundey v. Askin[24]; there, the Court of Appeal, and whilst recognising the dicta in Church of Scientology[25] that what was said or done in Parliament could not be examined outside it for the purpose of supporting a cause of action even though the cause of action arose out of something done outside Parliament, held that the tendering of Hansard as an event involved "no question of any further examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege of Parliament." Their

Honours referred to the point, in any event, that in Church of Scientology[26] Browne J. accepted the proposition of the Attorney-General that Hansard could be read for the limited purpose as evidence of fact as to what was in fact said in the House on a particular day by a particular person. I was referred also to a similar effect to the decision of Gibbs A.C.J., as he then was, in Sankey v. Whitlam[27].

On the authorities, I conclude it is now settled that an extract from Hansard may be admitted into evidence to prove certain things were said in a proceeding in Parliament. The tender before me of the PAC Report as an event falls into that category. I would, therefore, rule that it is admissible, if otherwise unobjectionable, for that purpose.

Mr. Sperling, whilst conceding the force of the authorities allowing the tender of the PAC Report as evidence of a fact, nevertheless objected on the basis that the real object was to show from the PAC Report what had been inquired into and who gave evidence and made submissions; that, on his submission, was to use the PAC Report as evidence of what the Committee had said it had done so as to infringe the principle of Parliamentary privilege. Mr. Kenzie made it clear that the tender on this first and limited basis did not involve the receipt of what was effectively the "front cover" of the PAC Report, but it did involve its reception to enable identification of what the Committee was dealing with and the subject matter. He stressed that that did not require any analysis of the accuracy of any of the facts or conclusions otherwise reached by the Committee. By analogy, Mr. Kenzie relied upon the observations by Mahoney J.A. in Jones v. Sutherland Shire Council[28] in relation to the operation of the rule against hearsay to preclude an inference of fact from a person's conduct where a necessary part of the process of reasoning from conduct to fact was that the person in question knew, or believed, or held the opinion, or had formed the conclusion, that the fact was true. As to those observations McLelland J. in Ritz Hotel Limited v. Charles of the Ritz Limited[29] commented:

> Although this is a useful guide, it seems to me that in the final analysis the answer to the question whether any such mental element is a necessary part of the process of reasoning may often be found to be a matter of degree rather than to depend upon the application of a clear qualitative distinction. The court must in my opinion endeavour to determine whether, considered in relation to the inference in question, the relevant document, utterance or other conduct has the character of an objective event or transaction on the one hand, or of a subjective assertion (involving knowledge, belief, opinion or conclusion) on the other.

> Only if the second characterisation is more appropriate in relation to the inference in question, will the inference be excluded by operation of the hearsay rule.

I find that reasoning helpful in a determination of the present question. If the purpose of the tender of the PAC Report, as Mr. Kenzie outlined it, could reasonably and properly be described as an objective event or transaction, then, in my view, it could not be said that it had any subjective considerations so as to raise any mental elements involving knowledge, belief, opinion or conclusion of the Committee. If that be so, I could not see that Parliamentary privilege would relevantly be offended.

On the question of receiving Hansard into evidence, Browne J. said in Church of Scientology[30]:

> It will be observed, and indeed the Attorney-General said, that the basis on which Blackstone puts it is that anything arising concerning the House ought to be examined, discussed, and adjudged in that House and not elsewhere. The house must have complete control over its own proceedings and its own members. I also accept the other basis for this privilege which the Attorney-General suggested, which is, that a member must have a complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter. So far as the authorities are concerned it will be seen that the words used are very wide. In the Bill of Rights 1688 itself the word is "questioned": "freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Blackstone uses the words "examined, discussed, and adjudged," they ought not to be examined, discussed or adjudged elsewhere than in the House.

After referring to those observations of Browne J., in R. v. Secretary of State for Trade; ex parte Anderson Strathclyde plc[31] Dunn L.J. said:

> In my judgment there is no distinction between using a report in Hansard for the purpose of supporting a cause of action arising out of something which occurred outside the House, and using a report for the purpose of supporting a ground for relief in proceedings for judicial review in respect of something which occurred outside the House. In both cases the court would have to do more than take note of the

> fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them. This, in my judgment, would be contrary to art.9 of the Bill of Rights. It would be doing what Blackstone said was not to be done, namely to examine, discuss and adjudge on a matter which was being considered in Parliament. Moreover, it would be an invasion by the court of the right of every member of Parliament to free speech in the House with the possible adverse effects referred to by Browne J.

I do not apprehend from the authorities that Hansard may be admitted into evidence for the purpose of simply showing the mere occurrence of something; if that were so, and I think it is not, the result would be a nonsense and the evidence simply burdened with pieces of paper. As was said by Browne J. in Church of Scientology[32], the whole basis for the privilege of Parliament according to Blackstone was "that a member must have a complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter"; Blackstone used the words "examined, discussed and adjudged". In Mundey v. Askin[33], the Court of Appeal in admitting Hansard accepted that the document could be received "to prove, as a fact, that certain things had been said in the course of a debate in the Legislative Assembly."

It was made plain by counsel that the eventual issue for determination on this point in the arbitration was the assertion by the AMA that since the 1985 determination was made by Macken J. there have been no relevant problems for some seven years which would require corrective action in any future determination I might make. The Minister joins issue with that proposition and seeks to show, including by reliance on the PAC Report, that problems have existed in that seven year period which the PAC Report will disclose as relevant objective events. I accept that as a legitimate and proper approach, and as not involving an infringement of Parliamentary privilege, because there can be no concern that the motives or intentions or reasoning of the Committee will be questioned or held against its members. The basis then for the tender of the PAC Report for this first and limited purpose as an event is, in my view, unobjectionable and no breach of Parliamentary privilege.

In the view I take, the second and wider basis for the tender of the PAC Report, that is as evidence of the facts and opinions contained in it, undoubtedly breaches Parliamentary privilege. Those facts and opinions were seriously put in issue by the AMA and Mr. Sperling made

it clear his instructions were to lead evidence to found a submission critical of the reasoning, opinions, findings, conclusions and procedures of the Committee; he submitted it would be necessary to ask me as arbitrator to reject many of the facts and opinions in the PAC Report. I do not understand that the AMA in any way would seek to impugn the integrity of the members of the Committee nor of the witnesses who gave evidence before it; but if that were so, then it would be my clear view that Parliamentary privilege was infringed. Even so, it seems to me that once Mr. Kenzie relies upon the PAC Report in such a way as to require inferences to be drawn from it to establish facts and opinions then necessarily an examination would have to be made of its subjective contents and conclusions. The position would be compounded when one adds the intended criticisms by Mr. Sperling. Such a course, in my view, and as to matters so seriously in contention between the Minister and the AMA, would clearly offend the privileges of Parliament; in a real sense, it would be, therefore, irrelevant to the proceedings I am conducting. I am not prepared to admit the PAC Report into evidence for those purposes and with those consequences. I should mention that in considering this aspect I have taken the opportunity to peruse the PAC Report to enable an assessment to be made whether its contents, if received into evidence for the purposes stated, would be a breach of Parliamentary privilege. In so doing I was satisfied it was proper, without any breach of Parliamentary privilege, to do so on a de bene esse basis by provisionally receiving the PAC Report for the limited and temporary purpose of examining it in order to determine whether its admission into evidence would be a breach of Parliamentary privilege: see Amann Aviation Pty. Limited v. Commonwealth of Australia[34] and Anderson Strathclyde[35].

The conclusions reached on this second issue of the tender of the PAC Report, namely the wider purpose, follow, as I would understand them, the line of the English authorities and most of the Australian cases referred to during argument. The Solicitor-General drew my attention to the judgment of Beaumont J. in Amann in which his Honour collected and commented upon the historical development of the case law on Parliamentary privilege in terms of art.9 of the Bill of Rights and the evolution of custom concerning the privileges of Parliament. Although his Honour was there concerned with the definition of "proceedings in Parliament" in s.16(3) of the Parliamentary Privileges Act 1987 (Cth.), s.16(1) thereof declares and enacts that the provisions of art.9 of the Bill of Rights applies in relation to the Parliament of the Commonwealth. "Proceedings in Parliament" are defined by s.16(3) thus:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning

proceedings in Parliament, by way of, or for the purpose of-

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

That, to my knowledge, is the only statutory definition of "proceedings in Parliament" in Australia; there is no comparable provision in England and the meaning of the term has been left for the courts to define as set out earlier in these reasons by reference to the cases. Nevertheless, after considering a number of cases, Beaumont J. said in Amann[36]:

> The purpose and effect of s.16 of the Act is, as s.16(1) states, to avoid any doubts which might otherwise have arisen. The provisions of s.16(3) in my view, are, in substance, declaratory of the position both in England and in Australia before the enactment of the Act.

I adverted earlier to the apparent difference between some of the Australian authorities on this subject. It is unnecessary, having in mind the approach I have taken, to rule for present purposes upon that difference; it would be remiss, however, in not mentioning it for completeness and in deference to the distinction in terms of principle which it raises as outlined by both the Solicitor-General and Mr. Booth. On the one hand, the wider construction given to the concept of Parliamentary privilege has as its purpose the satisfaction of the principle that "a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences": Sankey v. Whitlam[37]. That approach follows the reasoning in the English cases such as Dingle, Church of Scientology, Anderson Strathclyde and Rost. In R. v. Jackson[38], Carruthers J. so applied Parliamentary privilege in precluding the use of Hansard in legal proceedings when it was tendered to prove more than what was said in the Parliament. On the other hand, the narrower construction to art.9 of the Bill of Rights was applied by Hunt J. in Murphy[39], in terms that art.9 meant that no court proceedings having legal consequences against a member of Parliament were permitted which by those legal consequences the member was prevented from

exercising his freedom of speech in Parliament or before a committee thereof or of punishing him for having done so; his Honour held, therefore, that witnesses at a trial could be cross-examined as to statements by them to a Senate Select Committee and that such statements could be proved as prior inconsistent statements. That strict approach received support from the Supreme Court of South Australia (King C.J., White and Olsson JJ.) in Wright and Advertiser Newspapers Limited v. Lewis[40], being an action for libel, and in which case King C.J. quoted with approval what was said by Cockburn C.J. in Wason v. Walter[41] as follows:

> Comments on government, on Ministers and officers of State, on Members of both Houses of Parliament, on judges and other public functionaries, are now made every day which half a century ago would have been the subject of actions or ex officio information, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties.

My own view is that the tender of the PAC Report would inevitably result in a direct and critical challenge to the material contained in it as finalised by the Committee. That would represent a challenge to the functions of the Committee and the way in which it has performed those functions. Such a process would strike, in my view, at the whole basis for Parliamentary privilege as it has evolved, and would result in the PAC Report being impeached and questioned contrary to art.9 of the Bill of Rights. Whilst one may have some sympathy for the result that a party to proceedings is thus limited in the presentation of a case, the state of the law as I have found it makes that result inevitable. If it is to be otherwise, it is my opinion that it is not for me as Arbitrator to permit it, but rather for the Parliament as the beneficiary of the privilege. I should note and acknowledge in saying this that I was today advised by Mr. Booth that yesterday the Legislative Assembly declined to waive its privileges in response to the AMA petition.

In summary, I would be prepared to admit into evidence, if otherwise admissible, the PAC Report as relevant evidence of an event in the manner indicated in these reasons. I reject the PAC Report from evidence for the purposes of establishing the facts and opinions contained therein as being contrary to Parliamentary privilege.

I answer the specific questions arising in relation to Parliamentary privilege as follows:

1. Q. Whether the arbitrator and/or counsel are precluded by parliamentary privilege from examining the contents of the report in the course of argument concerning the tender of the report.

   A. No; the PAC Report may be examined on a de bene esse basis by provisionally receiving it for the purpose of a temporary and conditional examination so as to enable a determination whether if received into evidence it would breach parliamentary privilege.

2. Q. Whether in relation to that argument the AMA's counsel are precluded by parliamentary privilege from being critical of the report and/or the procedures which gave rise to the report in the course of that argument.

   A. Yes; such a course is unnecessary for the purpose of a temporary and conditional examination of the PAC Report.

3. Q. Whether parliamentary privilege precludes the tender of the report by the minister and/or the reception of the report into evidence by the arbitrator.

   A. No; it is a matter of the purposes for which the PAC Report is tendered into evidence which would make it inadmissible by reason of parliamentary privilege being offended.

4. Q. Whether the Minister is precluded by parliamentary privilege from relying on the report as evidence of an event and/or as evidence of the facts and opinions stated therein.

   A. The PAC Report is not precluded by parliamentary privilege from being admitted as evidence of an event so as to establish objectively that certain things had been said in it.

   The PAC Report is inadmissible into evidence as being a breach of parliamentary privilege for the purposes of establishing the truth of the facts and the correctness of the opinions stated therein as necessarily involving a critical examination of the reasoning, opinions, findings, conclusions and procedures of the Committee which the Arbitrator would be required either to accept or reject.

5. Q. If the report is received in evidence, whether counsel for the AMA would be precluded by parliamentary privilege from impugning the statements of fact and

opinion in the report, by (but not limited to) adducing evidence to contradict or qualify statements of fact and opinion in the report and/or by making submissions critical of the report including the reasoning, opinions, findings and conclusions in the report.

A. Yes.

6. Q. If the report is received in evidence, whether the arbitrator would be precluded by parliamentary privilege from examining and evaluating the contents of the report, receiving submissions concerning the facts and opinions stated therein, and deciding whether he accepted or rejected statements of fact and opinion therein.

A. Yes.

I make rulings accordingly.

REFERENCES


[1] Butterworths, London, 21st. ed. (1989) at p.145
[2] 17th ed. (1830), vol.1 at p.163
[3] supra at p.150
[4] (1839) 9 Ad. & El.1
[5] (1884) 12 Q.B.D. 271
[6] [1955] 92 C.L.R. 157 at 162
[7] (1864) 1 Moo. P.C.(N.S.) 487
[8] (1871) L.R. 3 P.C. App.560
[9] [1983] 50 A.C.T.R. 1
[10] [1982] 2 N.S.W.L.R. 369 at 373
[11] supra at 5
[12] [1978] 2 N.S.W.L.R. 435 at 438-439
[13] [1990] 2 Q.B. 460 at 467
[14] [1963] A.C. 103 at 120
[15] supra at 469
[16] [1960] 2 Q.B. 405
[17] [1972] 1 Q.B. 522 at 530-531
[18] supra at 92
[19] supra at 410
[20] supra at 462-463
[21] Butterworth's, London, 4th ed.(1980) par.1486 at p.598
[22] supra 120-121
[23] [1986] 5 N.S.W.L.R. 18 at 25
[24] supra at 373
[25] supra at 530
[26] supra at 531
[27] [1978] 142 C.L.R. 1 at 35
[28] [1979] 2 N.S.W.L.R. 206 at 229-233
[29] [1988] 15 N.S.W.L.R. 158 at 172
[30] supra at 530
[31] [1983] 2 All E.R. 233 at 239
[32] supra at 530
[33] supra at 373
[34] [1988] 19 F.C.R. 223 at 232
[35] supra at 239
[36] supra at 231
[37] supra at 35
[38] [1987] 8 N.S.W.L.R. 116
[39] supra at 30, 38
[40] [1990] 53 S.A.S.R. 416
[41] [1868] L.R. 4 Q.B. 73 at 94

## THE 1985 DETERMINATION BY MACKEN J.

DETERMINATION OF THE TERMS AND CONDITIONS OF WORK AND THE HOURLY RATES OF REMUNERATION IN RESPECT OF MEDICAL SERVICES PROVIDED BY VISITING MEDICAL OFFICERS UNDER SESSIONAL CONTRACTS AS DEFINED IN SECTION 29K OF THE PUBLIC HOSPITALS ACT, 1929, AS AMENDED.

1. EFFECTIVE DATE

This Determination shall have effect and operate from Wednesday 1 January 1986

2. DEFINITIONS FOR THE PURPOSE OF THIS DETERMINATION

"Association" means The New South Wales Branch of the Australian Medical Association.

"Call-Back" means called to attend a hospital patient at a time when the V.M.O. would not otherwise have attended the hospital.

"Contracting Hospital" means a hospital or separate institution (or the governing board thereof) which has entered into a sessional contract with a Visiting Medical Officer.

"Corporation" means the Health Administration Corporation being the Corporation constituted under the Health Administration Act, 1982

"General Practitioner" means a medical practitioner who is not a specialist.

"Higher Medical Qualification" means medical qualifications obtained by a medical practitioner subsequent to graduation in medicine which are recognized by the National Specialist Qualification Advisory Committee as an appropriate qualification in an accepted specialty.

"Hospital" means a hospital which is a recognized hospital For the purposes of the Health Insurance Act, 1973, as amended, and which is named in the Second Schedule to the Public Hospitals Act, 1929, as amended

"Hospital Patient" means a person who is classified as such under the provisions of the Health Insurance Act, 1973.

"Inpatient" means a person who comes within the definition of that word in the Health Insurance Act, 1973.

"Medical Practitioner" means a person registered or licensed for the time being under the Medical Practitioners Act, 1938 as amended.

"Normal Hourly Rate" means the hourly rate specified in accordance with the provisions of Clause 9 of this Determination.

"On-Call" means rostered to be available to attend hospital patients.

"Outpatient" means a person who is registered for medical treatment at a hospital or separate institution without being admitted to occupy a bed in that hospital or separate institution on the day he was registered.

"Privilege" means the right granted by a Contracting Hospital to a Visiting Medical Officer to provide such medical services within such Contracting Hospital as are delineated in the instrument granting such right.

"Separate Institution" means an institution which is a recognized hospital for the purposes of the Health Insurance Act, 1973, as amended, and which is named in the Third Schedule to the Public Hospitals Act, 1929, as amended

"Service" means service provided by a Visiting Medical Officer pursuant to the provisions of this Determination.

"Sessional Contract" means a contract between an incorporated hospital, a separate institution or the governing body of a separate institution and a medical practitioner under which the medical

practitioner is required to provide medical services or medical services of any class or description during periods or sessions specified in the contract to hospital patients of that incorporated hospital or separate institution.

"Specialist" means a medical practitioner who:

(a) after full registration has spent not less than five years in the practice of medicine in a hospital or in a department of the Faculty of Medicine in the University of New South Wales or in the Institute of Clinical Pathology and Medical Research or in any other institute or any practice elsewhere whether in New South Wales or elsewhere, recognized by the Hospital or the Corporation to be of equivalent standing; and

(b) has undergone supervised specialist training and/or experience for a period of not less than three years; and

(c) (i) has obtained a higher medical qualification in his speciality recognized by the National Specialist Qualification Advisory Committee of Australia; or

(ii) has been recognized as a specialist for the purpose of the National Health Act; or

(iii) where the Corporation and Association agree that the standing of the Visiting

Medical Officer warrants his classification as a specialist.

"Senior Specialist" means a specialist who:-

(a) has spent not less than ten years in the practice of medicine after full registration and has been engaged in the practice of his specialty for at least seven years; and

(b) who by reason of the high degree of experience and skill gained in his specialty is recognized by the Contracting Hospital and the Corporation as having attained the status of a senior specialist and who under this contract will be required to render services calling for a specialist of that status.

"Visiting Medical Officer" (hereinafter referred to as V.M.O.) means a visiting practitioner appointed to perform work, as a medical practitioner under a sessional contract with that incorporated hospital or separate institution or the governing body of that separate institution. Pathologists and radiologists are expressly excluded from this definition.

"General Practitioner" means a medical practitioner who is not a specialist.

"Visiting Practitioner" means a medical practitioner appointed to perform work as a medical practitioner in a hospital otherwise then as an employee.

"Year" means calendar year.

In this Determination unless the context otherwise requires words in the singular shall include the plural and words in the plural shall include the singular. Words importing the masculine gender shall include the female gender.

3. CLASSIFICATION

(a) The V.M.O. and the contracting hospital will agree into which category the V.M.O.. will be classified for the purpose of rendering services under the sessional contract prior to the commencement of the sessional contract, such classification to be based on qualifications and experience.

(b) At such time as the V.M.O. obtains relevant additional qualifications and/or experience he shall have the right to such higher classifications.

4. DUTIES

Subject to the privileges granted by the Contracting Hospital the V.M.O. shall render medical and/or surgical services within the range of his

professional qualifications to the Contracting Hospital for the care and treatment of hospital patients, provided that such service shall be rendered at the Contracting Hospital or at such hospital or health facility administered by the Contracting Hospital as agreed to by the Contracting Hospital and the V.M.O. at the time of entering into a Sessional Contract.

5. FACILITIES

Where reasonably practicable, the Contracting Hospital shall provide:-

(a) all ancillary medical, nursing and clerical assistance and facilities, instruments and equipment reasonably necessary for the proper performance of the professional services to be rendered by the V.M.O. under his contract;

(b) to the V.M.O. upon request free of charge sufficient suitable and serviceable outer uniforms and duty garments, which shall remain the property of the Contracting Hospital, and which shall be laundered at the expense of the Contracting Hospital.

6. COMPUTATION OF PAYMENTS AND CONTRACTED HOURS

(a) The services rendered by the Visiting Medical Officer under his Sessional Contract shall be expressed in hours per calendar month.

(b) Except where the Visiting Medical Officer shall have been absent on unpaid leave in accordance with Clause 15 of the Determination he shall be paid for no less than the number of hours specified in his Sessional Contract.

(c) Except where the provisions of sub-clause (f) of this clause are applicable, a Visiting Medical Officer shall not be paid for any greater number of hours than specified in his Sessional Contract; provided that this sub-clause shall not apply in respect of services rendered as a result of call-backs to the Contracting Hospital which are to be remunerated in accordance with Clause 8 of this Determination.

(d) A Sessional Contract shall not specify less than one contracted hour per calendar month.

(e) The number of contracted hours per calendar month to be specified in a Sessional Contract shall be the average number of hours per calendar month during which the Visiting Medical Officer has rendered services (other than services which are subject to remuneration in accordance with Clause 8 of this Determination) in the six calendar months immediately prior to the operative date of this Determination. Where any unpaid leave has been granted, the amount of such leave shall be added to the number of hours during which

services were actually rendered before calculating the average figure.

(f) Where a Sessional Contract has not been in effect for a period of six calendar months immediately prior to the operative date of this Determination, the number of contracted hours per calendar month to be specified therein shall be one in which case the Visiting Medical Officer shall be entitled to payment at his normal hourly rate calculated to the nearest complete hour, in respect of all services rendered in any calendar month in excess of one hour in duration.

(g) The number of contracted hours per calendar month to be specified in a Sessional Contract shall be adjusted six-monthly commencing six months subsequent to the operative date of this Determination. Such adjustment shall be made on the basis indicated in sub-clause (e) of this Clause with the number of contracted hours per calendar month thus determined forming the basis of the Sessional Contract for the ensuing six calendar months.

(h) In lieu of the provisions of sub-clauses (e) and (g) of this Clause, a Visiting Medical Officer may elect, at his/her absolute discretion, to continue to be remunerated in accordance with the provisions of sub- clause (f) of this Clause.

(i) Where a V.M.O. is paid on a sessional basis and has a specified period for the treatment of hospital patients cancelled by the hospital, i.e. where less than 14 days notice is given to the V.M.O., the V.M.O. is entitled to be paid for the cancelled time at the normal hourly rate, provided that if the V.M.O. is able to utilise any part of the cancelled period in the rendering of medical services following advice of the cancellation which should be positively encouraged, then payment of that part (or the whole) of the cancelled period shall not be made. In respect of anaesthetists and surgeons who have operating theatre time cancelled, such cancelled time shall be paid for where less than 28 days notice has been given by the hospitals.

7. ON-CALL ALLOWANCES

(i) The on-call allowance shall not be payable during periods of leave.

(ii) Where the V.M.O. is rostered on-call to more than one hospital at the same time he shall only be entitled to receive an on-call allowance from that hospital to which he has the greatest on-call commitment, or where the on-call commitments are equal, he shall receive an on-call allowance only from one hospital.

(iii) The V.M.O. shall be entitled to receive an on-call allowance equivalent to one-tenth of

his normal hourly rate for each hour that he is on call.

8. PAYMENT FOR CALL-BACK

In respect of call-backs made at the request of the Contracting Hospital the V.M.O. shall be remunerated as follows:-

(a) In respect of call-backs commencing within the hours of 8.00 a.m. to 6.00 p.m. Monday to Friday inclusive at the V.M.O.'s normal hourly rate plus a loading of 10%.

(b) In respect of call backs commencing at times other than those specified in paragraph (a) at the V.M.O.'s normal hourly rate plus a loading of 25%.

(c) The duration of call-backs shall include the actual travelling time from the place of contact to the Contracting Hospital and return to a maximum of 20 minutes each way.

(d) The payment for any one call-back shall be not less than one hour or call-back time plus the actual travelling time as provided in (c) above.

(e) For the purpose of classifying the call-back under paragraphs (a) or (b) of this clause the call-back shall be deemed to commence from the time the V.M.O. leaves his residence or place of contact to commence the call-back.

9. ORDINARY REMUNERATION

The normal hourly rates payable under a sessional contract in respect of the following classifications shall be:-

| | |
|---|---|
| (i) For a general practitioner with less than 5 years experience. | $54.00 |
| (ii) For a general practitioner with less than 10 years experience | $60.00 |
| (iii) For a general practitioner with 10 or more years of experience or who has been elected to Fellowship in the Royal Australian College of General Practitioners | $75.00 |
| (iv) For a specialist | $87.00 |
| (v) For a senior specialist | $94.00 |

and on a proportionate basis for less than an hour. The normal hourly rates prescribed by this clause are made by reference and in relation to a basic wage for adult males of $103.00 per week. Where the Industrial Commission in Court Session makes a determination or specification pursuant to Section 57 of the Industrial Arbitration Act, 1940 then the base hourly rate prescribed by this Clause shall be varied as if Section 58 of the Industrial Arbitration Act applied to them to the extent necessary to give effect to the change in the Basic Wage.

10. BACKGROUND PRACTICE COSTS

In addition to the normal hourly rate the V.M.O. shall be paid the following amount per hour during which he provides services under his sessional contract:-

| | | |
|---|---|---|
| (i) | For senior specialist and specialist | $25.00 |
| (ii | For general practitioners | $20.00 |

11. METHOD AND TIME FOR PAYMENT

(a) The V.M.O shall submit an account to the contracting hospital in respect of each calendar month.

(b) On termination of the contract the amount due and payable to the V.M.O shall be paid to him on such termination or so soon thereafter as reasonably practicable.

12. DURATION OF SESSIONAL CONTRACT

Subject to the proper performance of the services to be rendered under a V.M.O.'s Sessional Contract and to the rules and by-laws of the Contracting Hospital, now or hereafter in force the duration of a V.M O.'s services shall be as follows:

(a) for a period of three years or such lesser time as the parties may agree and, subject as hereinafter provided, for such further period or periods not exceeding three years each as may be agreed between the parties within three

months prior to the expiration of the then current period; or

(b) until the V.M.O. ceases to be registered as a medical practitioner under the Medical Practitioners Act, 1938, as amended; or

(c) until the Contract is terminated by three months notice given either by the Contracting Hospital or the V.M.O.; or

(d) until the V.M.O. becomes permanently mentally or physically incapable of performing his duties when the Contracting Hospital may terminate this Agreement in accordance with paragraph (c) of this Clause; or

(e) until the V.M.O. is suspended or dismissed in accordance with the provisions of this Clause,

whichever event shall first happen, and on the happening of the event referred to in sub-paragraph (b) of this Clause the Contract shall ipso facto be terminated;

PROVIDED

(i) that the V.M.O. shall, at the age of sixty-five years, relinquish his appointment and shall be ineligible for re-appointment except with the express prior approval of the Corporation which may impose conditions to its approval providing that these do not affect remuneration or other material benefits provided under this Determination; and

(ii) that if the Contracting Hospital considers it necessary in the interests of the hospital, it may suspend the V.M.O. but in that event the V.M.O. shall forthwith be given notice in writing of the Contracting Hospital's reasons and an opportunity to present his case to the Contracting Hospital; and

(iii) that the V.M.O. shall not be dismissed except:-

(a) where the V.M.O. has been suspended in respect of the matter in question and has been given notice in writing of the Contracting Hospital's reasons and an opportunity to present his case to the Contracting Hospital; or

(b) where the V.M.O. is considered by the Contracting Hospital to have been guilty of serious and wilful misconduct after he has been given an opportunity to present his case to the Contracting Hospital; and

(iv) that if the V.M.O. does not have a right of appeal under the Public Hospitals Act, 1929, as amended, in relation to his suspension or dismissal, he shall be entitled to lodge an appeal in relation to such suspension or dismissal in accordance with the provisions of Clause 13 of this Determination and in such circumstances a Committee constituted under Clause 13, or the legally qualified person appointed by the Director of the Corporation

and the President of the Association in accordance with Clause 13 shall have jurisdiction to make any order considered to be appropriate; and

(v) that no part of this Clause shall preclude a V.M.O from exercising any right of appeal available to him under the Public Hospitals Act, 1929, as amended.

13. DISPUTES

(i) Where the parties to a Sessional Contract are unable to resolve any matter arising under the Sessional Contract or in respect of the interpretation thereof within one month of the matter being raised, and there is no right of appeal available under the Public Hospitals Act as amended, the Association or the Corporation may refer any such matter or matters to a Committee of two or four persons on which the Association and the Corporation are equally represented.

(ii) The Committee shall investigate the referred matter or matters and shall endeavour to recommend how the same should be resolved; and if the Committee or a majority thereof is able to do so within one month of the matter or matters being referred to it then that recommendation shall be final and binding on the Contracting Hospital and the V. M.O. except

where the recommendation involves a question of law.

(iii) If within one month after the referral of the referred matter or matters the Committee has not made a recommendation in accordance with paragraph (ii) of this Clause then the referred matter or matters may be referred in writing by the Committee or by the Association or Corporation to the Director of the Corporation and the President of the Association who may by mutual agreement:-

(a) make a joint determination as to the manner in which the matter or matters in dispute should be resolved:

OR

(b) refer the matter or matters to a legally qualified person selected by them for determination and in such case the determination of such legally qualified person shall be final and binding on the Contracting Hospital and the V.M.O.

(iv) No party may initiate any action at law or in equity in respect of any dispute between the parties regarding any matter arising under this Determination or in respect of the interpretation thereof until such dispute has been dealt with in accordance with this Clause.

(v) Each party shall be responsible for the payment of his own costs and expenses in the resolution or determination of the referred matter or matters.

14. RECORD OF ATTENDANCE

(a) to facilitate the calculation of the number of contracted hours per calendar month to be specified in a Sessional Contract in accordance with Clause 6 of this Determination a Visiting Medical Officer shall maintain a record indicating the date upon which he has been required to render service pursuant to this Determination. Such record shall indicate the commencing and finishing times during which services were rendered and the number of hours, to the nearest quarter-hour, of such elapsed time as is attributable to services which are to be remunerated in accordance with this Determination.

(b) to facilitate the making and verification of claims in respect of the services referred to in Clauses 8(a) and (b) and 15(ii) of this Determination, a Visiting Medical Officer shall keep a record showing particulars of each service, that is to say the date, time of day, name of patient and nature of service rendered.

(c) the records referred to in this Clause shall be submitted to the Contracting Hospital each

calendar month by no later than the fifteenth day of the succeeding calendar month.

15. LEAVE

(i) Annual Leave

Unpaid leave of absence shall be granted to a V.M.O in one or more periods aggregating five calendar weeks per year. Such leave shall be granted at times mutually agreed upon between the V.M.O. and the Contracting Hospital.

(ii) Public Holidays

The V.M.O. shall be entitled to absent himself from his agreed hourly commitment without remuneration on public holidays unless the Contracting Hospital has given reasonable notice that it requires the V.M.O. to render services on any such day. Where the V.M.O. renders necessary medical service on a public holiday he shall be remunerated at his normal hourly rate for the actual time during which he renders such service on a public holiday with a loading of 50%.

(iii) Study and Conference Leave

Unpaid leave of absence shall be granted to the V.M.O. in one or more periods aggregating three calendar weeks per year. Such leave shall be granted at times mutually agreed upon between the V.M.O. and the Contracting Hospital.

(iv) Long Service Leave

Unpaid leave of absence in one or more periods aggregating two calendar months shall be granted to the V.M.O. upon the completion of ten years service. Thereafter, further unpaid leave of absence shall be granted on the basis of one calendar month for each additional two years service. Such leave shall be granted at times mutually agreed upon between the V.M.O. and the Contracting Hospital.

(v) Sick Leave

Unpaid leave of absence shall be granted to the V.M.O. during any period when the V.M.O. is unable to render services due to illness provided that the V.M.O. shall notify the Contracting Hospital of such incapacity as soon as is reasonably practicable

(vi) Other Leave

Additional periods of unpaid leave of absence may be granted to the V.M.O. at times mutually agreed upon by the V.M.O. and the Contracting Hospital.

16. TRAVELLING

When the V.M.O. is required by the Contracting Hospital or health facility to render services at a hospital or health facility other than the Contracting Hospital or health facility at which he ordinarily renders services under his sessional contract, a V.M.O. shall be reimbursed for the additional cost of travelling to the other hospital

or health facility. Where a V.M.O. uses his own motor vehicle for the purpose, the reimbursement shall be at the transport allowance mileage rate payable to members of the New South Wales Public Service by Determination of the Public Service Board of New South Wales, as amended from time to time.

17. COMMITTEES

A Visiting Medical Officer is eligible to claim payment for a proportion of the time which he spends in attending various committee meetings. The proportion attracting payment is determined in accordance with the ratio of hospital to private patients treated by each individual V.M.O. Committee meetings mean meetings concerned with the clinical planning administration of a department of a hospital, peer review and hospital patient management, but does not include attendance at meetings of the Medical Staff Council or Board of Directors.

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**THE CLAIM BY THE AUSTRALIAN MEDICAL ASSOCIATION (NSW BRANCH)**

DETERMINATION OF THE TERMS AND CONDITIONS OF WORK AND THE HOURLY RATES OF REMUNERATION IN RESPECT OF MEDICAL SERVICES PROVIDED BY VISITING MEDICAL OFFICERS UNDER SESSIONAL CONTRACTS AS DEFINED IN SECTION 29K OF THE PUBLIC HOSPITALS ACT, 1929, AS AMENDED.

1. EFFECTIVE DATE

This Determination shall have effect and operate from .....

2. DEFINITIONS FOR THE PURPOSE OF THIS DETERMINATION

"Area Health Service" has the same meaning as defined in the Area Health Services Act, 1986.

"Association" means The New South Wales Branch of the Australian Medical Association.

"Call-Back" means called to attend a patient to provide a service which cannot reasonably be postponed to a time when the V.M.O. would ordinarily be at the hospital and includes an attendance on a patient without being requested by the hospital to attend when in the opinion of the V.M.O. such attendance is necessary.

"College" means the present learned College or its successor relating to the particular speciality.

"General Practitioner" means a medical practitioner who is not a specialist.

"Higher Medical Qualification" means medical qualification obtained by a medical practitioner subsequent to graduation in medicine recognized by the National Specialist Qualification Advisory Committee as an appropriate qualification in an accepted specialty.

"Hospital" has the same meaning as defined in the Public Hospitals Act, 1929, as amended and includes an incorporated hospital and a health facility.

"Industrial Authority" has the same meaning as defined in the Public Sector Management Act, 1988.

"Medical Practitioner" means a person registered for the time being under the Medical Practitioners Act, 1938 as amended.

"Services" include call backs and attendance at committees referred to in Clause 9.

"Normal Hourly Rate" means the hourly rate specified in accordance with the provisions of Clause 7 of this Determination.

"On-Call" means rostered to be available to attend patients during the hours stated in the roster referred to in clause 12(iv).

"Patient" has the same meaning as defined in the Public Hospitals Act, 1929 as amended but does not include a patient classified as a private patient.

"Price Index" means the All Groups Consumer Price Index applicable to Sydney kept by the Commonwealth Statistician and in the event of such Price Index being discontinued or abolished then such Price Index as the Commonwealth Statistician shall substitute therefor and, if no Price Index shall be substituted therefor by the Commonwealth Statistician, then a Price Index specified as appropriate by a person appointed jointly by the Minister and the Association and, failing agreement on such a person, then by the President for the time being of the New South Wales Law Society.

"Principal" means the Hospital or Area Health Service with which a V.M.O. has entered into a sessional contract.

"Senior Specialist" means a specialist who has practiced as such for 7 years.

"Separate Institution" means an institution which is a recognized hospital for the purposes of the Health Insurance Act, 1973, as amended, and which is named in the Third Schedule to the Public Hospitals Act, 1929, as amended.

"Sessional Contract" has the same meaning as defined in the Public Hospitals Act, 1929, as amended.

"Specialist" means a medical practitioner who:

(i) has obtained a higher medical qualification; or

(ii) has been recognized as a specialist for the purpose of the National Health Act; or

(iii) Where, after consultation with the appropriate College the Principal and the Association agree that the standing of the VMO warrants his classification as a specialist.

"Visiting Medical Officer" (referred to herein as "V.M.O.") has the same meaning as defined in the Public Hospitals Act, 1929, as amended.

In this Determination unless the context otherwise requires words in the singular shall include the plural and words in the plural shall include the singular. Words importing the masculine gender shall include the female gender.

3. CLASSIFICATION

A V.M.O. who qualifies for a classification specified in Clause 7 shall be remunerated at the rate specified for that classification.

4. DUTIES

The V.M.O. shall render services within the range of his professional qualifications to the Principal for the care and treatment of patients during the term of the sessional contract.

5. FACILITIES

Where reasonably practicable the Principal shall provide:-

(a) all ancillary medical, nursing and clerical assistance and facilities, instruments and equipment reasonably necessary for the proper performance of the services to be rendered by the V.M.O. under his contract;

(b) to the V.M.O. upon request free of charge sufficient suitable and serviceable outer uniforms and duty garments which shall remain the property of the Principal, and which shall be laundered at the expense of the Principal.

6. REMUNERATION

(a) Except where the V.M.O. elects to be paid in the manner specified in paragraph (b), the V.M.O. shall be paid for the services provided to the Principal including attendance at committees pursuant to Clause 9 at the hourly rate specified in clause 7 together with the amount specified in clause 8 for each hour that he provides services to the hospital.

(b) After the first six months of the term of the sessional contract a V.M.O. may elect to be paid for the average number of hours of services he provides to the Principal per month ("the averaging system") instead of the actual number of hours of services he provides.

(c) If the V.M.O. elects to be paid pursuant to the averaging system the hours will be calculated by taking an average of the hours of services (excluding call back time) provided during the first six months of the contractual period.

(d) The number of hours for which the V.M.O., who elects to be paid pursuant to the averaging system shall be re-calculated every six months by taking the average of the hours of services (excluding call back time) actually provided to the Principal during the previous six months.

(e) Subject to sub-clauses (f) and (g) a V.M.O. who elects to be paid pursuant to the averaging system will be paid for those average hours at the rate specified in Clause 7 together with the amount specified in Clause 8.

(f) Whilst the V.M.O. is on call he will be paid at the rate specified in Clause 12.

(g) When the V.M.O. provides services as a result of a call back he will be paid in accordance with Clause 10.

(h) Where a V.M.O. has an arranged period for the treatment of patients cancelled by the hospital and less than 14 days notice is given to the V.M.O., the V.M.O. is entitled to be paid for the cancelled time at the normal hourly rate specified in Clause 7 together with the amount specified in Clause 8, provided that if the V.M.O. is able to utilise any part of the cancelled period in the rendering of services

during the cancelled time then payment of that part for the cancelled time shall not be made.

In respect of anaesthetists and surgeons who have arranged operating theatre time cancelled, such cancelled time shall be paid for where less than 28 days notice has been given by the hospital.

(i) The V.M.O. may elect, at his absolute discretion, to be remunerated either under the averaging system or pursuant to paragraph (a) of this Clause.

7. NORMAL HOURLY RATE

The normal hourly rates payable under a sessional contract in respect of the following classifications shall be:-

| | |
|---|---|
| (i) For a general practitioner who has been a medical practitioner for less than 5 years | $89.10 |
| (ii) For a general practitioner who has been a medical practitiioner for 5 years or more but less than 10 years | $99.00 |

(iii) For a general practitioner who

| | | |
|---|---|---|
| | has been a medical practitioner for 10 or more years or who has been admitted to Fellowship in the Royal Australian College of General Practitioners | $123.75 |
| (iv) | For a specialist | $143.55 |
| (v) | For a senior specialist | $155.10 |

and on a proportionate basis for less than an hour to the nearest quarter hour. The normal hourly rates prescribed by this clause are to be increased in accordance with Annexure "A" hereto.

8. BACKGROUND PRACTICE COSTS

In addition to the normal hourly rate the V.M.O. shall be paid the following amount per hour during which he provides services under his sessional contract:-

| | | |
|---|---|---|
| (i) | For senior specialist and specialist | $66.66 |
| (ii) | For general practitioners | $50.00 |

The payments prescribed by this clause are to be adjusted in accordance with Annexure "B" hereto.

9. COMMITTEES AND MEETINGS

(a) In this clause "committee" includes a sub-committee of a committee specified in this clause.

(b) The VMO shall be remunerated pursuant to Clause 6(a) for attendance at the following committees and meetings:

(i) Committees established by the board of a hospital or area health service including committees constituted to provide advice or other assistance to the board in relation to quality assurance, resources, finances, planning or such other matters as the board may determine, and also including medical appointments advisory committees and the credentials committee or sub-committee of such a committee.

(ii) Any other committee to which the VMO has been appointed by a hospital or area health service or which the VMO has been requested or authorised by the principal to attend.

(iii) Meetings of an institute, division or department of a hospital (that is to say,

meetings attended by the members of the medical staff of an institute, division or department).

(iv) Grand rounds.

(v) Peer review and quality assurance committees.

(vi) Meetings of a Medical Staff Council of a hospital or hospitals and the executive of such Council, and meetings of an Area Medical Staff Council and of an Area Medical Staff Executive Council.

(c) Work which is reasonably incidental to membership of or attendance at any such committee or meeting, such as preparation for the meeting and activities arising out of such a meeting, shall be treated as attendance time and shall be remunerated pursuant to Clause 6(a).

10. PAYMENT FOR CALL-BACK

In respect of call-backs the V.M.O. shall be remunerated as follows:-

(a) In respect of call-backs commencing within the hours of 8.00 a.m. to 6.00 p.m. Monday to Friday inclusive at the V.M.O.'s normal hourly rate specified in clause 7 plus a loading of 10%.

(b) In respect of call backs commencing at times other than those specified in paragraph (a) at the V.M.O.'s normal hourly rate specified in clause 7 plus a loading of 25%.

(c) The duration of call-backs shall include the actual travelling time from the place of contact to the Hospital and return to a maximum of 20 minutes each way.

(d) The payment for any one call-back shall be not less than one hour plus the actual travelling time as provided in (c) above.

(e) For the purpose of classifying the call-back under paragraphs (a) or (b) of this clause the call-back shall be deemed to commence from the time the V.M.O. leaves his residence or other place to commence the call-back.

(f) In addition to the amounts specified in this clause the V.M.O. shall be paid the amount

specified in Clause 8 in respect of the call back and travelling time.

11. PUBLIC HOLIDAYS

Notwithstanding anything to the contrary in this Determination:

(a) Where a V.M.O. provides services on a public holiday, other than a call back, he shall be remunerated at the hourly rate specified in Clause 7 plus 50% together with the amount specified in Clause 8.

(b) Where a V.M.O. provides services by way of call back on a public holiday he shall be remunerated in accordance with Clause 10 except that the loading shall be 50% irrespective of the time during which the call back occurs.

12. ON-CALL ALLOWANCE

(i) Subject to paragraphs (ii) and (iii) the V.M.O. shall be paid an on-call allowance equivalent to one-tenth of his normal hourly rate for each hour that he is on call.

(ii) The on-call allowance shall not be payable during periods in which the V.M.O. absents himself pursuant to Clause 16.

(iii) Where the V.M.O. is rostered on-call to more than one hospital at the same time he shall be entitled to receive an on-call allowance only from that hospital to which he has the greatest on-call commitment, or where the on-call commitments are equal, he shall receive an on-call allowance only from one hospital.

(iv) The Principal shall notify the VMO in writing of the hours during which the VMO is rostered on-call. A published on-call roster so stating will be sufficient notice to the VMO.

13. METHOD AND TIME FOR PAYMENT

(a) The V.M.O. shall submit an account to the Principal in respect of the services provided in each calendar month.

(b) The account shall specify:

(i) the aggregate time to the nearest quarter hour spent in providing services under the sessional contract for each day except for time spent in relation to committee and meeting attendances and call backs;

(ii) the aggregate time to the nearest quarter hour spent each day in attendances at

Committees and meetings designating the Committees and meetings attended;

(iii) as to call-backs, the date, name of patient and description of services provided, the period during which the services were provided to the nearest quarter hour, including travel, specifying the start and finish time.

(iv) as to on-call the period during which the V.M.O. is rostered on-call;

(c) The account shall be submitted by the 15th day of the following month, in which case the Principal shall pay the account by the end of the month.

(d) If a V.M.O. submits an account in respect of services provided in a particular month later than the 15th day of the following month then:-

(i) if the account is submitted by the 15th day of a month the Principal shall pay the account by the end of that month;

(ii) if the account is submitted after the 15th day of a month the principal shall pay the account by the end of the next ensuing month.

(e) With each payment the Principal shall notify the VMO in writing of how the payment is made up including hours and amount for ordinary hours including ordinary hours worked on a public holilday, on-call, call backs at 10% loading, call backs at 25% loading, call backs at 50% loading.

14. SUSPENSION AND TERMINATION

(a) Subject to part 6B of the Public Hospitals Act, 1929, as amended and to this clause, the Principal may terminate or suspend the operation of the sessional contract.

(b) The sessional contract may be terminated by the Principal or the V.M.O. by three months notice in writing.

(c) The sessional contract may be terminated by the Principal if the V.M.O. ceases to be registered as a medical practitioner or becomes permanently mentally or physically incapable of performing his duties under the contract.

(d) If the Principal considers that the V.M.O. may have been guilty of serious and wilful misconduct or may be mentally or physically incapable of carrying out his duties under the contract it may suspend the operation of the

contract by notice in writing to the V.M.O. The Principal will notify the V.M.O. in writing of its reasons for the suspension within 7 days. If, having given the V.M.O. an opportunity to be heard, the Principal is satisfied that the contract should be terminated on the ground mentioned in this paragraph, the Principal may terminate the contract.

(e) If the V.M.O. is dissatisfied with the suspension or termination of the contract by the Principal, that will constitute a dispute for the purposes of Clause 15.

15. DISPUTES

(a) In this clause:

"the Act" means the Public Hospitals Act 1929 as amended.

"the AMA" means The New South Wales Branch of the Australian Medical Association.

(b) In the event of any dispute or difference arising between a V.M.O. and a principal at any time as to any matter or thing of whatsoever nature arising under a sessional contract or in connection therewith other than a matter

relating to the appointment, re-appointment, suspension or termination of appointment of a V.M.O. as a visiting practitioner, then the V.M.O. or the principal may give notice in writing to the other and to the AMA identifying the matter or matters the subject of the dispute or difference.

(c) If on the expiry of 21 days from the date of service of such notice the dispute or difference has not been resolved by consultation or if the V.M.O. and the principal shall agree to dispense with that condition, the V.M.O. or the principal may serve a further notice in writing on the other and on the AMA requiring that the dispute or difference be referred to arbitration. Such dispute or difference shall thereupon be and is hereby referred to arbitration by a single arbitrator to be agreed upon by the V.M.O. and the principal or, in the absence of agreement, to be appointed by the president or other most senior office bearer of the Council of the Law Society of New South Wales or its successor. The arbitrator shall be a barrister or solicitor of not less than ten years standing or a retired judge.

(d) The arbitrator's fees shall be as may be negotiated on the appointment of the arbitrator and shall be provided by the V.M.O. as to one half and by the Principal as to the other half, unless otherwise ordered by the arbitrator.

(e) The V.M.O. and the Principal shall each appoint an assessor to sit with the arbitrator in a consultative capacity, but the determination shall be made solely by the arbitrator.

(f) The V.M.O., the Principal and the AMA shall have a right to appear before the arbitrator and may be represented by counsel, by a solicitor or by leave of the arbitrator by an agent.

(g) In addition to the power to determine the dispute between the V.M.O. and the Principal the arbitrator shall have a discretion to make an award for costs.

(h) The determination, including any award as to costs, of the arbitrator shall be final and binding upon the V.M.O. and the Principal.

16. PERIODS OF ABSENCE

(i) Holidays

The V.M.O. shall be entitled to absent himself in one or more periods aggregating five calendar weeks per year at times mutually convenient to the V.M.O. and the Principal.

(ii) Public Holidays

The V.M.O. shall be entitled to absent himself on public holidays unless the Principal has given reasonable notice that it requires the V.M.O. to render services on any such day.

(iii) Study and/or Attendance at Conferences

The V.M.O. shall be entitled to absent himself for one or more periods aggregating three calendar weeks per year at times mutually convenient to the V.M.O. and the Principal.

(iv) Provision of Services for Ten Years

After providing services for a period of ten years the V.M.O. shall be entitled to absent himself for one or more periods aggregating two calendar months at times mutually convenient to the V.M.O. and the principal and the V.M.O. shall be entitled to absent himself at times mutually convenient to the V.M.O. and

the principal for one calendar month for each additional two years during which services are provided.

(v) Illness

The V.M.O. shall be entitled to absent himself during any period when the V.M.O. is unable to render services due to illness provided that the V.M.O. shall notify the Principal of such incapacity as soon as is reasonably practicable.

(vi) Other Absences

Should the V.M.O. wish to absent himself for any other reason it shall be at times mutually convenient to the V.M.O. and the Principal.

(vii) If the V.M.O. and the principal cannot agree as to the mutually convenient time for absences, that shall constitute a dispute or difference for the purposes of Clause 15. Disputes.

17. TRAVELLING

When the V.M.O. is required by the Principal to render services at a hospital or hospitals other than that or those at which he ordinarily renders

services under his sessional contract, a V.M.O. shall be reimbursed for the additional cost of travelling to that hospital. Where a V.M.O. uses his own motor vehicle for that purpose whether or not public transport is available, the reimbursement shall be at the Official Business Rate for vehicles with the greatest engine capacity determined from time to time by the Industrial Authority.

18. CONFIDENTIALITY

The Principal shall not publish or permit or enable to be published or made available for publication details of the actual remuneration paid or payable to the V.M.O. under the sessional contract unless:-

(i) in the ordinary course of the principals operations to other persons and entities within the public hospital system including the Department of Health; or

(ii) the V.M.O. first provides written consent to such publication; or

(iii) such publication is required under compulsion of law.

**ANNEXURE "A"**

The rates prescribed by Clause 7 of this Determination shall be adjusted on each anniversary of the date this Determination came into effect (hereinafter called the "date of adjustment"). The rates shall be adjusted:-

(a) in the case of the first adjustment by multiplying the rates respectively by a fraction the numerator of which shall be the figure for full-time adult average weekly ordinary time earnings for person kept by the Australian Statistician ("the AWE figure") as at the date of adjustment and the denominator of which shall be the AWE figure as at the date this Determination came into effect; and

(b) in the case of each adjustment subsequent to the first adjustment, by multiplying the rates payable for the year immediately prior to the date of adjustment by a fraction the numerator of which shall be the AWE figure as at the date of adjustment and the denominator of which shall be the AWE figure as at the immediately preceding date of adjustment.

**PROVIDED ALWAYS** that the rates for the year following the date of adjustment shall in no case be less than the rates payable for the year immediately preceding the date of adjustment.

**ANNEXURE "B"**

The payments prescribed by Clause 8 shall be adjusted on each anniversary of the date this Determination came into effect (hereinafter called the "date of adjustment"). The payments shall be adjusted:-

(a) in the case of the first adjustment, by multiplying such payments respectively by a fraction, the numerator of which shall be the Price Index as at the date of adjustment and the denominator of which shall be the Price Index as at the date this Determination came into effect; and

(b) in the case of each adjustment subsequent to the first adjustment, by multiplying the payments payable for the year immediately prior to the date of adjustment by a fraction the numerator of which shall be the Price Index as at the date of adjustment and the denominator of which shall be the Price Index as at the immediately preceding date of adjustment.

**PROVIDED ALWAYS** that the payments for the year following the date of adjustment shall in no case be less than the payments payable for the year immediately preceding the date of adjustment.

**THE CLAIM BY THE MINISTER FOR HEALTH**

DETERMINATION OF THE TERMS AND CONDITIONS OF WORK AND THE HOURLY RATES OF REMUNERATION IN RESPECT OF MEDICAL SERVICES PROVIDED BY VISITING MEDICAL OFFICERS UNDER SESSIONAL CONTRACTS AS DEFINED IN SECTION 29K OF THE PUBLIC HOSPITALS ACT 1929

1. EFFECTIVE DATE

This determination shall have effect and operate from the day of 1991.

2. DEFINITIONS FOR THE PURPOSE OF THIS DETERMINATION

"Area Health Service" is as defined in the Area Health Services Act 1986;

"Association" means the NSW Branch of the Australian Medical Association;

"background practice costs" means the rate(s) determined by the arbitrator for that portion of private practice costs attributable to the performance of a sessional contract;

"base hourly rate" means the rate(s) specified as such in this Determination;

"call-back" means a period of time spent by the Visiting Medical Officer at a hospital(s) other

than between the hours of 8.00 a.m. and 6.00 p.m. Monday to Friday for the purpose of providing medical services as a matter of urgency to one or more hospital patients in response to a request from the relevant hospital or area health service, to attend for that purpose;

"core services" means medical services provided to hospital patients (other than medical services provided pursuant to a call-back) and the medical services specified in Clause 5(ii) and (iii) of the service contract at Annexure 1 hereto, but does not include attendances at meetings of a Medical Staff Council (however called), grand rounds or other continuing medical education programmes.

"Corporation" means the Health Administration Corporation constituted under the Health Administration Act 1982;

"general practitioner" means a medical practitioner who is not a specialist or senior specialist;

"higher medical qualification" means medical qualification obtained by a medical practitioner subsequent to graduation in

medicine recognised by the National Specialist Qualification Advisory Committee as an appropriate qualification in an accepted specialty;

"Hospital" means an incorporated hospital, or a separate institution (or its governing body);

"hospital patient" means a patient in respect of whom a Hospital or Area Health Service, as the case may be, provides comprehensive care, including all necessary medical services, by means of its own staff or by other agreed arrangements;

"incorporated hospital" means a hospital which is named in the Second Schedule of the Public Hospitals Act 1929;

"medical practitioner" means a person registered for the time being under the Medical Practitioners Act 1938;

"normal hourly rate" means the rate(s) specified as such in this Determination.

"on-call" means rostered to be available to attend hospital patients pursuant to an on-call

roster prepared by a hospital or an area health service, as the case may be; '

"patient" is as defined in the Public Hospitals Act 1929;

"public hospital" means an incorporated hospital, separate institution or a hospital under the control of an area health service;

"senior specialist" means a specialist who:-

(a) has spent not less than ten years on a full-time basis in the practice of medicine after full registration and has been engaged on a full-time basis in the practice of his/her specialty for at least seven years after satisfying the requirements for appointment as a specialist; and

(b) by reason of the high degree of experience and skill gained in his/her specialty is recognised by the relevant Hospital or Area Health Service as having attained the status of a senior specialist and who under this contract will be required to render services calling for a specialist of that status;

"separate institution" means an institution which is a recognised hospital for the purposes of the Health Insurance Act 1973 (Commonwealth) and which is named in the Third Schedule of the Public Hospitals Act 1929;

"sessional contract" is as defined in the Public Hospitals Act 1929;

"specialist" means a medical practitioner who:-

Either:-

(a) (i) after full registration has spent not less than five (5) years in the practice of medicine in a hospital or in a department of the faculty of medicine in any Australian university, or in any other institute or practice whether in New South Wales or elsewhere, recognised by the relevant Hospital or Area Health Service; and

(ii) has undergone supervised specialist training and/or experience for a period of not less than three (3) years; and

(iii) has obtained a higher medical qualification in his/her specialty recognised by:-

(aa) the appropriate college referred to in Schedule 2 to this Agreement or its faculty; or

(bb) the Corporation where, following consultation with the appropriate college referred to in Schedule 2 to this Agreement or its faculty or in the absence of an appropriate college then with a representative committee of peers nominated by the Council of the Association, the Corporation is reasonably of the opinion that the standing of the Medical Practitioner warrants his/her classification as a specialist

OR

(b) Prior to 1974 was recognised by the Board of a Public Hospital in New South Wales as a specialist and has since 1974 been in continuous specialist practice in that speciality.

"total hourly rate" means the rate(s) specified as such in this Determination;

"Visiting Medical Officer" means a visiting practitioner appointed to perform work as a

medical practitioner under a sessional contract. Pathologists and radiologists are expressly excluded from this definition;

"visiting practitioner" is as defined in the Public Hospitals Act 1929.

3. BASE HOURLY RATE

The base hourly rates payable under a sessional contract in respect of the following classifications shall be:-

(i) For a general practitioner with less than 5 years experience (As determined by Arbitrator)

(ii) For a general practitioner with less than 10 years experience (As determined by Arbitrator)

(iii) For a general practitioner with 10 or more years of experience or who has been elected to fellowship in the Royal Australian College of General Practitioners (As determined by Arbitrator)

(iv) For a specialist (As determined by Arbitrator)

(v) For a senior specialist

(As determined by Arbitrator)

and on a proportionate basis for less than an hour.

4. LOADING IN LIEU OF ALLOWANCES AND PAID LEAVE

In addition to the base hourly rate the Visiting Medical Officer shall be paid a loading of 18.04% per hour, such loading to be calculated on the base hourly rate for each hour during which he/she provides core services under his/her sessional contract.

The loading is comprised as follows:-

| | | |
|---|---|---|
| (i) | loading to compensate for the working of extended sessions | 5% |
| (ii) | loading in lieu of paid leave per year, namely:- | |
| | 1 week conference leave | |
| | 5 weeks annual leave | |
| that is | 6 weeks divided by 46 weeks work times 100 equals | 13.04% |
| | TOTAL | 18.04% |

5. NORMAL HOURLY RATE

The normal hourly rate payable under a sessional contract in respect of each of the classifications set out above shall be calculated by the addition of the base hourly rate and the figure that represents 18.04% of that base hourly rate.

6. BACKGROUND PRACTICE COSTS

In addition to the normal hourly rate the Visiting Medical Officer shall be paid the following amount per hour during which he/she provides core services under his/her sessional contract (rate(s) to be determined by the Arbitrator).

7. TOTAL HOURLY RATE

The total hourly rate that the Visiting Medical Officer shall be paid for the core services which he/she provides under his/her sessional contract shall be calculated by the addition of the appropriate background practice cost amount to the Visiting Medical Officer's normal hourly rate.

8. ON-CALL ALLOWANCES

When a Visiting Medical Officer is rostered on-call he/she shall be paid an on-call allowance of $5.50 for each hour (or part thereof). Where a VMO is rostered on-call at more than one public hospital simultaneously

he/she is only entitled to receive an on-call allowance in respect of that public hospital to which he/she has the greatest on-call commitment or where the on-call commitments are equal, he/she is entitled to an on-call allowance in respect of only one of those public hospitals.

9. CALL-BACK PAYMENTS

In respect of call-backs the Visiting Medical Officer shall be remunerated at his/her normal hourly rate plus a loading of 25% and, in addition, an appropriate background practice cost amount per hour equivalent to the relevant amount referred to in Clause 6 of this Determination.

10. PUBLIC HOLIDAYS

In respect of services to hospital patients (other than call-backs) provided under a sessional contract, the Visiting Medical Officer shall be remunerated at his/her normal hourly rate plus a loading of 50% and, in addition, an appropriate background practice cost amount per hour equivalent to the relevant amount referred to in Clause 6 of this Determination.

11. THE SESSIONAL CONTRACT

The terms and conditions of work to be performed by Visiting Medical Officers, and the terms and conditions upon which the amounts and rates of remuneration referred

to above are to be paid to Visiting Medical Officers, shall be as per Annexure 1 hereto.

SESSIONAL CONTRACT

**THIS AGREEMENT** made the day of 9

**BETWEEN** (insert the name of the relevant incorporated hospital, separate institution (or its governing body) or Area Health Service) "the Hospital"*/"Area Health Service"*) of the First Part **AND** (insert name of the medical practitioner) ("the Visiting Medical Officer") of the Second Part

**WHEREAS:**

A. The (insert name of appointing body) has determined to appoint the Visiting Medical Officer to perform work in providing medical services at the hospital or hospitals specified in Schedule 1 hereto (the "specified hospital(s)") and the Visiting Medical Officer desires to perform such work, subject to the terms and conditions hereunder.

B. The Visiting Medical Officer is to provide certain medical services as an independent contractor and is to be remunerated for the provision of such medical services on the basis of services performed over a specified period (but not on a fee-for-service basis) at the rates specified hereunder.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. Term of Agreement

(i) This Agreement is to be for the period from ..... to..... 19 (being not more than five (5) years) unless this Agreement is properly terminated by either party in accordance with Clause 21.

*** delete as appropriate.**

(ii) Nothing in this Agreement shall be construed as giving rise to an entitlement by the Visiting Medical Officer to a further agreement upon the termination or expiry of this Agreement.

2. Nature of Relationship

This Agreement does not establish the relationship of employer and employee between the parties to this Agreement, and the Visiting Medical Officer shall, for the purpose of providing the medical services required under this Agreement be regarded as an independent contractor.

3. Classification

The Visiting Medical Officer and the Hospital*/Area Health Service* agree that the Visiting Medical Officer will be classified for

the purpose of rendering services pursuant to this contract as a (insert appropriate classification of Visiting Medical Officer).

4. Clinical Privileges

(i) Subject to sub-clause (ii) the Visiting Medical Officer's clinical privileges shall be:

.....

.....

.....

(ii) The Hospital*/Area Health Service* may review and vary the clinical privileges granted to the Visiting Medical Officer at any time in accordance with any applicable Act or regulations, or by-laws in force at the specified hospital(s).

(iii) The medical services which the Visiting Medical Officer provides to patients at the specified hospital(s) shall be consistent with the clinical privileges determined by the Hospital*/Area Health Service* in respect of the Visiting Medical Officer from time to time.

5. Services

(i) Subject to clause 6, the Visiting Medical Officer shall provide medical services to hospital patients at the specified hospital(s)

consistent with the clinical privileges granted to him/her.

(ii) The Visiting Medical Officer shall participate in the teaching and training of post graduate medical officers and such other persons as reasonably required by the Hospital*/Area Health Service*.

(iii) The Visiting Medical Officer shall participate in committees:-

(a) which are expressly established or authorised by the Board of the Hospital*/Area Health Service*; and

(b) to which the Visiting Medical Officer is expressly appointed by the Board of the Hospital*/Area Health Service*, where reasonably required for the proper and efficient functioning of the specified hospital(s).

(iv) Subject to Clause 8, the Visiting Medical Officer shall participate in an on- call roster for the provision of medical services where reasonably required by the Hospital*/Area Health Service* and, when so rostered by the Hospital*/Area Health Service* shall be readily contactable at all times and able to attend the relevant hospital(s) within a reasonable period of time.

(v) The Visiting Medical Officer shall participate in the teaching and training of medical undergraduates, students of nursing, nurses, members of the allied health staff and such other persons as reasonably required by the Hospital*/Area Health Service.

(vi) The Visiting Medical Officer:

(a) shall be professionally responsible for the proper clinical management and treatment of all patients under his/her care in the specified hospital(s).

(b) shall adhere to the accepted ethics and conduct of medical practice both in relation to his/her colleagues and other hospital staff and to patients under his/her care in the specified hospital(s).

(c) shall take all reasonable steps to ensure:-

(i) that the clinical records related to the medical services provided by the Visiting Medical Officer, and which are required by the specified hospital(s), are adequately maintained for all patients under his/her care and that such records include details of diagnosis, treatments and operations undertaken;

(ii) that all other clinical documentation required by the specified hospital(s), such as statistical returns and morbidity notifications, are completed;

(iii) that following the discharge of each patient admitted under his/her care, the patient's medical record is completed within such reasonable period as determined by the Hospital*/Area Health Service*, so as to contain an adequate discharge summary;

(d) shall comply with all rules, by-laws and policies in force at the specified hospital(s).

6. Hours of Core Services

(i) For the purposes of this Clause, and Clauses 13 and 19, "core services", means medical services provided to hospital patients (other than medical services provided pursuant to a call-back) and the medical services specified in Clause 5(ii) and 5(iii) of this Agreement, but does not include attendance at meetings of a Medical Staff Council (however called), grand rounds or other continuing medical education programs.

(ii) Subject to (iii) and (iv) of this Clause the Visiting Medical Officer shall provide (insert agreed number of hours) hours of core services per week/fortnight/calendar month(s)* provided that:

(a) this sub-clause does not apply during periods of approved leave; and

(b) the Hospital*/Area Health Service* shall only allocate work to the Visiting Medical Officer which can reasonably be performed by the Visiting Medical Officer within the number of hours specified in this sub-clause.

(iii) The number of hours specified in sub-clause (ii) may be varied at any time, either for a specified period or until the next anniversary date of this Agreement, by further agreement in writing between the parties.

(iv) Not later than six weeks prior to each anniversary date of this Agreement, the Hospital*/Area Health Service*, after consulting with the Visiting Medical Officer, shall review the number of hours specified in sub-clause (ii) and determine the number of hours of services per week/fortnight/calendar month/s* that the Visiting Medical Officer shall provide in accordance with sub-clause

(ii) during the year that commences on the next anniversary date of this Agreement, provided that this sub-clause shall not apply if this Agreement has a term of one year or less.

* delete as appropriate

(v) In making a determination under sub-clause (iv), the Hospital*/Area Health Service* shall have regard to:

(a) the service needs and available resources of the Hospital*/Area Health Service*;

(b) the views of the Visiting Medical Officer;

(c) the number of hours per week/fortnight/calendar month(s)* of core services which the Visiting Medical Officer actually provided during the immediately preceding year;

(d) the nature of the position;

(e) the experience, knowledge and ability of the Visiting Medical Officer;

and

(f) any other relevant fact or circumstance.

7. Remuneration for core services

(i) Subject to compliance with Clause 19(ii)(c) the Visiting Medical Officer shall be remunerated for the number of hours specified under Clause 6(ii), except when on periods of approved leave, at the rate of $ (insert appropriate

hereinafter referred to as "the total hourly rate".

(ii) The total hourly rate shall comprise the following:-

(a) base hourly rate for (insert appropriate classification) $ (insert appropriate rate as per Determination)

(b) loading in lieu of extended session allowance, and paid annual leave, (being 18.04% of the base remuneration rate) $ (Insert appropriate rate as per Determination)

Normal hourly rate $ (Total of (a) & (b))

(c) Background practice costs $ (Insert appropriate rate as per Determination)

Total hourly rate $ (Total of (a) & (b) & (c))

8. <u>On-call allowance</u>

(i) For the purposes of this Agreement "on-call" means rostered to be available to attend

hospital patients pursuant to an on-call roster prepared by the Hospital*/Area Health Service*.

(ii) A Visiting Medical Officer shall be paid an on-call allowance of $5.50 for each hour (or part thereof).

(iii) An on-call allowance shall not be payable during periods of leave, or during any period in which services are being provided at a specified hospital(s) whether pursuant to this Agreement or otherwise.

(iv) Where a Visiting Medical Officer is rostered on-call at more than one of the specified hospitals at the same time he/she shall only be entitled to receive an on-call allowance in respect of that hospital to which he/she has the greatest on-call commitment, or where the on-call commitments are equal, he/she shall receive an on-call allowance only in respect of one of those hospitals.

9. Call-back

(i) For the purposes of this Agreement "call-back" means a period of time spent by the Visiting Medical Officer at a specified hospital(s)

other than between the hours of 8.00a.m. and 6.00p.m. Monday to Friday for the purpose of providing medical services as a matter of urgency to one or more hospital patients in response to a request from the Hospital*/Area Health Service* to attend for that purpose.

(ii) The Hospital*/Area Health Service* is deemed to have requested the attendance of the Visiting Medical Officer in accordance with sub-clause (i) in those circumstances where the Visiting Medical Officer attends a hospital patient as a matter of urgency and such attendance is verified by the Hospital*/Area Health Service*.

(iii) For the purposes of sub-clause (i) a period of time at a specified hospital(s) shall be deemed to include travelling time to or from the hospital up to a maximum of 20 minutes each way.

(iv) Subject to compliance with Clause 19(ii)(c), the Visiting Medical Officer shall be remunerated for the period of call-back at the normal hourly rate plus a loading of 25% and, in addition, the appropriate background

practice cost amount per hour for the Visiting Medical Officer's classification and specialty.

(v) The payment for any one call-back shall be not less than 1 hour.

(vi) A call-back shall be deemed to commence from the time the Visiting Medical Officer leaves his place of contact to commence the call-back.

10. Annual Leave

(i) Unpaid leave of absence shall be granted to the Visiting Medical Officer in one or more periods totalling 5 calender weeks per year. Such leave shall be granted at times mutually agreed upon between the parties to this Agreement.

(ii) There shall be no accrual of untaken annual leave from year to year.

11. Sick Leave

(i) Unpaid leave of absence shall be granted to the Visiting Medical Officer during any period when the Visiting Medical Officer is unable to render services due to illness provided that the Visiting Medical Officer shall notify the Hospital*/Area Health Service* of such

incapacity as soon as is reasonably practicable.

12. Conference Leave

(i) Unpaid leave of absence shall be granted to the Visiting Medical Officer in one or more periods up to a maximum of 1 calendar week per year. Such leave shall be granted at times mutually agreed upon between the parties to this Agreement.

(ii) There shall be no accrual of untaken conference leave from year to year.

13. Public Holidays

(i) Subject to sub-clause (ii) the Visiting Medical Officer shall be entitled to take leave of absence on public holidays provided that such leave shall be unpaid.

(ii) The Hospital*/Area Health Service* may require the Visiting Medical Officer to render services to hospital patients on a public holiday provided that the Visiting Medical Officer shall be given reasonable notice of such requirement.

(iii) Except in the case of call-backs, where the Visiting Medical Officer renders services on a

public holiday pursuant to a requirement under sub-clause (ii), then subject to compliance with Clause 19(ii)(c), he/she shall be remunerated for the actual time rendered at the normal hourly rate with a loading of 50%, and, in addition, the appropriate background practice cost amount per hour for the Visiting Medical Officer's classification and specialty.

14. Other Leave

(i) Other periods of unpaid leave of absence may be granted to the Visiting Medical Officer at times mutually agreed upon between the parties to this Agreement.

15. Suspension of Agreement

(i) The Hospital*/Area Health Service* may suspend the Visiting Medical Officer in accordance with any applicable by-laws where it considers it necessary in the interests of the specified hospital(s).

(ii) Where the Hospital*/Area Health Service* suspends the Visiting Medical Officer, the respective rights and obligations of the parties under this Agreement shall be suspended for the duration of that suspension.

16. Facilities

Where reasonably practicable the Hospital*/Area Health Service* shall provide:-

(i) all ancillary, medical, nursing and clerical assistance and facilities, instruments and equipment reasonably necessary for the proper performance of the services to be rendered by the Visiting Medical Officer under this Agreement;

(ii) to the Visiting Medical Officer upon request and free of charge, sufficient suitable and serviceable outer uniforms and duty garments which shall remain the property of the Hospital*/Area Health Service* and which shall be laundered at the expense of the Hospital*/Area Health Service*.

17. Notice

Any notice given in accordance with this Agreement shall be properly served if in writing and sent by registered mail or delivered by hand or facsimiled or telexed to the respective address of each party to this Agreement or to such other address as the addressee shall have furnished in writing to the addressor and shall be deemed to have been served seven (7) days after the date of posting or if delivered by hand on the date of delivery or if sent

by telex or facsimile on the date when the transmitted telex or facsimile was recorded.

18. Disputes

(i) In this clause:

"the Principal" means the Area Health Service, incorporated hospital or separate institution (or its governing body) with whom a visiting medical officer has entered into a sessional contract;

"the Act" means the Public Hospitals Act 1929.

(ii) In the event of any dispute or difference arising between a visiting medical officer and a principal at any time as to any matter or thing of whatsoever nature arising under a sessional contract or in connection therewith other than a matter relating to the non-reappointment, suspension or termination of appointment of a Visiting Medical Officer, then the Visiting Medical Officer or the Principal may give notice in writing to the other identifying the matter or matters the subject of the dispute or difference.

(iii) If on the expiry of 21 days from the date of service of such notice the dispute or difference has not been resolved by consultation or if the Visiting Medical Officer

and the Principal shall agree to dispense with that condition, the Visiting Medical Officer or the Principal may serve a further notice in writing on the other requiring that the dispute or difference be referred to arbitration. Such dispute or difference shall thereupon be and is hereby referred to arbitration by a single arbitrator to be agreed upon by the visiting medical officer and the principal or, in the absence of agreement, to be appointed by the president or other most senior office bearer of the Council of the Law Society of New South Wales or its successor. The arbitrator shall be a barrister or solicitor of not less than ten years standing, a retired judge, or a person with not less than ten years experience in medical or hospital administration.

(iv) The arbitrator's fees shall be as may be negotiated on the appointment of the arbitrator and shall be provided equally by the Visiting Medical Officer as to one share and by the Principal as to the other share, unless otherwise ordered by the arbitrator.

(v) The Visiting Medical Officer and the Principal shall each appoint an assessor to sit with the arbitrator in a consultative capacity, but the

determination shall be made solely by the arbitrator.

(vi) The Visiting Medical Officer and the Principal may be represented by counsel or by a solicitor before the arbitrator, or by an agent by leave of the arbitrator.

(vii) The decision of the arbitrator shall be final and binding upon the Visiting Medical Officer and the Principal.

(viii) Neither the Visiting Medical Officer nor the Principal will commence any proceedings at law or in equity in respect of any matter or thing of whatsoever nature arising under a sessional contract or in connection therewith unless and until an award has been made by an arbitrator appointed pursuant to this clause or, in the event that the matter in dispute or difference relates to the non-reappointment, suspension or termination of appointment of the Visiting Medical Officer, unless and until there has been a determination of an appeal pursuant to Part 6B of the Act in relation to such non-reappointment, suspension or termination of appointment.

19. Records of Attendance

(i) The Visiting Medical Officer shall maintain a record (in a form prescribed by the Hospital*/Area Health Service*) showing:

(a) the date of each attendance at the specified hospital(s);

(b) the starting and finishing time of each attendance at the specified hospital(s) on such date;

(c) the medical record number and/or the full name of each hospital patient to whom services were rendered;

(d) particulars of services rendered to each such hospital patient;

(e) particulars of other services provided pursuant to Clause 5(ii), (iii) and (iv) of this Agreement;

(f) with respect to each call-back, in addition to (a) to (d) above, the name of the hospital contact and the number of hours, to the nearest quarter hour, between starting and finishing times attributable to that call-back; and

(g) the number of hours, to the nearest quarter hour, between starting and finishing times as are attributable to core services.

(ii) The record referred to in sub-clause (i):-

(a) shall form the basis for all claims made by (and remuneration of) the Visiting Medical Officer in respect of services rendered pursuant to Clauses 8, 9 or 13;

(b) shall be used in reviewing the number of hours of services rendered by the Visiting Medical Officer for the purposes of implementing Clause 6(iv); and

(c) shall be submitted to the Hospital*/Area Health Service* for each calendar month by no later than 28th day of the succeeding calendar month.

(iii) In the event of non-compliance with sub-clause (ii) the Hospital*/Area Health Service* shall not be obligated to pay for services to hospital patients, on-call allowances or call-backs rendered by the Visiting Medical Officer unless special and extraordinary circumstances are shown explaining such non- compliance.

20. Termination of Agreement

(i) This Agreement shall be terminated:-

(a) upon the expiry of the period referred to in Clause 1 hereof or at such earlier time as may be agreed between the parties; or

(b) by three months notice in writing given by either party provided that if the Visiting Medical Officer is dissatisfied with a determination made under Clause 6(iii) hereof he/she may terminate the Agreement by six weeks notice in writing if given within seven days of receipt of the determination; or

(c) if the Visiting Medical Officer becomes mentally or physically incapable of rendering his/her services under this Agreement; or

(d) if the Visiting Medical Officer ceases to be registered as a medical practitioner under the Medical Practitioners Act 1938, or any subsequent enactment replacing same; or

(e) in the event of serious misconduct or other substantial breach, or repetitive breaches, of this Agreement, by the Visiting Medical Officer; or

(f) if the Visiting Medical Officer's appointment is terminated by operation of any Act or regulation.

(ii) On termination of this Agreement any amount due and payable to the Visiting Medical Officer pursuant to this Agreement shall be paid to

him/her as at the time of such termination or so soon thereafter as reasonably practicable.

21. Applicability of Determinations

This Agreement is to be read subject to determinations made by the arbitrator pursuant to Section 29M of the Public Hospitals Act 1929 from time to time.

22. Interpretation

In this Agreement unless the contrary intention appears:-

"Area Health Service" is as defined in the Area Health Services Act 1986;

"Association" means the NSW Branch of the Australian Medical Association;

"background practice costs" means the rate(s) determined by the arbitrator for that portion of private practice costs attributable to the performance of a sessional contract;

"base hourly rate" means the rate(s) specified as such in Clause 7 of this Agreement;

"clinical privileges" means the kind and extent of work which the Hospital*/Area Health Service* determines a Visiting Medical Officer shall be allowed to perform at the specified hospital(s);

"core services" means medical services provided to hospital patients (other than medical services provided pursuant to a call-back) and medical services specified in Clause 5(ii) and

(iii), of this Agreement but does not include attendance at meetings of a Medical Staff Council (however called), grand rounds or other continuing medical education programmes;

"Corporation" means the Health Administration Corporation constituted under the Health Administration Act 1982;

"general Practitioner" means a medical practitioner who is not a specialist or senior specialist;

"higher medical qualification" means medical qualification obtained by a medical practitioner subsequent to graduation in medicine recognised by the National Specialist Qualification Advisory Committee as an appropriate qualification in an accepted specialty;

"Hospital" means an incorporated hospital, or a separate institution (or its governing body);

"hospital patient" means a patient in respect of whom the Hospital*/Area Health Service* provides comprehensive care, including all necessary medical services, by means of its own staff or by other agreed arrangements;

"incorporated hospital" means a hospital which is named in the Second Schedule of the Public Hospitals Act 1929;

"medical practitioner" means a person registered for the time being under the Medical Practitioners Act 1938;

"normal hourly rate" means the rate(s) specified as such in Clause 7 of this Agreement;

"patient" is as defined in the Public Hospitals Act 1929;

"senior specialist" means a specialist who:-

(a) has spent not less than ten years on a full-time basis in the practice of medicine after full registration and has been engaged on a full-time basis in the practice of his/her specialty for at least seven years after satisfying the requirements for appointment as a specialist; and

(b) by reason of the high degree of experience and skill gained in his/her specialty is recognised by the Hospital*/Area Health Service* as having attained the status of a senior specialist and who under this contract will be required to render services calling for a specialist of that status.

"separate institution" means an institution which is a recognised hospital for the purposes of the Health Insurance Act 1973 (Commonwealth)

and which is named in the Third Schedule of the Public Hospitals Act 1929;

"sessional contract" is as defined in the Public Hospitals Act 1929;

"specialist" means a medical practitioner who:-

Either:-

(a) (i) after full registration has spent not less than five (5) years in the practice of medicine in a hospital or in a department of the faculty of medicine in any Australian university, or in any other institute or practice whether in New South Wales or elsewhere, recognised by the Hospital*/Area Health Service*; and

(ii) has undergone supervised specialist training and/or experience for a period of not less than three (3) years; and

(iii) has obtained a higher medical qualification in his/her specialty recognised by:-

(aa) the appropriate college referred to in Schedule 2 to this Agreement or its faculty; or

(bb) the Corporation where, following consultation with the appropriate college referred to in Schedule 2 to this Agreement

or its faculty or in the absence of an appropriate college then with a representative committee of peers nominated by the Council of the Association, the Corporation is reasonably of the opinion that the standing of the Medical Practitioner warrants his/her classification as a specialist

OR

(b) Prior to 1974 was recognised by the Board of a Public Hospital in New South Wales as a specialist and has since 1974 been in continuous specialist practice in that speciality.

"specified hospital(s)" means a recognised hospital(s) for the purposes of the Health Insurance Act 1973 (Commonwealth) specified in Schedule 1 of this Agreement;

"total hourly rate" means the rate(s) specified as such in Clause 7 of this Agreement;

"visiting practitioner" is as defined in the Public Hospitals Act 1929;

"Year" means twelve calendar months.

SIGNED for and on behalf of )
the Hospital*/Area Health Service* )
in the presence of ) .....

.....
Witness

SIGNED by the Visiting Medical )
Officer in the presence of: ) .....
Visiting Medical Officer

.....
Witness

SCHEDULE 1

(Name and address of the hospital or hospitals to be inserted).

SCHEDULE 2

Royal Australasian College of Surgeons
NSW State Committee
145 Macquarie Street
SYDNEY NSW 2000

Australian College of Paediatrics
201 Wickham Terrace
BRISBANE QLD 4000

Australasian College of Dermatologists
271 Bridge Road
GLEBE NSW 2037

Royal Australasian College of Physicians
NSW State Committee
145 Macquarie Street
SYDNEY NSW 2000

Royal Australasian College of Obstetricians and Gynaecologists
NSW State Committee
P.O. Box 185
KOGARAH NSW 2217

Royal Australian and New Zealand College of Psychiatrists
P.O. Box 1
ROZELLE NSW 2039

Faculty of Anaesthetists
Royal Australasian College of Surgeons
NSW State Committee
147 Macquarie Street
SYDNEY NSW 2000

Royal Australian College of Ophthalmologists
NSW State Committee
27 Commonwealth Street
SYDNEY NSW 2000

Australian College of Rehabilitation Medicine
NSW Branch
c/o Royal Ryde Rehabilitation Hospital
P.O. Box 6
RYDE NSW 2112

RESIDENT MEDICAL OFFICERS & CAREER MEDICAL OFFICERS

1. The generic term "Resident Medical Officer": includes the following categories: Intern, Resident Medical Officer (year 1 to 4), Registrar (year 1 to 4) and Senior Registrar.

1.1 The intern is a medical officer in the first year after graduation and is appointed to an approved hospital on the basis of matching his/her preference with academic achievement. The intern is provisionally registered with the NSW Medical Board and cannot be fully registered until the completion of one years service accompanied by a certificate of such satisfactory service from the hospital. The intern's practice is confined to supervised hospital practice as a condition of the provisional registration.

1.2 The resident medical officer (year 1 to 4) are appointed to hospitals on the basis of advertisement and selection. Over 90% of graduating medical officers spend more than their intern year in hospitals. They work under supervision and do not have ultimate

responsibility for patient care. They rotate through specialty terms gaining further experience. Continued employment is not guaranteed and those who do not progress to specialty training leave the hospital system.

1.3 The registrar is a medical officer undertaking training in a medical specialty. He/she is appointed on the basis of advertisement and selection to accredited training positions or approved programmes (in some specialties with involvement in the appointment process by the relevant College). The registrar does not have ultimate responsibility for patient care but plays a significant role in day to day patient management especially in emergency situations. The registrar has a supervisory role in respect of resident medical officers and interns. In the latter part of training he may achieve a higher medical qualification. It is not a long term position and after gaining (or failing to gain) higher medical qualification he will leave the employ of the hospital unless appointed as a VMO or salaried specialist. Many proceed overseas for further experiences and training.

The salary rates at the lower end of the registrar scale overlap those at the upper end of the resident medical officer scale.

1.4 The senior registrar is a medical officer appointed as such and who holds a relevant higher medical qualification. He/she usually exercises a greater degree of supervisory activities. It is not a long term position.

2. The category Career Medical Officer was created in 1987/88 to provide for the development of a career path in the public hospital system for non-specialist medical officers and to provide middle grade medical staffing in peripheral hospitals not included in the secondment networks involving resident medical officers.

They are able to undertake more clinical responsibility and require less supervision than resident medical officers. Depending on the needs and policies of the individual hospital they may have the ultimate responsibility for patient. care.

The criteria to be met for appointment as a CMO are as follows:

- Grade 1 - At least three (3) years post graduate experience
- Grade 2 - At least five (5) years relevant post graduate experience.
- Grade 3 - At least seven (7) years relevant post graduate experience. Relevant post graduate qualifications (which include College of General Practitioner).

Set out in the attached table are the salary rates payable to the various categories of salaried medical officers.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| *Intern* | *27441* | | | | | | |
| *RMO 1* | *32130* | | | | | | |
| *RMO 2* | 35337 | | | | | | |
| RMO 3 | 40026 | | | | | | |
| RMO 4 | 43453 | | | | | | |
| Registrar 1 | 40026 | | | | | | |
| Registrar 2 | 43453 | CMO Grade I | Yr 1 | 43453 | | | |
| Registrar 3 | 46892 | | Yr 2 | 46892 | | | |
| Registrar 4 | 50194 | | Yr 3 | 50194 | | | |
| Sen. Registrar | 56437 | | Yr 4 | 54070 | | | |
| | | CMO Grade II | Yr 1 | 56437 | | | |
| | | | Yr 2 | 58341 | | | |
| | | | Yr 3 | 60646 | | | |
| | | | Yr 4 | 62977 | | | |
| | | CMO Grade III | Yr 1 | 64936 | | Medical Superintendent | |
| | | | Yr 2 | 68741 | | L5 | 69690 |
| | | | Yr 3 | 74790 | Salaried Specialist | L4 | 73110 |
| | | | | | Yr 1 76322 | | |
| | | | | | Yr 2 80786 | | |
| | | | | | Yr 3 85244 | | |
| | | | | | Yr 4 89719 | L3 | 91907 |
| | | | | | Yr 5 94182 | L2 | 98738 |
| | | | | | Senior Specialist 103115 | L1 | 103868 |

The Public Hospital (Medical Officers) Award, covering resident medical officers makes provision for overtime and other penalties but no right of private practice.

The Career Medical Officers Award makes provision for overtime and other penalties but no right of private practice.

The Medical Officers - Hospital Specialists (State) Award makes no provision for overtime. Private practice arrangements exist outside the award by agreement.

The Public Hospital (Medical Superintendents) Award makes no provision for overtime for medical superintendents and there are no private practice arrangements.

**APPENDIX "K"**

DEPARTMENT OF HEALTH

McKell Building
Rawson Place,
HAYMARKET 2000

217 6666 Ext: 5691
(C. Brown: MH)

File No: 17262

Circular No: 90/39

Issued: 23rd May 1990

**SALARIED MEDICAL, SPECIALIST EMPLOYED IN AREA HEALTH SERVICES, AND SECOND, THIRD AND FOURTH SCHEDULE HOSPITALS - WORKVALUE CASE AND CHANGES TO PRIVATE PRACTICE ARRANGEMENTS**

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This Circular amends and replaces Circular 85/4, 86/175, 87/194 and 87/194a

Salaries

Following a hearing before Justice Fisher, President of the Industrial Commission, salary rates for Salaried Medical Specialists have been increased by 15%, effective from the first pay period on or after 12 December, 19899.

The salary increases are based upon the work value and anomaly/inequity principles of the now redundant 1988 State Wage Case.

Attached are new rate schedules giving effect to the salary increase. The rates will be updated through HOSPAY on 4th June, 1990. Retrospective payments will need to be calculated manually.

Budget Supplementation

Budget Supplementation for the salary increase on a current year and annual basis will be made by Finance and Budget Branch, upon receipt of dissection between various categories consolidated for each Area/Region, by year of service and applicable scheme of specialist/senior specialist. Such a dissection is to agree with staff profile information held by Central Administration.

Any costs arising from the new private practice arrangement, will have to be claimed separately with workings provided.

Receipt of the above information is required in Finance and Budget Branch by 10 June, 1990 to enable budget supplementation this financial year. Where this time frame cannot be met, supplementation is not guaranteed

Other Payments

In handing down his judgement, Justice Fisher made the following statement:

> "This decision is limited to the rates so displayed and is not to flow to allowances, conditions or other payments, however called".

The Department has, upon legal advice, interpreted this to exclude the 15% salary increase from flowing onto Award allowances, conditions or other payments and also to the Special Allowance as specified in Clause 4 of the attached Private Practice Arrangements.

Changes to Private Arrangements

Negotiations concluded between the Department and the P.M.O.A have resulted in several changes to the private practice arrangements set out in Circulars 87/194 and 87/194A. These changes are effective from the first pay period on or after 12 December, 1989.

Set out hereunder are the new private practice arrangements for salaried medical specialists major changes are:

1. Scheme A payment in lieu of Private Practice allowance has been increased from 16% to 20% (refer 3.1 (i))

2. Scheme B trust fund drawings have been increased from a maximum of 45% to 50%. This has been achieved by increasing the maximum drawings for private practice expenses from 10% to 15% (refer 3.2 (iv)).

3. The Recall/Special Allowance has been deleted and replaced with a Special Allowance. The rate of the allowance is 17.4% (refer 4.1) but is now payable for all purposes. (refer to notation under 3 current arrangements)

4. A new clause On-Call and Recall has been inserted (refer Clause 5)

5. Special Note should be made of the definition of "salary" in Clause 3 and Clause 4.3 as it relates to "salary". Note also Clause 4.5.

Contents -



1. Introduction

1.1 Following upon the recommendations contained in the Final Report of the Committee of Inquiry into rights of Private Practice in Public Hospitals (the Penington Committee) negotiations were conducted with the Public Medical Officers' Association concerning the rights of private practice for staff specialists in Second and Third Schedule hospitals and Fourth Schedule organisations. Substantial agreement was reached with the Association on new arrangements to apply from 1st January, 1985, details of which were set out in Circular 85/4.

1.2 Further discussions were subsequently held on matters that needed clarification. Circular 87/194 consolidated the results of those discussions.

1.3. Following arbitration of a dispute between the parties, amendment to the above Circular was issued as Circular 7/194A.

1.4 In 1989 the parties reached agreement on a number of points arising from a claim made by the Association. This Circular reflects the agreed position of the parties.

1. 5 The arrangements are based on the adoption of the principal recommendations of the Penington Report which are enumerated at Recommendation 40.

2. Arrangements Prior to 1st January, 1985

Staff Specialists employed as at 31st December, 1984, may continue to work under their present private arrangements whilst ever they are employed in the Second/Third/Fourth Schedule system, of Area Health Boards, including if they transfer from one hospital to another (provided their services are "continuous" as defined in the Transferred Officers' extended Leave Act) subject to the following:-

2.1 "Present arrangements" means whichever of Arrangement "A", "B", "C" or "D" of Circular 77/15 or other previously approved arrangements, the officer was working under as at 31st December, 1984.

2.2 In the case of Arrangement "C", an officer is limited to whichever of the three (3) remuneration packages he/she was working under as at 31st December, 1984. Such officers will be regarded as being on part-time leave without pay.

2.3 Officers who remain on Circular 77/15 arrangements are also to retain existing Trust Fund arrangements, contained in that Circular, except that all recommendations for disbursements are to require approval by the Board of Directors which shall have a right to disallow or vary these recommendations. Operation of Trust Funds are to be subject to audit annually with the cost thereof being met by the trust funds.

2.4 Where a staff specialist elects to remain with Circular 77/15 private practice arrangements he/she has the right to transfer to one of the new Schemes described hereunder in any subsequent financial year. However, where a staff Specialist does transfer to one of the new Schemes he/she cannot later transfer back to the pre-1985 arrangements.

2.5 The pre-1985 arrangements are not available for any staff specialist employed after 31st December, 1984.

3. Current Arrangements

The following arrangements apply from the first pay period on or after 12 December, 1989. Arrangements in the period between 1 January, 1985 and 12 December, 1989 are detailed in Circulars 87/194 and 87/194A. For the purpose of this agreement salary shall mean actual award salary plus tho Special Allowance are defined in Point 4.

3.1 Scheme "A"

(i) Payment of a salary supplement of 20 per cent of the officer's salary (excluding any administrative allowance) (refer clause 3 for Definition of Salary) from the General Fund. P.A.Y.E. taxation deductions are to be made in respect of these payments.

(NB. Participants in Scheme "A" have no entitlement to the private practice expenses allowance or the "second hospital" allowance which applies under scheme "B" but they are eligible for the 17.4 per cent special allowance.)

3.1. (ii) It is a requirement of participation, that the payment of the Scheme "A" allowance is conditional upon the Specialist medical officer giving the hospital written authority to render accounts in his name to all chargeable patients he/she might see in the course of his/her duties.

(iii) Study Leave and Conference Leave shall be accrued on the same basis as for Scheme "B" and paid out of the General Fund.

3. 2 Scheme "B"

This Scheme will include the following features:

(i) one Trust Fund for all participants within the hospital;

(ii) subject to legal advice on the taxation and trust aspects, one or both of the alternative models proposed by the Penington-1 Report (Recommendations No 18) must be adopted;

(iii) participating specialist to have drawing rights (to be made calendar monthly) from Trust Fund in accordance with their individual or agreed group (eg. "Departmental") contributions to the Fund up to a maximum of 25 per cent of salary

(excluding any administrative allowance).
(refer clause 3 for Definition of Salary)

Note: Where individual of agreed group contributions are not sufficient to permit drawings of 20 per cent of salary, supplementation up to 20 per cent to be made from that proportion of charges which would otherwise have been appropriated as facility charges paid to the hospital/AHS by staff specialists.

Where individual or agreed group contributions are sufficient to permit drawings of 20 per cent but less than 25 per cent of salary, (excluding administrative allowance) supplementation up to 25 per cent to be made from that proportion of charges which would otherwise have been appropriated as facility charges paid to the hospital/AHS by staff specialists.

Supplementation to the 20 per cent of salary level is to be made quarterly, at 31st March, 30th June, 30th September and 31st December each year. An adjustment is to be made at 30th June each year in cases where supplementation may have occurred in one or more quarters but receipts in excess of 20 per cent were made in other quarters.

Supplementation to the 25 Per cent of salary level, in appropriate cases, is to be made once each year, ie. for the year ended 30th June.

P.A.Y.E. deduction are not to be made in respect of Scheme "B" in relation to monies paid from the Trust Fund.

(iv) Where sufficient Trust Funds are available from the individual or agreed group contributions after payment of the initial drawings, further drawings (to be made calendar monthly) up to a maximum of 15 per cent of salary may be permitted by way of a private practice expenses payment.

(v) (a) Where by agreement between hospitals, a participating specialist provides a regular service at a hospital other than normally works the one in which he/she is employed, further drawings (to be made calendar monthly) up to a maximum of 10 per cent of salary may be permitted provided sufficient Trust Funds are available from the individual or agreed group contributions after payment has been made for the initial drawing and private practice expenses payment.

(b) Where under circumstances involving the acceptance of additional responsibilities (such as providing a regular service to a different hospital to the one in which he/she normally works without attending at that hospital) he/she may, subject to the Corporation's approval, make drawings as provided in (a) above.

(c) The maximum drawings that may be made under 3.2 (v) of this Circular is 10 per cent of the salary.

Note: Payment of the further drawings permitted under sub-clauses (iv) and (v) above are to be made calendar monthly, subject to there being sufficient Trust Funds available. An adjustment is to be made at 30th June each year in cases where sufficient Trust Funds were not available in a particular month to enable payment to be made to eligible staff specialists but Trust Fund funds over the whole year are sufficient to enable payments under sub-clause (iv) and/or (v).

(vi) The drawings referred to in (iii), (iv) and (v) above shall be payable during paid absences on approved annual, sick, long service, conference and study leave but shall not be paid where the monetary value of leave is paid on the termination of employment. The said drawings shall only be considered in relation to private practice and shall not be taken into account for the calculation of any award entitlement or public sector superannuation purposes.

3.3 Full Time Staff Specialists with Approved Leave Without Pay (Scheme "C")

Staff specialists are permitted to elect to take leave without pay subject to the following conditions:

(i) leave without pay is permitted for 25 per cent of the full time commitment in that specialty;

(ii) no private practice is to be undertaken during the 75 per cent of time for which a salary is payable (this relates to aggregated time and means that participating specialists must not spend more than an average of 25 per cent of their total working time in the treatment of private patients).

(iii) private practice is limited geographically to the employing hospital, except where approval is given by the principal employing hospital,

because of special circumstances, to undertake "outside" private practice;

(iv) participating specialists are to contribute to the same Trust Fund as other full time specialists;

(v) total drawings by each participating specialist, subject to sufficient individual or agreed group contributions to Trust Funds, to be a maximum of 100 per cent of full time salary (excluding any administrative allowance) (refer clause 3 for definition of salary)

(vi) the drawings referred to in (v) above shall be payable during paid absences on approved annual, sick, long service, conference and study leave but shall not be paid where the monetary value of leave is paid on the termination of employment. The said drawings shall only be considered in relation to private practice and shall not be taken into account for the calculation of any award entitlement or public sector superannuation purposes.

P.A.Y.E. deductions are not to be made in respect of Scheme "C" in relation to monies paid from the Trust Fund.

3.4 Half-time Employment (Scheme "D")

Subject to the service requirements of the employing hospital, half-time employment is to be permitted subject to the following conditions:-

(i) employment to be 50 per cent of the full time commitment in that specialty with entitlements to pro-rata leave entitlement;

(ii) no private practice is to be undertaken during the time for which a salary is payable;

(iii) approval to operate under this scheme includes the automatic appointment of the Specialist as a Visiting Medical Practitioner. Except in the case where the initial appointment was to Scheme D, if the hospital declines to renew an appointment as a Visiting Medical Practitioner, the Specialist has the option to automatically revert to one of the full time schemes. Private practice must be conducted on the same basis as applies to Visiting Medical Practitioners;

(iv) half-time Specialists working under this scheme cannot remain at the hospital on a geographic full time basis. There must be an "outside" private practice;

(v) half-time Specialists who hold visiting practitioner appointments at hospitals other than their employing hospital, may accept sessional payments in respect of services provided to public patients at those other hospitals;

(vi) where a Specialist gains approval to operate under Scheme "D" and transfers from a full time scheme, sick leave shall be subject to the following conditions:

(a) sick leave accrued at the date of transfer shall remain available

(b) while operating under Scheme D sick leave shall accrue at the normal rate of 14 calendar days per year

(c) sick leave taken while under Scheme D shall be paid for at half the full time rate of pay

(d) sick leave taken while under Scheme D shall be debited firstly against sick leave credits accrued whilst under Schedule D and then against sick leave credits accrued whilst a full time staff specialist

(vii) If a staff specialist referred to in (vi) above subsequently transfers from Scheme D to Scheme A, Scheme B or Scheme C, sick leave accruals shall be treated as follows:

(a) Sick leave to credit at the date of transfer, which has not been utilised shall be credited to the full time staff specialist on the basis of one half day's credit for each day accrued.

(b) Sick leave to credit at the date of transfer, which accrued whilst under a previous period as a full time staff specialist, which has not been utilised, shall be credited on the basis of one day's credit for each day accrued.

(viii) For a staff specialist who transfers from Scheme D to Scheme A, Scheme B or Scheme C, sick leave accrued but not utilised, whilst under Scheme D shall be credited to the full time staff specialist on the basis of one half day's credit for each day accrued.

(ix) Specialists employed under Scheme "D" shall be entitled to the paid leave at half Time rates set out in Clause 6 Conference Leave and Clause

7 Study Leave of this Circular, but, subject to Clause 8.4 Subsistence Allowance, shall not be entitled to Airline Tickets or Expenses (paid either from General Funds or Trust Funds) for that proportion of their service spent working under Scheme "D".

3.5 Staff specialists may elect whichever of Schemes "A", "B" or "C" they wish to work under each financial year. No separate approval, by the Board of the employing hospital/AHS is required. However, half-time employment is permissible only at the discretion of the employing hospital.

4. Special Allowance.

4.1 All staff specialists working under any of the new arrangements operating from 12 December, 1989 shall be paid a Special Allowance of 17.4% of award salary.

Officers working only 75 per cent or 50 per cent of full time shall be paid 75 per cent or 50 per cent respectively, of the allowance which would be paid to them if they worked in a full time capacity. Payment of this allowance is to be funded from the General Fund.

4.2 This allowance shall be payable during paid absences on approved leave and shall be paid where the monetary value of leave is paid on the termination of employment. The allowance shall be considered part of the base rate as defined for all purposes, including the allowance in lieu of exercising a right of private practice in Scheme "A" and Private Practice drawings in Schemes "B" and "C".

4.3 The allowance is to be met as an award cost.

4.4 It should be noted that payment of this allowance does not apply in the case of any officer who elects to continue working under the pre-1985 private practice agreement.

4.5 The Special Allowance is to be considered as salary for Superannuation purposes.

5. On-Call and Recall

5.1 It has always been part of the job requirements for staff specialists that they be available at any time specified by their employer and consequently the Department would consider that such arrangements should continue.

As such all staff specialists working under any of the new arrangements operating from 12 December, 1989 should be available for On-call and recall

duties outside of the hours of 8.00 a.m to 6.00 p.m Monday to Friday and on weekends and public holidays

6. Conference Leave

6.1 One period of leave, of up to one week, on full pay shall be allowed to each staff specialist participating in Schemes "A", "B" or "C" during each year of continuous service in one or more public hospital in New South Wales for the purpose of conference leave; provided that where, in any year of continuous service, the whole or any part of such leave is not taken by the officer nor granted by the hospital, any leave not so taken shall be granted during the following year provided further that the maximum amount of such leave that may be allowed to any officer shall not exceed two (2) weeks in any year of continuous service.

6.2 Conference leave may be taken during the year in which it accrues.

6.3 In respect of each period of conference leave a specialist shall be granted:-

(i) The actual cost of air fares up to a maximum cost of Business Class rates (in the case of Scheme "A" participants, air fares are also limited to a maximum of the cost of a Business Class Sydney/Perth return fare), or where air travel is not available, First-class return rail fares; and

(ii) Subsistence allowance in accordance with Clause 8.1.

6.4 Fares and expenses associated with conference leave are to be funded as follows:

(i) for specialists on Scheme "A" - from the General Fund;

(ii) for specialists on Schemes "B" or "C" - from Trust Fund residual.

7. Study Leave

7.1 Each staff specialist participating in Schemes "A", "B" or "C" shall be allowed three (3) months leave on full pay after five (5) year continuous service in one or more public hospital/AHS in New South Wales for the purpose of overseas study leave and shall be allowed a further period of three (3) months leave on full pay for each completed period of five (5) years continuous service thereafter with such leave being allowed to be deferred, provided that no officer shall be allowed to take accumulated leave in excess or six (6) months in any one

periods; provided further that an officer who has served for a minimum of five (5) years may, subject to employer convenience, elect to take his/her overseas study leave in broken periods.

7.2 In respect of each period of study leave a staff specialist on Scheme "A" shall be granted a travelling and subsistence allowance in accordance with Clause 8

7.3 The actual cost of air fares up to a maximum of Business Class rates shall also be granted to a staff specialist. In all cases a maximum of three air fares shall be paid in respect of each completed five years continuous service where leave is taken in broken periods at employer convenience. The source of funding for fares and expenses associated with Study Leave is to be the same as for Conference Leave and therefore depends on the nature of the Scheme selected as to whether it is paid from General or Trust Funds.

8. Subsistence Allowance (Conference and Study Leave)

8.1 The subsistence allowance payable to staff specialists under Scheme "A" for expenses associated with Conference Leave and Study Leave shall be in accordance with the rates determined by the New South Wales Public Service Board for Special Division Officers and Full Time Statutory Appointees employed in the New South Wales Public Service, as varied from time to time.

If Conference Leave or Study Leave is taken within Australia a daily allowance is payable in recompense for all expenses OR an amount equivalent to the actual necessary expenses for meals and accommodation together with a daily rate determined for incidental expenses is payable.

If Conference Leave or Study Leave is taken outside of Australia a daily rate is paid plus actual accommodation expenses. The rate of the daily allowance is dependant upon the level of the staff specialists base award salary.

Because of a number of variables (eg. the multiplicity of currencies, regular changes to the rates etc.) it is not intended to advise the actual amounts payable from time to time. Specific details can, however, be obtained by telephoning the Industrial Relations Unit of the Premier's Department on (02) 228 4381. In seeking such information from this Unit it is important to quote the salary actually being paid to the staff specialist at the date the conference or study leave is to commence.

Should a staff specialist consider that he/she has been disadvantaged by the payment of the above allowances, he/she may claim all inclusive actual expenditure. Any such claim should be assessed for reasonableness by the hospital/area health service.

8.2 The subsistence allowance for Specialists under Scheme "B" and "C" is a matter for the Trustees of the appropriate Staff Specialists' Hospital Charitable Trust to determine having due regard to the payment made to Specialists under Scheme "A".

8.3 No subsistence allowances or travelling expenses are payable to staff specialists under Scheme "D" except as provided for in 8.4 hereunder.

8.4 Where a specialist transfers to or from Scheme "A" and has accrued a right to study leave partly under Scheme "A" and partly under Scheme "B", "C" or "D", he/she shall be entitled to receive from the hospitals general fund 1/20th of the cost of return air fare and 1.5 days subsistence allowance for each completed month of service under Scheme "A", less any study leave already taken in respect of study leave accrued under Scheme A. Both air fares and subsistence allowances shall be calculated at the rates applying at the time of the taking of the leave. Accommodation expenses may also be paid at the rate of 1.66% of total accommodation costs, for each completed month of service served under Scheme "A".

9. Travel Insurance

In respect of travel undertaken by Specialists under Clause 6 Conference Leave and Clause 7 Study Leave the following arrangements are to apply:

9.1 For Specialists under Scheme "A", the hospital is to take out additional short-term insurance cover for the period the Specialist is overseas, in the event of death, for an amount not less than 10 times the salary (as defined in clause 3) for the individual staff member payable to the Specialist's nominated beneficiary.

9.2 For Specialists under Schemes "B" and "C" the Trust Fund is to arrange appropriate insurance having due regard for the arrangements made for Specialists under Scheme "A".

10. Privately Referred Non-inpatients

10.1 The Department of Health has completed negotiations with the New South Wales Public Medical Officers' Association and other bodies regarding charging arrangements for privately referred non-patients to all staff specialists who have been granted rights

of private practice by the hospital or area health service (previous Circulars 80/252, 80/290 and 81/355 still apply).

10.2 The arrangements will not affect those patients who are inpatients or registered non-patients of a recognised hospital but will apply to privately referred non-inpatients who satisfy the following conditions.

(i) The referral must be to the doctor by name and not to the hospital or the outpatient department.

(ii) The referral must be made by a doctor in private practice (including a staff specialist or visiting medical officer exercising a right of private practice); it must not be made by an intern a resident medical officer, registrar or medical superintendent.

(iii) No patient who presents at casualty or an out-patient clinic is to be privately referred for treatment of, or examinations relating to, the episode of illness which caused him/her to present at casualty or the outpatient clinic.

(iv) At the time the appointment is being made, patients are to be advised that they will not be treated as registered non-inpatients of the hospital, and that they will be charged by the attending specialist(s) as well as for diagnostic services ordered by that specialist.

(v) Referrals are to be genuine referrals made "at arm's length", ie. the referral letter should be completed before the patient's first appointment is made for an examination, treatment or consultation.

10.3 <u>IN GENERAL</u>

(i) Privately referred non-inpatients will not be registered as non-inpatients.

(ii) The hospital Area Health Service will issue accounts as the agent and the fees collected will be recorded and disbursed under the terms and conditions under which the staff specialists engage in private practice.

(iii) It is the doctor's responsibility to ensure that the criteria for a privately referred non-inpatient outlined in this Circular have been met.

11. <u>Accounting Instructions</u>

These documents are still under development, and will be issued as they become available.

12. Disputes Procedures

12.1 Should a dispute occur between the Association and the Department:

(i) concerning rights of private practice;

(ii) concerning an interpretation of this Circular;

(iii) concerning this agreement or its interpretation;

(iv) concerning any breach or alleged breach of any of the provisions of this Circular

such disputed matter(s) may be referred to a Committee of two or four persons on which the Association and the Department will be equally represented.

12.2 The Committee shall investigate the disputed matter(s) and endeavour to recommend upon how the dispute should be resolved.

12.3 If the dispute is not resolved by reference to a Committee referred to in 12.1 above the Association may seek in writing that the matter be considered by the President of the Association and the Manager of Employee and Industrial Relations of the Department of Health who may by mutual agreement:

(i) make a joint determination as to the matter in which the matter in dispute may be solved;

(ii) refer the matter to a person selected by them for determination in which case the determination of such person shall be final.

12.4 No party shall initiate any action at law or in equity in respect of any dispute between the parties regarding any matter arising from an interpretation of this Circular until such dispute has been dealt with in accordance with this Clause.

12.5 Each party shall be responsible for the payment of his own costs and expenses in the resolution or determination of the referred matter or matters.

B.J. AMOS
Director-General

# MEDICAL OFFICERS - HOSPITAL SPECIALISTS (STATE) AWARD

effective from the beginning of the first pay period to commence on or after 12/12/89

(Special Note: The salary rates detailed below encompass both the 15% increase awarded under the Work Value Principle of the 1988 State Wage Case and 3% increase awarded under the Structural Efficiency Principle.

| | | |
|---|---|---|
| | Specialist | |
| 37.001.11 | 1st year | 61577.00 |
| 37.001.12 | 2nd year | 65186.00 |
| 37.001.13 | 3rd year | 68776.00 |
| 37.001.14 | 4th year | 72386.00 |
| 37.001.15 | 5th year | 75986.00 |
| 002.11 | Senior Specialist | 83194.00 |
| 350 | Specialist - 1st year - Special Allowance | 10750.00 |
| 351 | Specialist - 2nd year - Special Allowance | 11379.00 |
| 352 | Specialist - 3rd year - Special Allowance | 12007.00 |
| 353 | Specialist - 4th year - Special Allowance | 12637.00 |
| 354 | Specialist - T/After - Special Allowance | 13264.00 |
| 355 | Snr. Specialist - Special Allowance | 14523.00 |

Allowances For Administrative Responsibilities
An officer appointed as a Director or Specialist in charge or Head of a Department or Service in a hospital with a ADA of over 200 and in charge of a professional or technical staff of two or more shall be paid a minimum allowance of code 560 to a maximum allowance of code 559
In hospitals with a ADA in excess of 850 the maximum allowance to be paid is code 558

| | | |
|---|---|---|
| 558 | Specialists Admin Allow Maximum under 850 ADA | 2593.00 |
| 559 | Specialists Admin Allow Maximum over 850 ADA | 3287.00 |
| 560 | Specialists Admin Allow Minimum over 200 ADA | 783.00 |
| | Specialist Scheme 'C' 75% | |
| 37.001.41 | 1st year | 46183.00* |
| 37.001.42 | 2nd year | 48585.00* |
| 37.001.43 | 3rd year | 51583.00* |
| 37.001.44 | 4th year | 54289.00* |
| 37.001.45 | 5th year | 56989.00* |
| 37.002.41 | Senior Specialist | 62395.00 |
| 356 | Specialist, 1st yr - Special Allowance 'C' | 8061.00 |
| 357 | Specialist, 2nd yr - Special Allowance 'C | 8533.00 |
| 358 | Specialist, 3rd yr - Special Allowance 'C' | 9004.00 |
| 359 | Specialist, 4th yr - Special Allowance 'C' | 9478.00 |
| 360 | Specialist, T/After - Special Allowance 'C' | 9949.00 |
| 361 | Snr. Specialist, Special Allowance 'C' | 10892.00 |

## Specialist Scheme 'D' 50%

| | | |
|---|---|---|
| 7.001.21 | 1st year | 30789.00* |
| 7.001.22 | 2nd year | 32590.00* |
| 7.001.23 | 3rd year | 34389.00* |
| 7.001.24 | 4th year | 36193.00* |
| 7.001.25 | 5th year | 37994.00* |
| 7.002.21 | Snr. Specialists | 41597.00* |
| 362 | Specialist, 1st yr - Special Allowance 'D' | 5474.00 |
| 363 | Specialist, 2nd yr - Special Allowance 'D' | 5688.00 |
| 364 | Specialist, 3rd yr - Special Allowance 'D' | 6002.00 |
| 365 | Specialist, 4th yr - Special Allowance 'D' | 6318.00 |
| 366 | Specialist, T/After - Special Allowance 'D' | 6632.00 |
| 367 | Snr. Specialist, Special Allowance 'D' | 7261.00 |

**EXTRACT FROM THE MINISTER'S WRITTEN SUBMISSIONS ON THE RELEVANCE OF THE PRINCIPLES OF WAGE FIXATION AND THEIR APPLICATION TO VMOs.**

## C. APPLICATION OF PRINCIPLES TO THE PRESENT CASE

(a) A requirement for a work value increase is a demonstrated changes to the value of the work. Specifically what is needed is a proof of "significant net addition to work requirements" - not simply proof of changes in the work or the environment in which such work is carried out. Proof of mere evolutionary change is not sufficient - this is made clear by the authorities. Nor is proof that professional people in particular are required to spend additional amounts of time in keeping abreast of developments and changes which impact upon their professional work. This is part and parcel of the expectation of the professional and is divorced from work value considerations. Furthermore, the mere development of a new procedure or technology does not necessarily sound in significant work value change, as tasks often are made more simple and/or require less skill as a consequence of such developments: See Re Medical Officers Hospital Specialists (State) Award 33 IR 79 at pp 83.8 - 84.5.

(b) Neither is it sufficient to demonstrate changes impacting on only a segment of the relevant work force population. The only changes relevant in this

context are those which impact across the board. Significant changes impacting only on segments of the population are not to give rise to across the board wage increases. The appropriate approach in such circumstances is either by way of special allowance or by a work value increase granted only to that segment of the population: e.g. State Wage Case 1987 17 IR at 116.8.

(c) With the development of the structural efficiency principle it is now well established that work value claims are to be considered in the context of structural efficiency and not otherwise - ie. not separately categorised and dealt with as such. In the context of a structural efficiency exercise, it is now impossible to have claims for work value change considered and granted without concurrently considering the claimant's position with respect to SEP: National Wage Case 1987 17 IR 65, 79, 80.6 and 81.5; State Wage Case 1989 30 IR at 112.1.

(d) The principles make it clear that it is insufficient to merely point to past efforts made by individuals covered by the claim to assist with improvements in efficiency. What is needed is a group commitment to ongoing co- operation with, and participation in, the process of structural reform so as to maximise productivity: 1989 National Wage Case 30 IR at 99.2; 1989 State Wage Case 30 IR at 111.2-.4.

(e) It is also clear that, if a claimant now seeks to mount a work value case in circumstances where increases under the structural efficiency principle from 1988 onwards have not been sought or granted, it faces the prospect (and reality) that the claims will be consolidated or merged and considered as one claim. In this context it is submitted that it is not acceptable to simply add the increases which might otherwise have been sought and claimed at different points of time and seek to have all those increases awarded at the one point in time (As the AMA seeks to do here: See Exhibit 165 p.2).

(f) Workers seeking the benefit of such increases face, inter alia, a six month time lag between the first and second structural efficiency increases, the requirement that the second structural efficiency increase be in place before claiming the 2.5% and a further requirement as to time lag in relation to 2.5% itself: 1989 National Wage Case 30 IR at 89.5 - 90.7; 1989 State Wage Case 30 IR at 112.8; 1991 National Wage Case 36 IR at 122.2.

(g) The principles also provide that work value increases will be taken to have been included and compensated for in the above SEP increases when granted. Consequently no further increases for work value would be achievable save by the mounting of a

special case within the context of and coincidental with the claims made for SEP increases: See His Honour at T pp 3167/3168.8 - 3169.3.

(h) The superannuation principle (and indeed superannuation legislation) does not countenance the payment of the 3% occupational superannuation monies direct to employees (and access to it is very restricted) and yet the AMA here seeks that 3% (and more) to be awarded to VMOs who are NOT employees, and for that money to be actually paid to VMOs for each hour of work. Furthermore, this is in circumstances where the VMO is under no obligation to put any money whatsoever into superannuation, let alone an "approved" fund. This is simply not a defensible position: National Wage Case (1987) 17 IR at 89.6.

(i) The current SWC allowance principle, set out in (1991) 36 IR 362 at p 430 provides as follows: -

"1. Existing allowances

(a) Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.

(b) Existing allowances which relate to work or conditions which have not changed may be adjusted from time to time to reflect national wage increases, except where a flat money amount has been awarded, provided that shift allowances expressed in awards as money amounts may be

adjusted for flat money amount national wage increases.

(c) Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of the work value changes principle.

2. New allowances

(a) New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.

(b) No other new allowances shall be created unless changes in work have occurred or new work or conditions have arisen: where changes have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant principle. The relevant principle in this context may be work value changes or first awards and extensions to existing awards principle.

3. Service increments

(a) Existing service increments may be adjusted to reflect a percentage National Wage Case increase.

(b) New service increments may only be allowed to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant provisions of the work value changes principle."

(j) In the 1985 Reasons for Determination, Macken J indicated that the Wage Fixation Principles were "impossible" to apply (see Exhibit F at pages 6.6 and 9.9)in making a determination pursuant to section 29M of the Public Hospitals Act. However, it is submitted that a close perusal of His Honour's

judgment makes it clear that His Honour's remark was made in the context of the peculiar circumstances confronting His Honour at that time, and cannot be taken as an expression of opinion by His Honour that the Wage Fixation Principles never had before, or never would again, have any relevance to such determinations under the Public Hospitals Act. Indeed, it is submitted that what His Honour was seeking to achieve (and did achieve) in 1985 was the creation of a situation in which it would be feasible and proper to apply the Wage Fixation Principles to claims for increases in the rates paid to VMOs for their work in the public hospital system.

It is submitted that His Honour's remarks about the virtual "impossibility" of applying the Wage Fixation Principles resulted from His Honour's views that: -

(a) Those Principles were only designed to operate in circumstances where "appropriate" base rates had already been established (and His Honour found that this was simply not the case with respect to VMOs rates): see exhibit F at page 14.8;

(b) That he had no jurisdiction to demand the "no extra claims" commitment from the AMA because

the Public Hospitals Act expressly permitted a further arbitration after the expiry of six months: see exhibit G at page 680, 681 - generally;

(c) Fee for service VMOs and staff specialists had received compensation for "the Medicare effect" and/or for persistent structural changes in the public hospital system in New South Wales and, at least in so far as the fee for service VMOs were concerned, this had been done without regard to the wage fixation guidelines: see exhibit G at page 678.4 - 678.6 where His Honour said: -

> "It (the Commonwealth) increased the (fee for service) rates far in excess of what the State Wage Cases would have normally allowed. Is it not a recognition that in this area at the moment those guidelines designed for a different purposes cannot be applied as they were written?"

It was in these circumstances that His Honour then proceeded to set what he expressly stated were "appropriate base rates for VMOs without attempting to squeeze into the confines of the guidelines a situation with which they were never designed to deal" (Exhibit F at page 12.9). It is submitted that His Honour's Reasons for Determination very much contemplate the notion that in any future determination of VMO rates relevant Wage Fixation Principles could more readily be applied because

appropriate base rates had (at last) been set by His Honour in the 1985 determination itself.

Of course, following His Honour's remarks in the 1985 determination about the impossibility of applying the Principles, which may not have been correct in any event (due to the existence of the anomalies Principle) the Public Hospitals Act was amended to expressly provide that arbitrators appointed pursuant to Section 29L of the Public Hospitals Act had regard to the Wage Fixation Principles.

(k) The AMA submitted that, if the Wage Fixation Principles were applicable then recourse should be had to the 1989 (and not the 1991) Principles. Its submissions to this are contained in Exhibit 198. The Minister submits as follows: -

1. In Exhibit 198 the AMA have included in "exercise 1" those claims for wage increases sought which arise from State Wage Cases. Included in that schedule is a claim for a wage increase of 2.5% arising from the State Wage Case of 1991. The wage fixation principles developed as part of that State Wage Case are set out in (1991) 36 I.R. starting at p. 426. It is clear from the principles headed Structural Efficiency and Wage Adjustments that for a party to be awarded the 2.5% wage

increase allowable pursuant to the decision that party must meet the requirements of the structural efficiency principle as set out at p. 427 of the report.

2. It is just not possible in the Minister's submission for the AMA to both seek that increase of 2.5% pursuant to the 1991 State Wage Case and at the same time state that the appropriate wage fixation principles for the arbitrator to have regard to are those set out in the 1989 State Wage Case. The proposition only has to be stated to show its incongruity. The AMA cannot have it both ways.

3. If then, as must logically follow, the appropriate wage fixation principles relevant to the AMA's claim are those set out in the 1991 State Wage Case then the issue of whether or not this matter was part heard need not be decided. However for the sake of completeness the Minister makes the following submissions in reply to the AMA's submission that this matter was part heard when the judgment of the Commission in Court Session was handed down on 29 May 1991:

(a) Whilst the phrase that appears in the 1991 State Wage Case is "part heard" and not as

appeared in some early cases the phrase "substantially part heard" it is the Minister's submission that the phrase must be given some work to do. Programming, pre- trial negotiation or preliminary skirmishing before the Commission do not in our submission bring a matter within the scope of the phrase "part heard".

(b) Whilst it is a matter of fact whether or not a particular matter falls within the scope of the phrase "part heard" some guidance might be taken from how that phrase has been applied in other matters in recent times. In this regard we would refer the arbitrator to the judgment of the Industrial Commission in Court Session in matter 378 of 1991 the Hospital Employees (Engineers) (State) Award of 17 February 1992. In that matter the applicant union argued that the matter fell within the category of being part heard because the claim had been served upon the employer some quite considerable time prior to the matter coming on; that the claim had been mentioned in other proceedings before the Commission, further, that meetings had taken place between the parties with regard to the

matter, which had been to no avail, and which had led to an application being lodged some 2 weeks prior to the State Wage Case decision coming down. The matter had also been the subject of a mention some days before the State Wage Case had been determined. The Commission in Court Session found that the matter was not one that could be described as part heard on the date on which judgment in the State Wage Case had been handed down.

4. It follows that the work value principle as set out in the May 1991 State Wage Case decision is the appropriate one for the arbitrator to have regard to. This means that paragraph (c) of that principle which restricts the time from which work value changes in an award should be measured, is appropriate.

5. We rely on the submissions we have already made with regard to the Medical Officers - Hospital Specialists (State) Award case but in summary make the following points.

   (a) The Staff Specialist Case was based on an agreement between the parties.

(b) His Honour the President in that case raised the difficulty experienced in seeking to critically examine an application before the Commission when no party is seeking to cross-examine or put forward alternative views.

(c) The President emphasised that the amount of 15% increase agreed between the parties was a very large increase when considered in the context of general wage movements: See 33 IR 79 at p 84.5.

(d) The President found that an anomaly existed for very specific reasons, those reasons going to the delay that had occurred in an examination of the staff specialists' rate of pay.

For the above reasons it is submitted that the Staff Specialists' Case is not analogous to this matter. Except with respect to the statements therein as to the manner of application or interpretation of the work value principle made by the President in the judgment, the Staff Specialists' Case is to be distinguished.

6. Paragraph (c) of the work value principle provides that the time from which work value changes may be measured may be extended if extraordinary circumstances can be demonstrated in "special case"

proceedings. It is the Minister's submission that such extraordinary circumstances have not been shown to exist in this matter. What in fact has occurred in this matter is a consistent failure on behalf of the AMA to seek to apply those wage fixation principles that have from time to time been in place since the determination of His Honour Mr. Justice Macken. We rely upon our detailed submissions as to the content and requirements of such principles. We would again direct the arbitrator's attention to the concern expressed on a number of occasions in those National and State Wage Case decisions as to the possibility of double counting occurring because of an overlap of the work value principle with firstly, the restructuring and efficiency principle, or later the structural efficiency principle, this concern being expressed in the last paragraph of the work value principle since 1987.

It is of assistance to look at the reasoning of the Commission in Court Session in the Hospital Employees (Engineers) (State) Award matter referred to above. The Commission in Court Session in that matter was also faced with a submission by the applicant union that extraordinary circumstances existed so as to justify the extension of the time that work value changes could be taken into account. In rejecting that submission the Commission said: -

"The "extraordinary circumstances" claimed by the Association to exist in this case such as to allow consideration of alleged work value changes before 4 October 1989 are basically the same as the matters relied on in its submission that the present case was part heard as at the date of the State Wage Case - May 1991

The Association again relies on the fact that a log of claims had been served on the Health Administration Corporation in March 1990, the fact that the conciliation committee was so advised in the second stage structural efficiency case for increases for hospital employees generally, and the fact that some discussions between the parties in relation to the log of claims took place before the formal application was filed on 14 May 1991. It also asserts that it would be unfair if other groups of hospital employees under other awards, in respect of whom claims for work value increases have been filed and are part heard, were able to take advantage of earlier datum points than the present group of employees merely because applications in respect of such groups had been filed and processed to a "part heard" stage before the date of decision in the State Wage Case - May 1991. It would also be unfair if the earlier datum point for work value changes could not be relied upon in the present case when work value changes for this particular group of employees had not been specifically relied on when the second stage structural efficiency claim for hospital employees generally had been granted.

We have given full consideration to the submissions of counsel for the Association on this aspect of the case in light of relevant provisions of State Wage Cases and principles thereunder to which we have referred. In our opinion the Association has not made out a case that "extraordinary circumstances" exist which would justify a departure from the normal datum point requirements of par. (c) of the current Work Value Changes principle. We note specifically that we have given consideration to the decision of Sweeney J. in the Hospital Employees Technical (State) Award Case [4], a decision currently under appeal, when arriving at our decision on this aspect of the matter."

It is submitted that the mere fact that the AMA elected not to lodge its application for an arbitration until November 1990 is not a reason

which justifies the matter being one which falls within the category of an "extraordinary circumstance".

APPENDIX "M"

# PRIME MINISTER

FOR MEDIA

2 April 1985

JOINT STATEMENT BY THE PRIME MINISTER AND PREMIER OF NSW

The Prime Minister and Premier of New South Wales today announced a 7 point package aimed at settling the New South Wales doctors' dispute.

Since we met the Presidents of the Federal and New South Wales Branches of the AMA in late February there have been extensive high level negotiations between both Governments and the representatives of the AMA.

This package meets the concerns of the New South Wales medical profession while maintaining the basic principles of Medicare which have twice been endorsed by the Australian public.

It is the Governments' bottom line offer.

There will be no change in the 1% levy, the 85% benefit for medical services, or the entitlement of all Australians to free accommodation and treatment in public hospitals.

Some of the claims put forward by the medical profession have been rejected because of their substantial cost, or because they would have altered the basic nature of Medicare.

For example, the proposal for a 30% tax rebate of basic health insurance premiums would have cost $250 million, and been a socially unjust way of distributing taxpayers' funds. The proposal for a means test on public hospital treatment would destroy Medicare's basic principle that every Australian is entitled to treatment according to their medical needs.

The implementation of the package will commence in four weeks time, provided that the New South Wales public hospital system has returned to normal levels of service. However, the remuneration elements of this package will be available immediately to those doctors still working or who return to work in New South Wales public hospitals.

Implementation of the package is subject to the New South Wales Branch of the AMA proceeding to arbitration on the level of the hourly sessional rate.

We make it quite clear that neither the Commonwealth nor New South Wales Governments are prepared to tolerate further hardship and distress to New South Wales public hospital patients.

The Governments' package is a reasonable basis for the settlement of the dispute.

The main points of the package cover:-

- significant increases in remuneration for doctors treating Medicare patients in public hospitals, and the option of fee for service payment to doctors working in major country and metropolitan district hospitals.

- Repeal of provisions of Section 17 of the Health Insurance Act.

- A $150 million injection of Commonwealth capital funding to upgrade equipment and facilities in Australian teaching hospitals over three years.

- Privately insured patients entering public hospitals to be automatically classified as 'private patients' unless they opt to be treated as Medicare patients.

- Replacement of the basic hospital table with a comprehensive hospital table which will cover hospital bed day charges; benefits for the implantation of surgical devices; and the difference between the Medicare benefit and the schedule fee for medical services provided in hospitals.
  An expansion of the range of private insurance tables that can be offered. This will allow private funds to offer lower cost cover for those who undertake to meet the first part of the cost of hospitalisation.

- Support for the principle of community rating by providing that all insurers who offer health insurance must do so under the conditions of the National Health Act.

- While maintaining the Commonwealth subsidy to private hospitals, the Commonwealth intends to deregulate its controls over the approval and categorisation of private hospitals. These functions are more appropriately administered by the States and the private health funds. Until this deregulation is completed, the AMA will be fully consulted on the principles of all Commonwealth controls over private hospitals.

Details of the package are attached.

It is quite clear that the additional remuneration contained in 190

the package compensates doctors for any reduction in their incomes due to the reduced number of private patients under Medicare.

In the interests of sick and injured patients in New South Wales, and to permit the implementation of this package, there must now be a prompt return to normal services in New South Wales public hospitals.

The Commonwealth Government is already providing $140 million per annum to subsidise private hospitals, and a further $260 million to keep the cost of private treatment in public hospitals at affordable levels. In addition, $2,220 million in Medicare benefits will be paid this year toward the cost of all private medical services provided by Austrlia's 30,000 doctors, both inside and outside of hospitals.

These funds are being contributed by the taxpayers of Australia to underwrite private medical practice in this country.

In these circumstances, our Governments will not stand by and see most of the population of New South Wales being denied medical services in public hospitals. If the dispute is not resolved, and normal public hospital services are not restored, both Governments will be obliged to review their position.

DOCTORS DISPUTE IN NEW SOUTH WALES

SETTLEMENT PACKAGE

The implementation of this package will commence in four weeks time provided that the New South Wales public hospital system has returned to normal levels of service. However, the remuneration elements of this package will be available immediately to those doctors still working or who return to work in New South Wales public hospitals.

The implementation of this package is subject to the New South Wales Branch of the AMA proceeding to arbitration on the level of the hourly sessional rate.

(1) The Commonwealth is prepared to meet the additional costs flowing from the introduction of fee for service remuneration for the treatment of public patients, in all but teaching hospitals. The fee for service remuneration is to be offered at the following rates:

85% of the Schedule Fee, where there are no resident medical officers or registrars at a hospital.

70% of the Schedule Fee, where a hospital has resident medical officers, but not registrars.

60% of the Schedule Fee, where there are registrars in the same discipline at the hospital.

Each of the 3 broad disciplines of medical staff (surgical, medical and anaesthetics) will be able to choose a remuneration method between fee for service and sessions, within each of the major country and metropolitan district hospitals.

The New South Wales Government has already offered a $12.50 interim increase in the sessional rate to $62.50 an hour. Any further increase in the level of the sessional fee can only be made through the established arbitration procedures. However, the New South Wales Government has a considerable level of funds available, to provide an increased number of sessions for medical staff in recognition of the increased number of public patients.

The total package provides the New South Wales Government with an additional $16 million per annum from the Commonwealth for paying doctors, on top of the estimated $27 million per annum provided for doctor remuneration under the Medicare Agreement.

This further $16 million is made up of:

a) $10 million toward the cost of remunerating honorary staff for their treatment of public patients; and the extension of fee for service remuneration to country hospitals without resident medical staff. This figure will be matched by New South Wales.

b) $6 million for the further extension of fee for service remuneration, to all but the teaching hospitals.

The additional State and Commonwealth funding brings the total amount of remuneration available for the treatment of public patients in New South Wales to $105 million per annum. This is a $150% increase on the $32.9 million paid for the treatment of public patients in 1982/83. Currently, less than half the amount available has been taken up by doctors in New South Wales due to the dispute.

(2) The Commonwealth will repeal all of the amendments to Section 17 of the Health Insurance Act that were introduced in the Medicare legislation. The Government is prepared to take on trust the medical profession's assurance of a high level of Schedule Fee observance in public hospitals, and abandon its current regulatory powers in this area. However, the Commonwealth will closely monitor the incidence of charging above the Schedule Fee in public hospitals, especially in light of the increased insurance coverage for medical services in hospitals.

(3) A $150 M capital renewal program over 3 years, to enable upgrading of facilities and equipment in Australian teaching hospitals. This capital program would be funded solely by the Federal Government, which will be encouraging the State Governments to examine their recurrent funding in the teaching hospital area.

(4) The automatic classification of privately insured patients as private patients in public hospitals unless they specifically opt to be Medicare patients.

(5) <u>PRIVATE INSURANCE ARRANGEMENTS</u>

a) Introduction of a comprehensive hospital table to replace the existing basic table. The comprehensive table will cover:

Accommodation charges in public and private hospitals as at present

The difference between the Medicare Benefit and the Schedule Fee for private medical services in hospitals.

Benefits for defined surgically implanted items such as those for joint replacement, cardiac pacemakers, etc. This will greatly assist in reducing hospital waiting lists for patients requiring procedures involving these items (eg hip replacements).

b) Registered health funds will be able to offer front-end deductible tables as an option to their basic table. This will be attractive to those in the community who undertake to meet the first part of the costs of illness, and will result in considerably lower premiums.

c) The general 2 month waiting periods for hospital benefits to new fund members will be waived for a period of 3 months. The current exclusion from benefits for pre existing illnesses will be reduced from 2 years to 1 year. Medibank Private will totally waive the pre-existing ailment rule for 3 months to any of their former contributors who wish to rejoin. Other health funds will be encouraged to do the same.

d) A new "single day" hospital benefit for patients not required to stay overnight in hospitals, will assist in reducing and stabilising contribution rates.

(6) Commercial insurers now offering health insurance on a "risk rated" basis will be required to operate under the same conditions as registered health funds. This measure will reinforce community rating and ensure that the sick and elderly who have contributed to health funds for many years will continue to be covered, and not be discriminated against by having to pay higher premiums.

(7) The Commonwealth currently provides approximately $140 million per annum in subsidies to private hospitals. The Commonwealth is also involved in the approval of additional private hospital beds, and private hospital categorisation which governs how the subsidy is allocated. The Commonwealth intends to continue its financial subsidy to private hospitals, but believes that any regulatory controls would be more appropriately administered by the States and the private health funds. Detailed negotiations are to be undertaken to achieve the deregulation of private hospitals at the Commonwealth level.

Until the transfer of Commonwealth private hospital controls to the States and private health funds is completed, the AMA will be fully consulted on all principles and guidelines covering approval of private hospital beds and their categorisation.

## MOVEMENTS IN HOSPITAL MEDICAL STAFF SPECIALISTS' SALARIES, MARCH 1977 TO AUGUST, 1992

| Auth. Made Effective | SWC 31.3.77 | SWC 24.5.77 | SWC 22.8.77 | SWC 12.12.77 | SWC 28.2.78 | Awd.I.C. Kelleher 14.7.78 31.5.78 | SWC 7.6.78 | SWC 12.12.78 | SWC 27.6.79 | SWC 4.1.80 |
|---|---|---|---|---|---|---|---|---|---|---|
| 1st year Allow. | 23284 | 23482 | 23952 | 24311 | 24444 | 26400 | 26743 | 27813 | 28703 | 29995 |
| Total Per Week | 446.24 | 450.03 | 459.04 | 465.92 | 468.47 | 505.95 | 512.53 | 533.03 | 550.09 | 574.85 |
| p.h.(38hrs.) | 11.74 | 11.84 | 12.08 | 12.26 | 12.33 | 13.31 | 13.49 | 14.03 | 14.48 | 15.13 |
| 2nd year Allow. | 24704 | 24902 | 25400 | 25781 | 25914 | 27987 | 28351 | 29484 | 30429 | 31798 |
| Total Per Week | 473.45 | 477.25 | 486.79 | 494.09 | 496.64 | 536.37 | 543.35 | 565.06 | 583.17 | 609.41 |
| p.h.(38hrs.) | 12.46 | 12.56 | 12.81 | 13.00 | 13.07 | 14.12 | 14.30 | 14.87 | 15.35 | 16.04 |
| 3rd year Allow. | 26124 | 26322 | 26848 | 27251 | 27384 | 29575 | 29959 | 31157 | 32154 | 33601 |
| Total Per Week | 500.67 | 504.46 | 514.54 | 522.26 | 524.81 | 566.80 | 574.16 | 597.12 | 616.31 | 643.96 |
| p.h.(38hrs.) | 13.18 | 13.28 | 13.54 | 13.74 | 13.81 | 14.92 | 15.11 | 15.71 | 16.22 | 16.95 |
| 4th year Allow. | 27546 | 27744 | 28299 | 28723 | 28856 | 31164 | 31569 | 32382 | 33833 | 35355 |
| Total Per Week | 527.92 | 531.71 | 542.35 | 550.48 | 553.02 | 597.26 | 605.02 | 620.60 | 648.41 | 677.58 |
| p.h.(38hrs.) | 13.89 | 13.99 | 14.27 | 14.49 | 14.55 | 15.72 | 15.92 | 16.33 | 17.06 | 17.83 |
| 5th year Allow. | 28965 | 29163 | 29746 | 30192 | 30325 | 32751 | 33177 | 34504 | 35605 | 37207 |
| Total Per Week | 555.11 | 558.91 | 570.08 | 578.63 | 581.18 | 627.67 | 635.84 | 661.27 | 682.37 | 713.07 |
| p.h.(38hrs.) | 14.61 | 14.71 | 15.00 | 15.23 | 15.29 | 16.52 | 16.73 | 17.40 | 17.96 | 18.77 |
| Sen.Spec. Allow. | 31805 | 32003 | 32643 | 33133 | 33276 | 35927 | 36394 | 37850 | 39061 | 40819 |
| Total Per Week | 609.54 | 613.34 | 625.60 | 634.99 | 637.73 | 688.54 | 697.49 | 725.39 | 748.60 | 782.29 |
| p.h.(38hrs.) | 16.04 | 16.14 | 16.46 | 16.71 | 16.78 | 18.12 | 18.36 | 19.09 | 19.70 | 20.59 |

## MOVEMENTS IN HOSPITAL MEDICAL STAFF SPECIALISTS' SALARIES, MARCH 1977 TO AUGUST, 1992

| Auth.<br>Made Effective | SWC<br>9.1.81 | SWC<br>7.5.81 | VARIATION MIN. REF<br>1.1.82 | AWARD I.C. GLYNN 8.12.82<br>1.7.82 | AWARD I.C. 18.3.83<br>1.11.82 | SWC<br>6.10.83 | SWC<br>6.4.84 | DET (intro of 20% on call)<br>1.1.85 | SWC 2.6%<br>6.4.85 |
|---|---|---|---|---|---|---|---|---|---|
| 1st year | 32411 | 33578 | 35022 | 38524 | 40065 | 41788 | 43501 | 43501 | 44632 |
| Allowance | | | | | | | | 8700 | 8926 |
| Total | | | | | | | | 52201 | 53558 |
| Per Week | 621.16 | 643.52 | 671.20 | 738.31 | 767.84 | 800.87 | 833.69 | 1000.43 | 1026.44 |
| p.h.(38hrs) | 16.35 | 16.93 | 17.66 | 19.43 | 20.21 | 21.08 | 21.94 | 26.33 | 27.01 |
| 2nd year | 34360 | 35597 | 37128 | 40841 | 42475 | 44301 | 46117 | 46117 | 47316 |
| Allowance | | | | | | | | 9223 | 9463 |
| Total | | | | | | | | 55340 | 56779 |
| Per Week | 658.51 | 682.21 | 711.56 | 782.70 | 814.03 | 849.03 | 883.83 | 1060.59 | 1088.17 |
| p.h.(38hrs) | 17.33 | 17.95 | 18.73 | 20.60 | 21.42 | 22.34 | 23.26 | 27.91 | 28.64 |
| 3rd year | 36307 | 37614 | 39231 | 43154 | 44880 | 46810 | 48729 | 48729 | 49996 |
| Allowance | | | | | | | | 9746 | 9999 |
| Total | | | | | | | | 58475 | 59995 |
| Per Week | 695.82 | 720.87 | 751.86 | 827.04 | 860.12 | 897.11 | 933.89 | 1120.67 | 1149.80 |
| p.h.(38hrs) | 18.31 | 18.97 | 19.79 | 21.76 | 22.63 | 23.61 | 24.58 | 29.49 | 30.26 |
| 4th year | 38260 | 39637 | 41341 | 45475 | 47294 | 49328 | 51350 | 51350 | 52685 |
| Allowance | | | | | | | | 10270 | 10537 |
| Total | | | | | | | | 61620 | 63222 |
| Per Week | 733.25 | 759.64 | 792.30 | 871.53 | 906.39 | 945.37 | 984.12 | 1180.94 | 1211.65 |
| p.h.(38hrs) | 19.30 | 19.99 | 20.85 | 22.94 | 23.85 | 24.88 | 25.90 | 31.08 | 31.89 |
| 5th year | 40208 | 41655 | 43446 | 47791 | 49703 | 51840 | 53965 | 53965 | 55368 |
| Allowance | | | | | | | | 10793 | 11074 |
| Total | | | | | | | | 64758 | 66442 |
| Per Week | 770.58 | 798.32 | 832.64 | 915.91 | 952.56 | 993.51 | 1034.24 | 1241.08 | 1273.36 |
| p.h.(38hrs) | 20.28 | 21.01 | 21.91 | 24.10 | 25.07 | 26.15 | 27.22 | 32.66 | 33.51 |
| Sen.Spec. | 44107 | 45695 | 47660 | 52426 | 54523 | 56867 | 59199 | 59199 | 60738 |
| Allowance | | | | | | | | 11840 | 12148 |
| Total | | | | | | | | 71039 | 72886 |
| Per Week | 845.31 | 875.74 | 913.40 | 1004.74 | 1044.93 | 1089.85 | 1134.55 | 1361.46 | 1396.86 |
| p.h.(38hrs) | 22.25 | 23.05 | 24.04 | 26.44 | 27.50 | 28.68 | 29.86 | 35.83 | 36.76 |

## MOVEMENTS IN HOSPITAL MEDICAL STAFF SPECIALISTS' SALARIES, MARCH 1977 TO AUGUST, 1992

| Auth.<br><br>Made Effective | SWC<br>3.8%<br><br>4.11.85 | SWC<br>2.3%<br><br>1.7.86 | SWC<br>$10<br><br>10.3.87 | SWC<br>$6<br><br>5.2.88 | SWC<br>4%2nd Tier<br><br>22.3.88 | SWC<br>3%<br><br>16.9.88 | SWC<br>$10<br><br>9.3.89 | Award I.C<br>15%<br><br>12.12.89 | SWC<br>3%<br><br>27.6.90 | SWC<br>2.5%<br><br>17.9.91 |
|---|---|---|---|---|---|---|---|---|---|---|
| 1st year | 46328 | 47394 | 47915 | 48228 | 50157 | 51662 | 52184 | 61577 | 63424 | 65010 |
| Allow. | 9266 | 9479 | 9583 | 9646 | 10031 | 10332 | 10437 | 10750 | 11036 | 11312 |
| Total | 55594 | 56873 | 57498 | 57874 | 60188 | 61994 | 62621 | 72327 | 74460 | 76322 |
| Per Week | 1065.46 | 1089.97 | 1101.95 | 1109.15 | 1153.50 | 1188.11 | 1200.13 | 1386.14 | 1427.02 | 1462.70 |
| p.h.(38hrs.) | 28.04 | 28.68 | 29.00 | 29.19 | 30.36 | 31.27 | 31.58 | 36.48 | 37.55 | 38.49 |
| 2nd year | 49114 | 50244 | 50765 | 51078 | 53121 | 54715 | 55237 | 65180 | 67135 | 68813 |
| Allow. | 9823 | 10049 | 10153 | 10216 | 10624 | 10943 | 11047 | 11379 | 11681 | 11973 |
| Total | 58937 | 60293 | 60918 | 61294 | 63754 | 65658 | 66284 | 76559 | 78816 | 80786 |
| Per Week | 1129.53 | 1155.51 | 1167.49 | 1174.70 | 1221.84 | 1258.33 | 1270.33 | 1467.25 | 1510.51 | 1548.26 |
| p.h.(38hrs.) | 29.72 | 30.41 | 30.72 | 30.91 | 32.15 | 33.11 | 33.43 | 38.61 | 39.75 | 40.74 |
| 3rd year | 51896 | 53090 | 53611 | 53924 | 56081 | 57763 | 58285 | 68776 | 70839 | 72610 |
| Allow. | 10379 | 10618 | 10722 | 10785 | 11216 | 11553 | 11657 | 12007 | 12326 | 12634 |
| Total | 62275 | 63708 | 64333 | 64709 | 67297 | 69316 | 69942 | 80783 | 83165 | 85244 |
| Per Week | 1193.50 | 1220.96 | 1232.94 | 1240.15 | 1289.74 | 1328.44 | 1340.44 | 1548.20 | 1593.85 | 1633.69 |
| p.h.(38hrs.) | 31.41 | 32.13 | 32.45 | 32.64 | 33.94 | 34.96 | 35.27 | 40.74 | 41.94 | 42.99 |
| 4th year | 54687 | 55945 | 56466 | 56779 | 59050 | 60822 | 61344 | 72386 | 74558 | 76422 |
| Allow. | 10937 | 11189 | 11293 | 11356 | 11810 | 12164 | 12269 | 12637 | 12973 | 13297 |
| Total | 65624 | 67134 | 67759 | 68135 | 70860 | 72986 | 73613 | 85023 | 87531 | 89719 |
| Per Week | 1257.68 | 1286.62 | 1298.60 | 1305.80 | 1358.03 | 1398.77 | 1410.79 | 1629.46 | 1677.53 | 1719.46 |
| p.h.(38hrs.) | 33.10 | 33.86 | 34.17 | 34.36 | 35.74 | 36.81 | 37.13 | 42.88 | 44.15 | 45.24 |
| 5th year | 57472 | 58794 | 59315 | 59628 | 62013 | 63873 | 64395 | 75986 | 78266 | 80223 |
| Allow. | 11494 | 11759 | 11863 | 11926 | 12403 | 12775 | 12879 | 13264 | 13618 | 13959 |
| Total | 68966 | 70553 | 71178 | 71154 | 74416 | 76648 | 77274 | 89250 | 91884 | 94182 |
| Per Week | 1321.73 | 1352.15 | 1364.12 | 1371.33 | 1426.18 | 1468.96 | 1480.95 | 1710.47 | 1760.95 | 1804.99 |
| p.h.(38hrs.) | 34.78 | 35.58 | 35.90 | 36.09 | 37.53 | 38.66 | 38.97 | 45.01 | 46.34 | 47.49 |
| Sen.Spec. | 63046 | 64496 | 65017 | 65330 | 67943 | 69981 | 70503 | 83194 | 85690 | 87832 |
| Allow. | 12609 | 12899 | 13003 | 13066 | 13589 | 13996 | 14101 | 14523 | 14910 | 15283 |
| Total | 75655 | 77395 | 78020 | 78396 | 81532 | 83977 | 84604 | 97717 | 100600 | 103115 |
| Per Week | 1449.92 | 1483.27 | 1495.25 | 1502.46 | 1562.56 | 1609.42 | 1621.43 | 1872.74 | 1927.99 | 1976.19 |
| p.h.(38hrs.) | 38.16 | 39.03 | 39.35 | 39.54 | 41.12 | 42.35 | 42.67 | 49.28 | 50.74 | 52.00 |

## VMO RATES FROM JULY, 1976 TO AUGUST, 1992

| AUTHORITY | ROGERS | MACKEN | MACKEN | SWC 4.2% | SWC 3.7% | MACKEN | MACKEN | MACKEN | SWC 4.1% | INT/INC $12.50 | SWC 2.6% | SWC 3.8% | MACKEN | SWC 2.3% | SWC $10 | SWC $6 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| MADE | 8.9.76 | 8.12.78 | 29.2.80 | | | 18.9.81 | 15.12.82 | 14.12.83 | | | | | 19.12.85 | | | |
| EFFECTIVE DATE | 8.9.76 | 1.1.79 | 1.3.80 | 14.7.80 | 9.1.81 | 1.10.81 | 15.12.82 | 14.12.83 | 6.4.84 | 1.7.84 | 6.4.85 | 4.11.85 | 1.1.86 | 1.7.86 | 10.3.87 | 5.2.88 |
| | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ | $ |
| GP LESS THAN 5 YEARS | 9.58 | 10.60 | 11.89 | 12.39 | 12.85 | 22.00 | 25.00 | 27.60 | 28.70 | 41.20 | 42.30 | 43.90 | 74.00 | 75.00 | 80.00 | 83.00 |
| GP 5 TO 10 YEARS | 10.76 | 11.90 | 13.34 | 13.90 | 14.41 | 24.50 | 28.00 | 31.00 | 32.30 | 44.80 | 46.00 | 47.70 | 80.00 | 81.50 | 87.50 | 91.00 |
| GP 10 + YEARS OR FRACGP | 12.56 | 14.90 | 16.72 | 17.42 | 18.06 | 30.00 | 34.00 | 37.60 | 39.10 | 51.60 | 52.90 | 54.90 | 95.00 | 96.50 | 104.00 | 108.50 |
| SPECIALIST 1st | 11.97 | 14.20 | 15.93 | 16.60 | 17.21 | | | | | | | | | | | |
| (Five 2nd | 12.56 | 14.90 | 16.72 | 17.42 | 18.06 | | | | | | | | | | | |
| year 3rd | 13.19 | 15.60 | 17.49 | 18.22 | 18.89 | | | | | | | | | | | |
| scale) 4th | 13.85 | 16.40 | 18.39 | 19.16 | 19.87 | | | | | | | | | | | |
| 5th | 14.54 | 17.20 | 19.29 | 20.10 | 20.84 | | | | | | | | | | | |
| SPECIALIST | | | | | | 35.00 | 40.00 | 44.20 | 46.00 | 58.50 | 60.00 | 62.30 | 112.00 | 114.00 | 122.50 | 127.50 |
| SENIOR SPECIALIST | 15.99 | 18.90 | 21.19 | 22.08 | 22.90 | 38.00 | 43.50 | 48.10 | 50.10 | 62.60 | 64.20 | 66.60 | 119.00 | 121.00 | 130.00 | 135.50 |
| | (1) | (2) | | | | (3) + (4) | | | | (5) | | | (6) | | (7) | (8) |

(1) Rate does not include 5¼% superannuation.
(2) Rate does not include 7½ superannuation or BPC's ($2.00/1.50)
(3) 5 year scale for Specialists replaced with single rate.
(4) Rate includes 49.3% loading, ie. 7½% superannuation, 5% split session, 36.8% leave and BPC's.
(5) Interim increase of $12.50 per hour.
(6) Effective date for rate was extended by government retrospective to 1.12.84; BPC's increased to $25.00/20.00 - not retrospective.
(7) SWC increase of $10 per week became 9.49% (Court of Appeal interpretation).
(8) SWC increase of $6 per week became 5.2% (Court of Appeal interpretation).

## NORMAL HOURLY RATE BY REFERENCE TO CURRENT STAFF SPECIALISTS RATE

Exercise 3: To calculate a normal hourly rate for VMOs by reference to current staff specialists remuneration package (including salary, allowances and the value of conference travel benefits, but not including special allowance).

| SCHEME A | | Source |
|---|---|---|
| Senior specialists, 1992 package | $122,768.00 p.a. | DOH Circulars 90/39; 91/103 |
| Per hour for a full year (52.178 weeks p.a. 38 hours p.w.) | $ 61.92 (A) | |
| Plus associated time (50% of (A)) | $ 92.88 | Exh BBB |
| Plus part – time loading (10% of (A)) | $ 99.07 (B) | Exh BBB |
| Loading for superannuation etc (49.3% of (B)) | $ 147.91 | |
| % increase on current rate, $110.50 | 33.85% | |

| SCHEME B | | Source |
|---|---|---|
| Senior specialists, 1992 package | $160,561.00 p.a. | DOH Circular 91/103 |
| Per hour for a full year (52.178 weeks p.a. 38 hours p.w.) | $ 80.98 (A) | |
| Plus associated time (50% of (A)) | $ 121.47 | Exh BBB |
| Plus part – time loading (10% of (A)) | $ 129.56 (B) | Exh BBB |
| Loading for superannuation etc (49.3% of (B)) | $ 193.43 | |
| % increase on current rate, $110.50 | 75.05% | |

| SCHEME C | | Source |
|---|---|---|
| Senior specialists, 1992 package | $186,160.00 p.a. | DOH Circular 91/103 |
| Per hour for a full year (52.178 weeks p.a. 38 hours p.w.) | $ 93.89 (A) | |
| Plus associated time (50% of (A)) | $ 140.84 | Exh BBB |
| Plus part – time loading (10% of (A)) | $ 150.22 (B) | Exh BBB |
| Loading for superannuation etc (49.3% of (B)) | $ 224.28 | |
| % increase on current rate, $110.50 | 102.97% | |

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**SCHEME D SALARIED SPECIALIST**

The present arrangements for Scheme D Salaried Specialists are set out in Health Department Circular 90/39 (Exhibit 15) at Clause 3.4.

In summary the following conditions apply: -

1. Employment to be 50 per cent of the full time commitment with entitlement to pro rata leave provisions.

2. No private practice to be undertaken during the time for which a salary is payable.

3. Appointment as a Visiting Medical Practitioner.

4. Private practice within the hospital to which the appointment relates must be on the same basis as a Visiting Medical Practitioner.

5. The specialist must maintain a private practice outside the hospital in a similar manner to a Visiting Medical Practitioner.

6. The specialist cannot receive sessional payment from the hospital where an appointment is held as a scheme D salaried specialist.

7. The specialist may hold visiting medical practitioner appointments at other hospitals and may receive sessional payment from these hospitals.

8. The present rates payable (which includes 50% of the 17.4 per cent special allowance) are as follows: -

| | p.a. | p.h (19 p.w.)* |
|---|---|---|
| Specialist year 1 | 38,161 | 52.85 |
| Specialist year 2 | 40,393 | 55.95 |
| Specialist year 3 | 42,622 | 59.03 |
| Specialist year 4 | 44,860 | 62.13 |
| Specialist year 5 | 47,091 | 65.22 |
| Specialist year 6 | 51,558 | 71.41 |

9. Leave entitlements (at half time rates)

| | |
|---|---|
| Annual Leave | 5 weeks |
| Sick Leave | 2 weeks (cumulative) |
| Long service leave | 5 months after 10 years service and 1 month each 2 years thereafter |
| Conference leave | 1 week per annum |
| Study leave | 3 months after each 5 years service |

*Assuming 38 weeks worked per annum (minimum as per Annexure C to Exhibit AAAA)

10. The scheme D specialist does not receive any expense allowance or fares in respect of stufy or conference lave or any salary supplement in lieu of private practice.

11. The scheme D is salaried specialist is entitled to participate in the superannuation provisions as a part time employee.

VICTORIA (10 August 1992) (wef 8 May 1992)

Determining Body: Hospitals Remuneration Tribunal

Regarded as Employees: Yes

Relationship to Salaried Specialist Rates: Standard Sessional Rate = 1/10 weekly rate for equivalent classification of Salaried Specialist + 37.5% (to account for employer superannuation, travel time, continuious duty allowance & background practice cost)
Hourly Rate = 1/4 Standard Sessional Rate.

Total Hourly Rate: Senior Specialist $51.00
Senior Specialist i/c Dept. $53.10

Background Practice Cost: Included in 37.5%

Medicare Effect: Nil

Superannuation: Included in 37.5%.

On Call: 1800 - 0800 M-Sun ) "on call period"
0800 - 1800 Sat, Sun & PH )
* "exclusive on call": 1 Standard session/ "on call period"
* "non exclusive": 1/4 Standard session/ "on call period"
i.e "exclusive M-S" $51.00 or $53.10/hr
"non exclusive M-S" $ 12.75 or $13.30/hr

Call Back:
* when rostered on call: 1hr travelling time @ hourly rate + 125% hourly rate weekdays and 150% Sat, Sun & PH.
* when not rostered on call: fee for service as defined in the Vic "fee for service" award derived from the medical benefits schedule.
* when called for "urgent or unusual cases": fee for service as above.

Public Holidays: if coinciding with rostered period: paid

Annual Leave: 4 weeks paid leave - cumulative.

Sick Leave: 5.6 weeks paid leave - cumulative, if infectious disease or work related injury up to 39 weeks paid leave.

Long service Leave: 6 months paid leave after 15 years + 2 months for each succeeding 5 yrs.

Conference Leave: Up to a maximum of 2 weeks paid leave each year.

Sabbatical Leave: Up to a maximum of 26 weeks paid leave after each 6 years service.

Compassionate Leave: 2 days paid

"Up Front" Hours: yes

Paid Hours in excess: At the hourly rate for each hour or part thereof.

SOUTH AUSTRALIA (10 August 1992) (wef 1 July 1992)

Determining Body: Unregistered agreement between SASMOA & SA Health Commission. Limited to Teaching Hospitals & Teaching Community Health Centres.

Regarded as Employees: Yes

Relationship to Salaried Specialist Rates: Not identified - "all in rate" compensates for recreation, conference & sick leave & other conditions of employment.

Total Hourly Rate: Senior specialist $95.65
+$2327.00/pa if head of unit

Background Practice Cost: Not identified.

Medicare Effect: Nil

Superannuation: May participate in the super fund of the SA Health Commission.

| | | | |
|---|---|---|---|
| On Call: | Week nights | $22.30 | |
| | Sat Sun & PH | $33.50 | (or any other day the Officer would normally be off duty). |

| | | | |
|---|---|---|---|
| Call Back: | 0800-1800 M-F | 115% sessional hr rate | $88.03 |
| | Other hours | 150% sessional hr rate | $114.82 |
| | PH | 250% sessional hr rate | $191.38 |

(Hourly rate =$76.55) (Minimum 3 hrs)

Public Holidays: paid

Annual Leave: 5 Weeks without pay.

Sick Leave: Unpaid.

Long service Leave: In accordance with Government Management & Employment Act.

Conference Leave: Included in total rate.

Sabbatical Leave: nil.

Compassionate Leave: nil

Maternity Leave: nil

"Up Front" Hours: yes (up to 18hrs/pw) can be varied by mutual agreement.
minimum 2 hrs/pw (by agreement)

Paid Hours in excess: no

Armed Forces Leave: 14 days camp paid
+ 14 days additional paid.

QUEENSLAND (10 August 1992) (wef 1 July 1992)

Determining Body: Section 12.4 Agreement
Industrial Arbitration Act
(Private Agreement)

Regarded as Employees: Yes

Relationship to Salaried Specialist Rates: Not direct

Total Hourly Rate: Senior Specialist
Base rate $63.86
Loaded rate $79.18 (base + 24%)

Background Practice Cost: Included in 24%

Medicare Effect: Nil

Superannuation: Included in 24%

On Call: On call session 1800 - 0800 daily
0800 - 1800 Sat, Sun & PH
paid @ 30% base rate / on call session ($19.16)

Call Back: 150% base hourly rate / hr (minimum 2 hrs for first call back in 24 hr period)

Public Holidays: paid

Annual Leave: Departmental employees - 4 weeks paid leave
Other employees - 5 weeks paid leave cumulative 2 yrs
17.5% loading paid for 4 weeks.

Sick Leave: 2 weeks - cumulative

Long service Leave: Departmental employees - according to Public Service Management & Employment Act.
Other employees - according to Hospital Officers & Employees Long Service Leave Regulations 1974.

Conference Leave: Departmental employees - according to approved arrangements.
Other employees - 3 weeks/yr cumulative to 12 weeks.

Sabbatical Leave: nil

Compassionate Leave: nil

"Up Front" Hours: yes

Paid Hours in excess: with prior approval of Medical Superintendent.

WESTERN AUSTRALIA (12 August 1992) (wef 12 August 1992)

Determining Body: Public Hospitals Medical Practitioners Award.

Regarded as Employees: Yes

Relationship to Salaried Specialist Rates: Not identified

Total Hourly Rate: Senior Specialist

| | |
|---|---|
| Base rate | $64.65 |
| Total rate | $80.14 |

Background Practice Cost: 14% of Base rate = $9.04/hr

Medicare Effect: NSW Macken decision taken into account when fixing rate so to that extent Medicare effect included.

Superannuation: 10% of Base rate = $6.46/hr

On Call: $8.28/hr (same rate as salaried specialists)

Call Back: $67.62/hr for first 2 hrs then $67.62/hr. for third hr then $90.16/hr.

Public Holidays: paid

Annual Leave: 4 weeks paid.

Sick Leave: 2 weeks paid.

Long service Leave: Paid.

Conference Leave: Special leave may be granted.

Sabbatical Leave: nil

Compassionate Leave: Short leave not exceeding two consecutive working days (up to 3 days/yr) may be granted.

"Up Front" Hours: yes

Paid Hours in excess: no

TASMANIA (10 August 1992) (wef 1 July 1992)

Determining Body: Private Arbitration pursuant to section 61 of the Imdustrial Relations Act 1984. (Lodged jointly by the Minister Administering the Tasmanian State Service Act 1984 and the Tasmanian Branch, Australian Medical Association)

Regarded as Employees: Yes

Relationship to Salaried Specialist Rates: Not direct

Total "All Up" Hourly Rate: Class 111 Specialist

$90.00

Background Practice Cost: Included in "All Up" rate

Medicare Effect: Nil

Superannuation: Included in "All Up" rate

Superannuation guarantee: 3% x 70% "All Up" rate

On Call: Week days $2.52/hr
WE & PH $3.22/hr

Call Back: $90.00/hr

Public Holidays: paid

Annual Leave: 4 Weeks paid (+17.5%)

Sick Leave: 6 weeks/pa (number of sessional hrs worked in a six week period per year)

Long service Leave: In accordance with State Employees provisions.

Conference Leave: 2 weeks/pa.

Sabbatical Leave: 13 weeks after 5 years paid.

Compassionate Leave: nil

Maternity Leave: unpaid

"Up Front" Hours: yes

Paid Hours in excess: "All Up" rate

Preference of employment: Members of AMA (Tas)