INDUSTRIAL RELATIONS COMISSION OF NEW SOUTH WALES
BEFORE THE FULL COMISSION
CORAM: FISHER, P.

PETERSON J.

McKENNA CC.
FRIDAY, 24 DECEMBER 1993.
Matter No. IRC 1460 of 1993
AUSTRALIAN MEDICAL ASSOCIATION, NEW SOUTH WALES BRANCH, and

THE MINISTER FOR HEALTH.

Appeal by the Australian medical Association, New South Wales

Branch, against a Determination of Mr. Justice Hungerford made

on 25 March 1993 pursuant to the Public Hospitals Act, 1929.
JUDGMENT OF THE COMMISSION
The Public Hospitals Act 1929 provides in Part 5C, Visiting

Medical officers, for the establishment of rates of

remuneration for Visiting Medical Officers ("VMOs") by a

member of the Industrial Relations Commission of New South

Wales appointed by the Attorney General for the purpose

(s.29L). Part 59 also provides for an appeal from a

determination made by the arbitrator to the Full Commission

(s.29QA) 'This judgment-concerns an appeal by the Australian

Medical Association, New South Wales branch, ("AMA") from a

determination made on 25 March 1993 by Hungerford J. who on 15

February 1991 had been appointed to arbitrate upon an

application by the AMA for a new determination.
The AMA was represented on the appeal by Mr. H.D.

Sperling, Q.C., and Mr. W.R. Haylen, Q.C.; the Minister by Mr.

R.C. Kenzie , Q.C., with him Mr. M.J. Kimber of counsel.

Visiting Medical Officers are doctors in private practice who

are engaged -to provide professional services to patients in public hospitals under either sessional contracts or fee-for-service contracts. There are more than 5,000 VMOs contracted to the N.S.W. public hospital system under such arrangements. Of the 5,000 approximately 3,500 are on sessional contracts, the balance under fee-for-service arrangements.
in addition to VMOs, public hospitals will have resident medical officers and, relevantly for the purposes of the determination of VMOs' rates, in a number of hospitals, employed "staff specialists" of whom there are approximately 1,000 in number. Apart from the different nature of their contractual relationship with hospitals, staff specialists generally perform the same work, and are of equal capacity and standing, as their VMO counterparts. Staff specialists work under four Schemes, A, B, C & D. Scheme A provides an allowance of 20 per cent of the award salary in substitution for a right of private practice. Those in Schemes B and C receive a full-time salary but have certain rights of private practice under a hospital-regulated scheme. Scheme D staff specialists 'work, in effect, 'half-time on salary and otherwise operate as' private practitioners in every sense, but outside the hospital in which they act as a half-time staff specialist.

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The Arbitration

The determination sought from Hungerford J. as arbitrator related principally to the rates of remuneration, Allowances

and conditons under sessional contracts.
The matter was mentioned on 6 March, 20 May and 27 June 1991 in order to facilitate the preparation for hearing. on 9 July 1991 the solicitors for the AMA applied to have his Honour disqualify himself from hearing the matter on grounds which were supported by affidavit. After hearing the parties, namely the AMA and the Minister for Health ("the Minister"), on the issue of disqualification his Honour by judgment given on 2 August 1991 declined to step down.
Whilst we have reviewed the authorities and submissions advanced by the parties in this respect, we are of the view that the time has long since passed to seek to raise such issues in these appeal proceedings. If the AMA was minded to seek relief from his Honour's decision not to disqualify himself, it- was at liberty to pursue -such options that were available a relevant point in time, namely, when his Honour delivered a fully-reasoned- interlocutory decision concerning the disqualification application. We do not Consider that the AMA's submission concerning a purported unlikelihood of success in seeking relief at a more relevant time gives good or sufficient reason why the matter should now be held to support the appeal. In any event, for reasons which are expounded later in this decision concerning the nature of the

proceedings on appeal, we are of the view that it is not only inappropriate but unnecessary to now consider the disqualification issue.
The matter then proceeded to become a very substantial

arbitration indeed. It involved 111 sitting days; 43 witnesses from the ranks of VMOs for the AMA; 17 witnesses for the Minister; 6 other witnesses including expert evidence going to matters of an accounting nature and the evidence of two staff specialists called by the Doctors' Reform Society, which intervened in the proceedings. The issues before Hungerford J. were complex and of considerable proportions. In the broad, the positions of the parties and the intervenor were:

The AMA sought substantial increases in ordinary hourly rates of remuneration, the background practice costs allowance, on-call and recall payments and an increase in the 7.5 per cent superannuation contribution of $12.50 per hour.

The AMA also sought a 50 per cent loading for associated time (time spent working in relation to public patients but outside sessional hours) and a part-time loading of 10 per cent.

The Minister sought positively to reduce existing ordinary hourly rates, background practice costs allowance and on-call and recall payments. Initially,

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the Minister did not seek to interfere with the 49.3 per cent loading in lieu of annual leave, public holidays, sick leave, conference and study leave, long service leave and superannuation. However, on the AMA -seeking an increase in the superannuation factor (7.5 per cent) of

the 49.3 per cent, the Minister reassessed his position and then sought to reduce the loading by eliminating the superannuation, public holidays, sick leave and long service leave elements and by reducing that for conference and study leave (a total reduction in the loading from 44.3 per cent to 13.04 per cent for these factors).

The Doctors' Reform Society sought a new determination which would maintain the hourly sessional rates at current levels.

In summary, Hungerford i's determination had the following effect in relation to these claims:

Ordinary hourly rate for senior specialist reduced from $110.50 to $98.50 [other classifications proportionately).

On-call allowance reduced from 10 per cent (equal to $11.05 per hour for senior specialist) to $7.00 per hour for all classifications.

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Call-back payment of normal hourly rate plus 10 per cent (8am - 6pm Monday to Friday) and plus 25 per cent at other times maintained.

Reduced the 49.3 per cent leave, split sessions and superannuation loading by:

reducing the leave loading from 36.8 per cent to 26.83 per cent;

deleting the 7.5 per cent superannuation loading;

leaving the split sessions loading of 5 per cent and

adding a 5 per cent extended sessions loading.
Reduced the hourly background practice costs allowance from $25.00 for specialists and $20.00 for general practitioners to $15.00 for surgeons and $9.00 for anaesthetists, physicians and general practitioners.
It is these issues which fall to be considered on appeal.
The determination also effected a number of alterations of substance and value which may-.be grouped under the heading of 'structural efficiency changes". " They were the subject matter of claims made by the Minister and were directed in large part to giving the public hospitals a greater degree of control of costs so that budgetary processes could be. undertaken properly and adhered to by reducing the possibility that costs overruns could occur outside the control of the hospitals. An illustration is the grant of what was termed an "up front

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hours" sessional contract, which was described by his Honour as "the key feature" in this respect. Other changes of this kind were the provision requiring the VMO to maintain and provide records of various particulars concerning- patients, services provided, call-back requests etc., and the acceptance that the VMO would have no automatic right to the renewal of a sessional contract on its expiry (five years being the usual term).
We cannot pass the summary of the parties, positions without recording the unfortunate state which was presented to his Honour to resolve in the arbitration. The facts concerning the ordinary hourly rate make the point. The existing rate for a senior specialist was $110.50 per hour; this was the

rate fixed in 1985 by Macken J., increased by State Wage Case increases up to February 1988. The AMA sought to increase this to $139.72 (using the AMA-preferred example of three exercises it presented) and up to $200.00 per hour on another approach; the Minister argued for a reduction to $48.63 per hour. On any view, this was an arbitration between extreme positions. -- No matter what view might be taken of the 1985 determination, which was at the heart of the arbitration, we consider the parties reflected an unreality of Approach which put his Honour in a virtually impossible position in attempting to find a just answer to the competing claims. On the one hand the AMA's claims, which were costed at $76-80 million in the first year, were likely to create the belief that it perceived the public hospital system as a milch cow, to be milked to the maximum; on the other hand the Minister's

claims on the matters in issue on the appeal seemed to adopt a policy, if not designed to, likely to introduce difficulty in the hospital system if successful.- In these circumstances, Hungerford J. effectively discounted the 1985 determination on the basis -that it was fundamentally flawed and, therefore, represented an inappropriate basis for the 1993 determination. Instead, he relied upon ordinary industrial principles and an analysis of economic consequences, as is now required by the legislation, and used an earlier determination upon which to reconstruct rates.

Given the high values of the increases granted in 1985, his Honour's view of them and the apparent paucity of ordinary industrial justification for increases of such magnitude, the process of reconstruction led inexorably to his Honour's assessment of rates at a level substantially below those enjoyed for the last eight years. we in due course come to find that this adoption by the parties of positions which, relative to each other, could be described only as absurd, was a major failing in their respective duties which, we consider, included a, duty to act rationally in the pursuit of industrially realistic aims in an arbitration. The parties were groups of substance, engaged an arbitration of large potential gain or loss; having regard to the importance of the public health care system and the role of the VMOs therein, the parties were, in our opinion, duty-bound to adopt responsible, rather than inane, contentions. The differences were not minor or even merely substantial: to present the

issue as a difference in a proposed hourly rate of $90.00+ did not satisfy the duty upon them.

Following the handing down of the determination on 25 March 1993 the provision of VMO services to NSW public hospitals was put in jeopardy by meetings of VMOs called in response to the determination. It will suffice for present purposes to record that, in due course, the Minister and the AMA resolved certain issues, apart from those reserved to be dealt with by this appeal, in a private mediation process. That result

effectively adopted the position determined by his Honour in those respects although the process was of significance because, in extension of his Honour's rulings, the parties were able to reach agreement on the means by which the determination, and particularly the structural efficiency aspects, could be put into effect, subject only to the resolution of the outstanding issues by the Full Commission. We will return to this matter.

Prior Determinations

We do not propose to extensively summarise the determinations made prior to 1993; the Reasons for Determination ("RFD") of Hungerford J. do that exhaustively. We will, deal with the relevant history in the context of our consideration of particular issues we have to decide. However, it is convenient to observe that the first private arbitration was undertaken by Mr. A.J. Rogers, Q.C., in 1976. Thereafter, the Public Hospitals Act was amended to incorporate Part 5C, providing for formal arbitration. Macken J. was appointed

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under s.29M and conducted arbitrations in 1978, 1980, 1981, 1982, 1983 and 1985.

The 1985 determination was central to the considerations of Hungerford J.; the AMA claims were based upon the 1985 rates in the sense that the AMA sought increases thereon. The Minister, however, sought a review of rates based on the proposition that the 1985 rates were an unsound footing on which to build new rates; that the arbitrator should go back

to the 1983 rates, which were said to be sound in principle, and build new rates taking into account all relevant considerations in the intervening period. This process necessarily required the arbitrator to make an assessment of what increases should have been awarded, in the view of the 1993 arbitrator, in 1985.

It is to be remembered that the 1985 determination gave increases to VMOs which, viewed at least superficially, can only be thought astounding. The cost to the State of VMO services increased as a result thereof from $50 million per annum to $200 million per annum, $40 million of which was represented by the N. S.W.. --„-,'and Australian Governments' settlement offer. The ordinary hourly 'rates were increased by 88 to 92.85 per cent; the background practice costs allowance by more than 600 per cent.

The 1985 determination was made in circumstances where the "Doctors' Dispute", when mass resignations of VMOs from the public hospital system accompanied changes effected by the introduction of Medicare by the Commonwealth Government. The dispute was eventually resolved, at least in part, by a consent interim increase of $12-50 per hour in the VMOs, base rate, coupled with an agreement to submit to the conduct of an arbitration' to fix new rates. It is relevant to note that there was then no provision in Part 5C authorising an appeal from the arbitrator's determination. Consequently, the determination then made by Macken J. prevailed at that time.

No application was made by the Minister between 1985 and 1991-

2 for a reconsideration of those rates. We are not prepared to ascribe to that fact the effect that the AMA contends for, namely that it raises the inference that the 1985 rates were viewed by successive administrations as just and reasonable over that time.

A major issue which we are required to address, however, is what status is to be afforded to an earlier determination in these circumstances.

The Test on Appeal

The Full Commission has been exposed to a considerable body of material, as we have recorded.This occurred, necessarily in the concentrated context of the appeal. We are conscious that the arbitrator's proceedings were, in their enormity, spread over a much longer period and involved many more sitting days. His Honour had the benefit of hearing the evidence. it is, therefore, of importance that the principles applicable to the determination of an appeal such as this be considered, and applied.

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The appeal provisions in the Public Hospitals Act 1929, are as follows:
s.29QA(l) 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.
On the coming into force,-of the Industrial Relations Act 1991, Regulation 12 6 (1) thereunder., --the effect that an appeal pursuant to s.29Q is to the Full Industrial Relations Commission under s.382 of that statute. Section 382 is in the following terms:
s.382(l) If the Minister considers that the public

interest is, or would be likely to be, affected by a

decision of the Commission (other than the Full

Commission), the Crown may, as prescribed by the rules

of the Commission, appeal to the Full Commission.
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(2) From a decision of the Commission (other than the

Full Commission) an appeal lies, as prescribed by the rules of the Commission, to the Full Commission at the

suit of"
[a) a party, or an industrial Organisation,

affected by the decision; or
(b) without affecting paragraph (a) - an

association registered under Chapter 6,

if the decision affects the association.
(3) An appeal does not lie under subsection (2) from a

decision of the Commission:
(a) that was made by consent of the parties; and
(b) in respect of which the prescribed certificate

is given.
(4) An appeal under this section is to be determined:
(a) on the evidence adduced in relation to the

decision appealed against; and
(b) on any other evidence (whether or not fresh or

new evidence) or information called for by the

Full Commission.
(5) On an appeal under this section, the Full Commission

may (in accordance with this Act):
(a) vary an award, order, ruling, contract

determination or other decision in any way it

thinks fit; or
(b) direct a member of the Commission to take

further action under this Act to carry its

decision of the appeal into effect; or
(c) direct that its decision on the appeal take

effect as from any specified date after the

lodging of the application.
Counsel on both sides of the record contended that the nature of the appeal provided by the section is a rehearing, on the evidence adduced before the primary tribunal, together with such further evidence as may be called for by the Full Commission. In such a rehearing the duty of the Full
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Commission is to pay due regard to the judgment appealed from

and to come to its own view on the material and, if that view

differs from that of the primary tribunal, substitute it.

This view of the effect of s.382 depends upon the judgment of the High Court of Australia (Deane, Gaudron McHugh JJ.) in Re Coldham and Ors; Ex parte Brideson (No.2) in which a not dissimilar statutory provision conferring a right of appeal, s.88F of the Conciliation and Arbitration Act 1940 (Cth.), was held to have that effect. That judgment has been considered and applied to s.382 of the 1991 Act by the Full Commission (Cahill V.P., Peterson J. and Tabbaa CC.) in Outboard World Pty. Limited, t/as Budaet Waste Control (Sydney) v. Muir, a judgment given 6 December 1993. We take that course in this appeal.

The Submissions on Appeal

The AMA on appeal put in issue virtually all relevant findings and conclusions of the arbitrator. The Minister sought to support the determination, and the reasons, of Hungerford_ J. It is inconvenient to attempt to summarise the submissions which, on-appeal, took 3.6 weeks of hearing; involved 300 plus pages of written submissions on appeal for the AMA with a plethora of back-up material; 240 pages for the Minister, with multiples of that amount in support. In virtually all respects the arguments reiterated what was put to Hungerford J. We propose to advert to the arguments where necessary in the course of our reasons, to which we now turn.

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The Status of the 1985 Determination?

It is appropriate to deal first with this question. The arbitrator considered that the 1985 determination was, in

relevant respects, fundamentally flawed and thus represented an inappropriate basis on which to base a new determination. We consider, as was pressed upon us by the parties, that this is a key starting point for resolution of the case.

Whether the point from which the assessment is to start is 1983 or 1985, there is a case for the introduction of increases in salary to reflect changes in work value of a special case nature which have been found by his Honour to have occurred (a view in which we concur) and also structural efficiency increases arising from State Wage Case decisions since February 1988. If the 1985 rates are a valid starting point then it follows that actual increases would occur. if the calculations effectively commence with the 1983 rates then (as his Honour's rates show) the gap becomes too large to bridge: the resultant rates will be lower than the existing rates.

There seems to us to be difficulties involved in every approach to this question, some of which perhaps arise because the proposition that the immediate past fixation is invalid is reasonably rare.

There can be little doubt that in conducting a review of rates under Part 5C an arbitrator is not bound to accept existing rates as having been properly fixed; particularly is this so when a party puts that matter in issue. It is also correct, we think, to say that the application of principle where applicable is to be preferred in the assessment of rates of remunerate Indeed, s.29N requires the arbitrator to have

regard to, amongst other things, "the principles of wage fixation for the time being adopted as a general ruling or declaration of principle" by the Commission for awards. However, in a reconsideration of history and especially the correctness of a past arbitrator's assessment a very great risk emerges that in placing a new value on that earlier arbitration the latter-day arbitrator may err, if only for the reason that the capacity to assess from afar cannot be equal to that of the person bearing the earlier duty. The position is exacerbated by the fact that the 1985 arbitration was conducted under a different statutory scheme; there was then no stipulation that the arbitrator should have regard to the economic consequences of the proposed determination or the principles of wage fixation relating to awards (s.29N(2)). Nevertheless, the arbitrator is not constrained by the existing determination. The duty provided by s.29M is to "determine" the terms and conditions of work and the rates of remuneration. The arbitrator must "act judicially and be governed by equity and good conscience ... (s.29N(l)(b)). We consider these provisions require the arbitrator to decide a matter in the manner usual of industrial arbitration as it is commonly understood. The arbitrator must decide what is fair and just as between the parties. Subject to the special directives of s.29N(2), that will leave the arbitrator

restrained by issues of relevance, natural justice and also by a requirement that the decision be within the natural bounds

of the matter.

In Colliery Employees' Federation v. Northern Colliery Proprietors' Association[2], the President of the then Court of Arbitration of New South Wales, Cohen J. said that "the words "equity and good conscience" leave this Court, in my opinion, in the position that, whilst not infringing any positive law of the country, it may do that which it believes to be right and fair and honest between man and man". In our view that still captures the sense in which the arbitrator is to fulfil his primary function.

There is a long history of authority within the industrial arbitration context which concerns the notion of a "review"... "notwithstanding any previous inquiry" of the conditions and wages of an industry (see ss.21, 32; Industrial Arbitration Act 1940). Those sections and the relevant cases are consistent with the view that an industrial arbitrator is not constrained beyond what we have stated above. We are of the opinion that while it was proper that his Honour made his own assessment with history as a relevant factor to attempt in 1993 to strike a rate reconstructed by reference to an earlier determination was to undertake a somewhat artificial process which, in as much as it denied the realities of comparatively recent history, undoubtedly presented its own difficulties. Plainly, the reconstruction of rates in this way raised the possibility of supplanting rather than rectifying the types of

difficulties that his Honour identified. Indeed, the AMA

submitted that his Honour's final rates included an unexplained component which comprised some 9 per cent of the senior specalist's rate.

We consider that it was open to his Honour to find that the rates fixed in 1985 were objectively high, indeed too high, by reference to relevant contemporary considerations, such as proper comparative guides. Equally, such guides may, and do, provide assistance in arriving at a 1993 valuation.

We conclude that any deficiencies held to be established in the sessional rates fixed by the 1985 determination were relevant to a reconsideration in contemporary terms of the rates but that reconsideration could not in reason be founded upon a notional reconstruction of the 1985 rates.

The Principal Issues

We deal with these matters in the following order:

. Remuneration for services.

. The base hourly sessional rates.

. The rolled up rate - leave and superannuation factors.

. Background practice costs loading."

. The on-call allowance and recall payment.

Remuneration for Services

We commence our consideration as did his Honour with reference to the high levels of knowledge and skill required of VMOs.

His Honour's words are apt to repeat:

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"I may immediately say one could not help but be impressed by the nature of the work performed by VMOs and the high degree of knowledge and skill required to carry

it out.; I adopt the conclusion reached by Mr. Rogers in 1976, namely that VMOs include practitioners whose reputation and skill ranked them in the most pre-eminent in the field, not only in Australia but in the world. As did Mr. Rogers, I accept also on the evidence the high quality of the professional skill and ability of VMOs, the exceptional stresses and strains imposed on them in making decisions affecting the very life of patients, the impact on them of the great strides made in medical and general scientific knowledge and their burden in keeping abreast with all new techniques and developments."[3]

This conclusion was not put in issue on the appeal and we accept it as an accurate statement of the position. There is no doubt that the arbitration relates to a highly qualified and distinguished group which is an integrated and, as the public hospital system is presently organised, essential aspect of the provision of medical services in those hospitals. Whilst the submissions on appeal were, for ease of reference and consistency, generally directed to the rates for senior specialists, there are five categories of VMOs covered by the determination, namely, general practitioners of less than 5 years, 5-10 years and over 10 years; specialists; and senior specialists. There is a sliding scale of rates for these different categories of

Speaking generally, we consider it would be only in the most necessitous circumstances or in the case of changed circumstances that sessional rates for VMOs would be reduced. Whilst the theory of rate fixation permits of reduction, the fact that rates fixed by an arbitrator endure for a period of approximately seven years produces a normalcy and an

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expectation of continuance which can only be displaced for good reason. In this case the alleged errors of 1985, even if proven, do not necessarily mean the displacement after many years of the rates then fixed. Arbitration essentially reflects a preference for the resolution of differences and thus the attainment of stability, over less attractive forms

of dispute resolution. The appeal process acts as a contemporary brake upon any over or under assessment of value. These tenets lead us to reconsider, in accordance with our duty on appeal, the sessional rates to apply for the period of the determination now to be made.

We emphasize at this stage our inability to continue in the rates the effect of the decision of the N.S.W. Court of Appeal in Liverpool Hospital & Ors. v. Hyslop and Anor (No. 2) ("Hyslop (No. 2")[41. That decision was taken in the light of (and we accept it, as we must, as describing the effect in law of) the terms of the 1993 determination. However, viewed from an industrial standpoint the result was fortuitous for VMOs to a degree which cannot be supported any longer. The result was not expressly. intended by Macken J. nor, can we see how it could have been assessed as the appropriate measure to deliver an increase in sessional rates to adjust for a flat money increase in the basic wage.

The decision had the effect that flat money increases in the basic wage of $10.00 per week and $6.00 per week in March 1987 and February 1988 respectively were converted to a percentage

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increase in the basic wage of 9.49 per cent and 5.2 per cent and it was these percentages which were then applied to the sessional rates. Consequently, the hourly remuneration for a senior specialist rose by $14.50 per hour to $110.50. On the other hand, employees within the award system receiving the benefit of the basic wage increases received $16.00 per week or 42 cents per hour. In relation to this matter Hungerford J. said:

... it seems to me industrially inequitable to a most substantial degree for a provision to operate to give

VMOs an hourly increase nearly thirty-five times the increase obtained by award employees for the very same reason."[5]

We agree with this view. The effect of the 1985 adjustment provision is unsupportable in industrial terms. The VMOs have had the benefit of a provision which we cannot support; nor do we think Macken J. could have intended that effect. it follows necessarily that, as Hungerford J. found, the rates require a discount by the inflated amount.

We propose therefore to make our assessment in contemporary terms without particular reliance upon the history of the development of sessional rates but having made the discount to which we have just referred. In our "view, that requires a reduction in the hourly rate of $14.00 in the case of a senior specialist, with proportional effect on the other classification rates.

This approach then requires us to consider the application of the increases, against which there is no appeal, in relation

to work value changes occurring since the last work value assessment. We appreciate that his Honour assessed the percentage increases on this account in the context of the particular rates he was building and that the application of those percentages to different amounts will produce a different money result, although upon analysis the difference is only a matter of cents in the case of the senior specialist; we therefore will retain the percentage levels assessed by his Honour in this regard.

The course we have followed diverges dramatically from that urged from the Minister and from the three exercises advanced by the AMA. The AMA's exercises were never designed as precise answers to its claim. Rather, they were designed to assist the arbitrator in the process of assessment.

The AMA put forward three exercises, its preferred view being exercise No. 1. Exercise 1 took the 1985 rates and then

updated them for State Wage Case increases, work value changes plus an extended sessions-allowance of 5 per cent which was proposed by the Minister in exchange for a new form of sessional contract. This approach was advanced with the benefit of the decision in Hyslop (No. 2) producing an hourly rate for a senior specialist of $159.83. Without the benefit of that indexation clause the hourly rate proposed became $139.72.

Exercise 2 took the 1985 rates and added a factor to reflect the increments over the intervening period to staff

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specialists, together with the 5 per cent extended sessions allowance.

Exercise 3 took a present value of staff specialists, added a factor to take into account the contractor nature of the VMO plus an extended sessions allowance.

Exercises 2 and 3 produced hourly rates for the senior specialist ranging between $146.69 to $184.80. Because of their dependence upon the staff specialists' rates, Exercises 2 and 3 reflected a 15 per cent increase awarded to staff specialists on 12 September 1989 by Fisher P. in Re medical Officers - Hospital Specialists (State) Award(6].

Hungerford J. rejected Exercise 1 as irrelevant on the ground that the 1985 determination was not a proper base on which to assess current rates and concluded as follows:

"Necessarily, then, one is forced back to the last work value assessment for VMOs in the 1982 determination, effective as from 15 December 1982, but as adjusted for the deferred work value increase by the 1983 determination."[7]

We find it unnecessary to seek to resolve the conflict concerning the nature of the determination made by Macken J. in 1985. The introduction of Medicare and the displacement of the tradition under which VMOs provided service to hospitals as Honoraries, with the suggestion being extant that the "Robin Hood Principle" meant that fees received in relation to

private patients were necessarily fixed at a level high enough to cover the cost of the service provided to public patients;

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the thought that sessional rates were from 1976 to 1985 discounted in that context (a thought described by the Minister as la myth) suggest that the 1985 determination was the first full value determination made by an arbitrator. We would observe that Macken J. was in a prime position to know the basis upon which, during the 1976-1985 period, he had actually assessed rates but on the other hand the contentions advanced against his Honour's reasons are strong; the quantum of increase, the fact that the rates in other States remain markedly lower than those fixed in 1985 and other relevant factors all produce difficulties in the way of an assessment. We are in a position different to that in which Hungerford J. found himself in assessing new rates. The agreement between the parties arrived at subsequent to his Honour's decision is a matter we consider of importance in making a final assessment of the sessional rates to be applicable. The parties took a judgment which introduced significant and far-reaching changes and sat down to settle between them how the changes involved in that judgment should be introduced. They have agreed to submit the residual difference between them as to rates to -the appeal process'. In the context of the application of the judgment of the Full Commission the parties will operate in a new form of contractual relationship which involves a substantially different culture. The VMOs have accepted that in the provision of medical services they will

now be subjected to administrative and budget restraints. These changes are of enormous financial value to the administration. We accept that the reasons for decision went

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forward on the basis that these matters would occur but in a context where the sessional rates were to be reduced substantially, their necessary co-operation to implement those procedures,* was not to be forthcoming. We think the application of the framework established by Hungerford J. now becoming a reality (as the fresh and undisputed evidence called in these proceedings indicated) is a feature which should be brought to account in the assessment of rates.

Associated Time

The AMA mounted a claim for a 50 per cent allowance in respect of time which it is said, and we as a general proposition accept, is spent by VMOs in relation to public hospital patients treated in sessional periods but done away from the hospital and outside the periods to which the sessional payments relate. This includes time taken in travelling from rooms to the hospital and between hospitals; in rooms attending to management of waiting lists and theatre bookings; in rooms writing reports concerning public patients particularly by specialists to GP's; time in discussions with relatives concerning patients and administration work relating to sessional contracts. In effrvt, the proposition of the AMA is that a VMO would,have to spend 50per cent,more time than a staff specialist spends to earn the equivalent hourly rate.

Hungerford J.'s finding in this respect was that the evidence did not support what his Honour believed to be a "rather excessive claim for associated time of 50 per cent". The evidence was found not to have established any relevant increase in the quantum of associated time. His Honour

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eliminated the time travelling between hospitals from consideration for the reason that it was to be compensated for in the split sessions loading which would form part of the rolled up rate. Otherwise, his Honour declined to adopt the AMA's approach. His Honour, in taking this course, relied upon the fact that the AMA's Exercises 1 and 2, being based as they were on the rates fixed by Macken J. in 1985, reflected associated time as a factor because Macken J. took that into account as a general factor in determining sessional rates in 1985 without specifying any particular amount therefor.

Another factor of relevance in relation to associated time is that Cahill J. in 1972 took into account some aspects of what is here described as associated time in fixing an additional week's annual leave for staff specialists which has been factored into the rolled up rate for VMOS[8].

Taking into account all of these factors we propose to make, as the submissions of the parties agree we are entitled, our own assessment on the basis that the determination will operate prospectively, in place of the rates presently applicable. After making the relevant discount for the effect of the judgment in, Hyslop (No. 2) and taking into account work value changes and special case considerations, we

determine that the base rate for a senior specialist will be $84.00.

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The Rolled-Up Rates Concept

All parties agree that it is appropriate to continue to remunerate,vmos on the basis that the normal hourly rate for sessional payments compensate for the work itself, including the factors to which we have adverted and also such "paid" leave of absence, superannuation and any special allowances which relate to the time for which the payment is made. We agree that the rates should be fixed accordingly. It is necessary to consider the elements of the loading to the base hourly rate, fixed in 1985 at 49.3 per cent and reduced by his Honour to 36.83 per cent, the reduction occurring after the inclusion of a 5 per cent factor for extended sessions allowance. The AMA contends for a loading of 54.3 per cent. In 1976 these factors were not paid for by way of a loading in a rolled up rate but rather as leave and separate money allowances. It is also to be noted that the adoption in 1981 of a 49.3 per cent loading was by consent of the parties at the suggestion of the then Health Commission of N.S.W. That loading continued until the 1993 reassessment which in general terms eliminated the 7.5 per per annuation factor; added a 5 per cent extended sessions 'loading and, reduced long service leave, conference and study leave and sick leave as the following table shows.

2 8
Loadings in Ordinary Hourly Rate
1976 1981-49.3% 1993-36.63%

(Then not (By consent)

in Rate)
Superannuation 5.25% 7.5% Nil
Annual Leave 5 weeks 5 weeks 5 weeks
Long Service 2 months for 2 weeks 1 week

Leave 10 years per annum per annum
Conference and 3 weeks 3 weeks 1 week

Study Leave
Public Holidays Paid as fall 2 weeks 2 weeks
Sick Leave Nil 2 weeks 1 week
Split and 10% Ss 5% Ss 5% SS +

Extended Sessions 5% ES

Loadings
The issues for consideration on the appeal are the

superannuation element and the reductions in total of four

weeks from the weighting for leave of absence. We deal with

these seriatum.

Superannuation

In the proceedings before Hungerford J, the minister sought

the deletion of superannuation payments to VMOS' on a number of

grounds including distinctions said to exist between VMOs as

independent contractors and staff specialists; it is

unreasonable and inequitable for VMos to receive the value of

superannuation benefits in their hand on a hourly basis when

staff specialists must await retirement or early retirement to

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receive their benefit. The AMA on the other hand sought not

the same entitlement for superannuation as staff specialists

but what was,, said to be an equivalence which would require a further $12,'50 per hour to be added to the 7.5 per cent loading-

His Honour noted the fact that superannuation had formed part of VMO determinations from 1976 by consent and the only issue over that period had been as to quantum. Against the AMA's position he drew from the history the proposition that the VMO's superannuation loading had not equated with contributions paid in respect of staff specialists. His Honour acknowledged the point that the VMO spends on average 5 .6 hours per week in the public hospital system and 40 to 50 hours per week in 'private practice and referred to the fact that payments to VMOs in this regard are made on an hourly basis and not as a deferred benefit on retirement which affords the VMO the opportunity to invest the moneys and to provide for the future at will. On the other hand, his Honour considered what he called -"the undoubted truth" that a VMO as an independent contractor is entitled to payment for services rendered to appropriately compensate for the work and for other incidents of life; superannuation falls into that category. His Honour therefore concluded that prima facie he would be prepared to include some loading in VMOs' remuneration on this account but not at- an equivalent level with staff specialists. His Honour did not proceed to quantify that amount but later spoke of any component he might have otherwise awarded as being "not, I apprehend, as much as

the present 7.5 percent because of the favourable comparison with staff specialists"[9]. His Honour's conclusion on this matter was that the Superannuation Guarantee (Administration) Act 1992 (Cth) requires the State of New South Wales to pay in respect of VMOs a superannuation contribution equivalent to 4 per cent from 1 July 1992 to 31 December 1992 and 5 per cent from 1 January 1993 increasing over the next nine years to 9 per cent on 1 July 2002. Therefore, to continue the 7.5 per cent factor in the rolled- up rate would be to engage in double counting.

On the appeal the AMA moderated its claim to submit that the inclusion of a 7.5 per cent component is not to over-value the superannuation contribution for VMOs.

our analysis of the material before his Honour and the submissions made at that time and again on appeal leads us to conclude that unless the Superannuation Guarantee Scheme operates, in effect, to substitute a sum in relation to superannuation such that the continuation of the 7.5 per cent would be a-double count,-that no case was made for a reduction in the 7.5 per cent loading._In our view, the history of consent in this matter far outweighs the latter day propositions that such an amount is conceptually inappropriate for VMOs as a matter of merit. We find quite unconvincing the submissions made on behalf of the Minister to the effect that it is inappropriate that the benefits receivable by a staff specialist in relation to superannuation and indeed other matters are not a material factor of considerable weight in

the assessment of a sessional payment to VMOs who perform work interchangeably with staff specialists; work which would otherwise, given a different system, be performed by staff specialists..'

We therefore propose to consider the Superannuation Guarantee Scheme and its effect to determine whether or not its impact is such to warrant a discount or the removal of the 7.5 per cent loading.

The effect of the Superannuation Guarantee Scheme within the New South Wales public sector has been to cause the State Authorities Superannuation Scheme (SASS) which was established with effect from 1 April 1988 and was applicable to staff specialists to cease to remain available to employees not members of the scheme as at 18 December 1992. Therefore, staff specialists who were in the SASS scheme at that date will continue under its provisions, the benefits of which are substantially greater than those which-apply prospectively to new employees under the Superannuation Guarantee Scheme. it follows that for staff specialists, as with all public servants, there will be two standards operating in future. In those circumstances, assuming --that- the Superannuation Guarantee Scheme does not operate to displace completely the 7.5 per cent loading, we consider that there can be no warrant to continue the 7.5 per cent loading for persons under sessional contracts entering into superannuation arrangements for the first time after the date of this determination. The parties are agreed for the purposes of the appeal that the

provisions of the Superannuation Guarantee Scheme apply to VMOs such that the New South Wales Government will make a payment equivalent to 5 per cent in relation to VMOs to a fund or its equivalent but not direct to the VMOs. In relation to newly-employed staff specialists the payment made will be confined to 5 per cent. In relation to staff specialists who are members of the SASS Scheme, they will have continued enjoyment of higher contribution rates introduced to reflect the 3 per cent "award superannuation" benefit awarded in the National Wage Case decision, June 1986 which was implemented by the State Authorities Non-Contributory Superannuation Act, 1987 (NSW). It seems to us that VMOs operating under contracts pre-dating the elimination of the SASS Scheme cannot be regarded as having received any consideration of that additional 3 per cent benefit which was applied to staff specialists. Be that as it may we do not believe that a consideration of the relative superannuation benefits must go forward on a dollar for dollar basis. Given the limited number of hours worked on average by VMOs and the great preponderance of hours they spend in their private practices, the 5 per cent payment (increasing over time to 9 per cent) to be made by, the New South Wales Government on behalf of all VMOs is sufficient I in relation to those engaged hereafter. However, it is appropriate that VMOs engaged under continuing contracts (or replacement contracts) who have participated in

the receipt of the 7.5 per cent loading should continue to do so by way of the receipt of a top up of 2.5 per cent of the 5 per cent otherwise payable as a consequence of the Superannuation Guarantee Scheme. We think in the

circumstances that it is preferable that the additional 2.5 per cent be paid into the fund to which the 5 per cent will go rather than to cause the need for differential hourly rates for sessioal contracts depending on the date of engagement of the VMO. However, we are prepared to leave that question to the consideration of the parties and if they are agreed that the 2. 5 per cent should go into a rolled up rate suitable provision can be made in the settlement of the determination to that effect.

Leave Component of the Rolled-Up Rates

Hungerford J. records the position that no party had originally sought to review the 49.3 per cent loading nor any of its components although the Minister had submitted in opening that "many of the components of the loadings leading to the 49.3 are components which would lead one to immediately ask this question, what have they got to do with independent contractors who have a contractual relationship with a hospital". The Minister then reassessed his position once it became apparent the AMA was proposing a substantial increase in remuneration based on- increases allegedly granted to superannuation entitlements, of,, staff specialists. The Minister then sought to eliminate the factors" in the loading

of two weeks for public holidays, two weeks for sick leave, two weeks for long service leave and two. of the three weeks for study and conference leave. Annual leave was to remain at five weeks giving, in the Minister's claim, six weeks total leave to be factored in as against the existing 14 weeks.

3 4 Firstly, it is important to realise that the reference to "weeks" in this context is a reflection of the hours worked under sessional contracts in a week by VMOs which averages 5.6 hours. Therefore, to factor in for example five weeks annual leave is to build 25 hours of the base hourly rate into the payments to be received for the sessional contract work undertaken in a full year; if a VMO works more or less hours than five then the reflection of the leave factor increases proportionately to the hours worked.

Save for sick leave, which we think is in a special position, we consider that the other heads of leave factored into the rate do have a natural and direct relevance to VMOs in their contractual relationship with a hospital. If the position is theorised by reference to a VMO who carries out a number of sessional arrangements at different public hospitals so that the VMOs' obligations thereunder occupy him or her for substantially more than five hours in a week, it can be seen that a failure to take into account matters of this kind could leave the VMO in a -position where quite inadequate compensation is received in relation to these matters in a full year. Further, we accept-as obvious the proposition that

contractors generally in fixing their hourly rates will do so in the knowledge that the rate must be sufficient to compensate for such elements of leave as may be necessary to put them on a relevant equal standing with those in employment generally. Annual leave, public holidays and long service leave are three prime examples. But a consideration of significance is the achievement of a relevant degree of

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equivalence. In a general sense we have grave doubts that the payment of sick leave on an hourly basis to a VMO in relation to work performed under sessional contracts is a proper means of attempting to achieve some sensible balance in relation to that subject matter. The evidence before his Honour established the "incidence of sickness to be quite low, being on average no more than one day per year". Although the staff specialist receives two weeks per annum, sick leave, which is cumulative, it bestows no more than a form of insurance against the possibility of sickness. To make a payment of two weeks, sick leave to VMOs regardless of experience in that respect is to advantage VMOs to an inordinate degree. In this regard, we agree with his Honour's conclusions that two weeks is wholly excessive and that one week should be included in the rolled-up rate "as a generous assessment".

As to study and conference leave we again take the same view as his Honour. His conclusions in this regard depended upon the evidence before him and, in granting one week for study leave and one week for- conference leave, constituted a

generous assessment in the light of that evidence. Sick leave and study and conference leave-are-in our view two items which are not able to be assessed simply-by reference to benefits received by others. Each of them depends upon need and utilisation. It is too much to expect that a payment should compensate for leave which is neither necessary in the case of sick leave nor fully utilised in the case of study and conference leave.

3 Long service leave is in a different category. We see that as analagous to annual leave and public holiday provisions. They are matters of general application and import. Whilst long service leave is generally payable only upon the achievement of a relevant period of service, in the case of the payment to a contractor, we see no means by which that obligation can be met except in the context of the hourly rate. In this respect, we reiterate that since 1981 the parties have themselves assessed the appropriate level for long service leave as two weeks per annum. Throughout that period the rate payable under the Long Service Leave Act 1955 (NSW) has been slightly less than one week per annum. As against that, in one form or another since 1976, whether by way of paid leave or as a result of the incorporation in the loaded rate in 1981, the long service leave for VMOs has equated with two weeks, per annum. The relationship between that quantum payable according to the Long Service Leave Act has remained

unchanged throughout that period. The fact of that relationship in our view cannot constitute a good reason to vary the determination to reflect the general statutory provisions- or something -nearer that level. That two weeks might be thought "generous" is also we consider no reason to reduce the quantum because, if generous, it has always been SO. Whilst we incline to the view that two weeks may be accepted as being on the generous side, we conclude that no case of substance was made out to reduce that leave factor. We therefore decide that it continue at two weeks, per annum. within the rolled up rate concept.

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BackGround Practice Costs

Since the first formal determination made by Macken J. in 1978, the Sessional rate payable to VMOs has included a component known as background practice costs (BPC) The BPC component is designed to compensate the VMO for a proportion of the costs of conducting the practice.

The 1978 determination included an hourly rate for specialists of $2.00 and for general practitioners of $1.50. The 1980 determination made no change in those rates but in 1981 a new determination provided $2.50 for specialists and $1.90 for general practitioners. The 1982 and 1983 determinations adjusted those rates by State Wage Case increases. Up to that time the rates were paid as additions to the base hourly rate but in the 1985 determination Macken J. removed these amounts from the rolled up rate and substituted amounts of $25.00 for

specialists and $20.00 for general practitioners. These increases, 616 per cent and 655 per cent respectively, were found by Hungerford J. to be "unsupported by any statement of the principle on which they were assessed, and indeed ran counter to the approach- adopted in previous determinations. The increa ses determined were inordinately high. [10]
The substantial nature of these increases was not lost on Macken J. who described them as involving as "a convulsive jump in this cost from the current loadings."
Macken J.'s reasoning in relation to this matter contained the following:

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"A leading firm of accountants was asked to survey private practice costs for purposes of the Determination and calculated the hourly rate at maxima of $32.14 per hour for General Practitioners and $39.29 per hour for Specialists; the minimum respective levels being $28.57 and $32.14 per hour. Although this falls far short of the V M O.'s own estimate of the private practice costs incurred during sessions in public hospitals it provides a convulsive jump in this cost from the current loadings.
As such a loading cannot be quantified with great precision and because, in any event, it involves a high degree of averaging between the specialties, I prefer the accountants' conservative approach to assessing this loading. For these reasons I propose to fix a loading in the sum of $20.00 per hour for General Practitioners and $25.00 per hour for Specialists on account of background

practice costs. This sum will be paid in addition to

those sums calculated under the title of Remuneration. While expressed as a separate payment in this

Determination I expect that in practice a rolled-up sum

will continue to be paid to V.M.O.'s and that it will be

calculated to include the private practice loading."(")

The 1993 Determination

Before Hungerford J. the AMA claimed increases in the allowances to $66.66 per hour for specialists and $50.00 per hour for general practitioners. The Minister claimed $10.28 per hour for surgeons and $5.73 per hour for anaesthetists, physicians and general practitioners.

The AMA's claim was based on an approach which would afford a direct proportion of the total costs incurred by a VMO in the conduct of his or her practice in relation to both private and public patients whereas the Minister followed a costing approach which would seek to reimburse only those additional costs incurred by VMOs as a result of their work under sessional contracts. This proposition went forward on the basis that the predominant costs of the VM0 are incurred in

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relation to the conduct of a private practice and should not

be compensated for by the background practice cost element.

The Minister submitted that the approach taken by Macken J.

"was wrong as being unfair and involving an unwarranted and

fundamental departure from the established principle in

assessing the allowance as part of the VMOs' sessional

remuneration" [121 .

We observe in passing some difficulty in understanding that

submission. What was referred to as the established principle

of placing background practice costs in the hourly

remuneration, particularly as an element in the base rate, was

to cause the application of the 49.3 per cent loading to that

very factor; it is difficult to see how the resulting increase

in cost for this factor would not involve a complete lack of

commonsense. Given that the rate to be fixed by Macken J. was to be substantially higher than the pre-existing loading it seems to us to have been entirely appropriate that it be extracted from the base rate to constitute a fixed loading per hour.

Equally we have difficulty in accepting that the approach of Macken J. on this question did not involve a proper principle. The excerpt from his Honour's reasons set out above demonstrate that his approach was dependent upon the evidence of accountants before him which seems to have been accepted as the more conservative approach to this question. In this case before Hungerford J. the contrasting positions in principle of the parties were each supported by conflicting evidence called

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from a partner of Duesburys, Chartered Accountants, for the AMA and by a partner in Deloitte Ross Tohmatsu, for the Minister.

The conceptual difference between the accounting experts was whether the whole of the cost of the practice should be divided in the proportion that the sessional contract hours bear to the total practice hours (the concept advanced by the accountants and accepted by Macken J. in 1985) or only those additional or attributable costs, which arise from the engagement in sessional contracts, should be met. In resolving this question we find it unnecessary to dwell upon one aspect of the argument before us related to concepts of "marginal" costing.

It is clear that the full cost approach of the AMA does not

involve the full costs of practice but only those costs which are not able to be attributed exclusively to private practice elements.

Hungerford J. recorded- the issue - concerning background practice costs to have been "one of the most troublesome as involving major attention by the parties and directly contradictory expert evidence. in the final analysis, however, it must come down to a matter of a value judgment as to what is considered to be the proper principle to apply in all the circumstances" . (13] His Honour determined, on balance, that the attributable costs approach was the proper course to follow to determine background practice costs allowances.

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This approach led to his Honour, on the basis of survey material of actual costs, assessing the allowance to be $15.00 per hour for surgeons and $9.00 per hour for anaethetists, physicians and general practitioners. These compare with the $25.00 allowance fixed in 1985 for specialists and $15.00 for general practitioners. Based on the summary information from a survey of overheads, which was in evidence, it appears that the allowances assessed by his Honour reflect that portion of costs associated with the provision of a motor vehicle, printing and postage and telephone charges.

The resulting reduction in allowances does not arise, obviously, from a reduction in overall costs of conducting medical practice but from the adoption of the attributable costs method over that which had been accepted by Macken J. in

1985. it is inherent in any conclusion that the attributable cost method should be employed, that the alternative method has afforded VMOs, in the past, a level of recompense for overheads which ought not be met by the public hospital system. On appeal, the AMA submitted that in relation to sessional contracts, the Government (not the public patient) is a buyer of medical -services and stands in the same character as 'a private patient; there is no occasion to treat the Government in any different way than any other buyer of a service.

Whilst these submissions may reflect the optimum in a commercial world, they do not represent a suitable basis upon which the assessment of background practice costs allowance

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can be undertaken. The exclusion of costs said to be pertinent only to private patients is considerable; it involves 60 items or heads of cost including bad debts, drugs, dressings, ;laundry, dry cleaning, linen, locum costs, magazines, journals, medical supplies, surgery supplies, tapes cassettes, theatre fees, and uniforms. It is in this way as we have earlier described that the maximum cost approach is not adopted by the AMA. The question which arises is whether, in the assessment of an appropriate allowance, the choice ought be made between the competing views of the expert witnesses. We think not.

The attributable costs method would have the VMO compensated for stationery and postage but not for the labour necessarily

employed to type the letter or report. That approach can only proceed upon the basis that the facilities of labour, office, office equipment and the like are there and paid for by the private practice and therefore able to be used free of charge to the public hospital system. However, the integration of public hospital and private practice patients in the practice of a VMO negatives that-proposition. We think it unfair to assume that without the sessional'contract the doctor would be required to meet the full cost of practice from the private patients treated and therefore VMO obligations can be absorbed into that circumstance without a proportion of costs of more direct kind being borne by the public hospital system. We consider that the assessment should bring to account an element which reflects compensation for not all matters of

cost (apart from those excluded on the AMA's approach) but a reasonable proportion of salary and other costs such as occupancy and office equipment. In assessing what might be reasonable, ;we are cognisant of the Minister's submissions that the level of BPCs for VMOs cannot be controlled or monitored by hospitals. Certainly, on the figures presented, we were concerned that there were wide and, for all intents and purposes, unsatisfactorily explained discrepancies in certain components and the statistical bases used to calculate the claimed amounts. Whereas the attributable costs approach applies all of the motor vehicle costs to the exercise (an approach which we think not ungenerous) we do not consider that salary and occupancy costs should be borne in full proportion because while some aspect of those costs is attributable to work directly performed in relation to public patients, that work does not appear to represent a proportion of total charges on a pro-rata hours basis. This approach will result in an allowance lower than that supported by the AMA's case but of course higher than that supported by the Minister's case. We do not propose to illustrate our assessment-by reference to precise sums or proportions thereof but to make an assessment- which. reflects our view of what would be fair between the parties on this- issue. We maintain

the divisor at 1692 hours. We determine the allowances to be:
Surgeons $25.00 per hour
Physicians, Anaesthetists and

General Practitioners $15.00 per hour
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We observe that these sums equate with those fixed by Macken J. in 1985; however, the basis of assessment we have used is quite different and depends upon our reaction to the evidence adduced on this subject. That evidence demonstrates. that BPCs vary between disciplines and does not justify a continuation of the payment of the higher sum to physicians and anaesthetists.

-Call and Call-Back

On

Apart from the provision of medical services during sessional hours, VMOs are able to be rostered "on-call" which means that they are available to attend to public patients at other times as required, usually in emergencies or for consultation by less-senior or less-specialised staff. When called upon to attend in those circumstances, the VMO is paid according to the call-back provision. As a result of the decisions of Hodgson J. and, on appeal, the Court of Appeal, in Hyslop (No. 1) [14], the 1985 determination was held to mean that the on-call allowance was to be payable during actual periods of call-back. That involved, obviously, a form of double payment. --The determination by Huncgerford J. altered the prescription of the on-call' rate from one-tenth of the ordinary houriy rate to $7.00 per hour for all classifications

of VMO. The one-tenth provision had meant that from 1985 the on-call rate ranged between $6.40 per hour for a general practitioner with less than five years experience to $11.05 per hour for a senior specialist. Hungerford J. also made provision to ensure that there would no longer be any requirement to continue to pay the on-call rate whilst a VMO

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was being paid according to the call-back provisions. The only issue on appeal concerns the movement in the on-call rate from one-tenth of the ordinary hourly rate to $7.00 per hour.

There has been provision made for the payment of an on-call rate to VMOs since 1976 when Mr. Rogers, Q.C., recommended a payment at one-tenth of the ordinary hourly rate.

In 1991 in response to an application by the Health Commission to remove the on-call allowance Macken J. provided for on-call periods of 24 hours in respect of which a flat payment was made. In 1982 the allowance, which was 42 cents per hour, was altered by Macken J. to provide a payment of $20.00 for a period of twelve hours, i.e. $1.67 per hour. In 1983 Macken J. fixed $20.86 for the first 12 hours and $1.75 per hour thereafter.

In 1985 Macken J. reinstated the payment at 10 per cent of the ordinary hourly rate in order to "keep the VMO in line with the staff specialist in this regard". In 1993 Hungerford J. regarded that conclusion as having -been in error because whilst the-staff specialist received approximately 10 per cent of his annual income as an on-call component, which in 1985 approximated $6,304.00 per annum, his Honour took the view

that the staff specialist was on-call at all times. He therefore contrasted that with a full year of 47 weeks after allowing for leave for which a VMO senior specialist would receive in theory $77,222.00.

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It is clear that the provision of medical services in New South Wales public hospitals are thought by the policy makers to require the availability of specialists in virtually all branches of medicine to cater for the potential needs, particularly for emergency services, of public patients. The rosters which cater for that perceived need vary according to the nature of the work or specialty between a one in two roster (which might apply, for example, to two available doctors in relation to a country hospital, the roster requiring each doctor to be available on-call for 50 per cent of the time outside ordinary hours) to a one in (more than) seven roster which would provide for the sharing of the on-call periods amongst (more than) seven doctors. It appears that a one in seven roster is the most common. Where staff specialists are employed in a hospital they share equally with VMOs in participation on the on-call roster.
It seems to us, however, that a distinction must be drawn between the obligations of a doctor who is actually rostered on call as against one who is presently rostered off but as a staff specialist is liable to be called in, if available. We were informed that the general-, understanding in relation to participation in the on-call roster is that the doctor must be

available within about half an hour, of the hospital and in a condition, of course, to perform such services as are necessary. Consequently the on-call roster imposes obligations with respect to accessibility by telephone or pager; a restriction of locality within reasonable proximity of the hospital and a necessary condition of sobriety. Those

restrictions, as the evidence of Dr. Mulcahey makes clear, operate in a real way to restrict the movement and activities of doctors; 'but a staff specialist who is not actually rostered on-call is under no such immediate limitation. The liability to receive a call may well exist but there is no requirement to stand ready for that possibility. In this respect, as we understand it, VMOs and staff specialists are in broadly the same position.

The evidence also establishes that what appear to be quite extravagant sums, fiscally and administratively indefensible, are received by some VMOs on account of the on-call allowance. Hungerford J. recorded some examples of these payments as follows:

"For instance, an orthopaedic surgeon was paid $26,263.00 for on-call but nil for call-back; a cardio-thoracic surgeon was paid $28,877.00 for on-call but with no call-back; a plastic surgeon was paid $48,504.00 for on-call and only $235.00 for call-back; an opthalmologist was paid $39,518.00 for on-call and only $195.00 for call-back; and an ear, nose and throat surgeon was paid $23,678.00 for on -call but with no call-back payment

These sums--are not particularly useful in the assessment of the hourly- allowance; for example, assuming the plastic surgeon referred to in the quote 'was. a: senior specialist, the reduction in the on-call rate from $11.05 to $ 7. 0 0 per hour means that for the same on-call duty the payment within a given year would be $30,726.00. The reduction is significant but the residue remains very substantial. It seems to us that the answer to such apparent excesses of entitlement lies not

in the assessment of the hourly rate but in the application of
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the concept of on-call by the hospital administration.
Indeed, in this respect, the Minister submitted that it was a product of the lucrative amounts received by certain VMOs which caused resistance to rationalisation of on-call arrangements. If the hourly rate is a just rate for the restriction involved in being on-call then the receipt of a substantial sum reflects a burden which is onerous and extended. The wisdom is elusive in the application of an on-call roster to a circumstance in which, on experience, the likelihood of a call-in is very rare.
The assessment of a rate of this kind also reflects the obligation to fix a rate which is fair in all the circumstances of the case, particularly having regard to the nature of the burden imposed. Resort to general industrial standards for call-back may not be of particular assistance. There are prominent awards in the system which provide ordinary time in relation to a person required to hold himself in readiness for work out of hours. In that context a 10 per cent rate seems relatively low. Equally, however, by comparison-with the on-call allowances for other professionals within the- public. hospital system,_ such as nurses and RMOs, the VMO rates are generous indeed. Furthermore, there is nothing, other than the requirement to stand in readiness, to prevent a VM0 conducting private patient consultation whilst also being paid for being on-call. Also, the determination made by Hungerford J., in establishing a flat rate per hour,

reflects the fact that the burden imposed is essentially a social one and visits each class of medical practitioner

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engaged as a VMO in much the same way; the flat rate of $7.00 per hour involves also an increase for some VMOs and a decrease for others to achieve that equality.
We are unable to conclude that we would take any different course to that which was adopted by the arbitrator in this respect. The determination to issue will therefore continue the clause awarded by the arbitrator for on-call and re-call.
The determination we now make shall take effect on and from 1 February 1994.
The parties are directed to draft and file by 31 January 1994 a revised determination to give effect to this judgment, also including those matters that were agreed as part of the mediation. The determination will then be executed by order.
REFERENCES
[1] (1990) 170 CLR 267

[2] 1904 AP, 182 @ 185

[3] RFD Hungerford J. p.404

(4]

(1989) 27 IR 104

(5] RFD Hungerford J. p.193

[6] (1990) 33 IR 79

[7] RFD Hungerford J. p.442

[8] (1974) AR 675

(9] RFD Hungerford J. p.308

[10] RFD Hungerford J. p.489

[11] RFD Macken J. 1985 p.23

[12] RFD Hunaerford J. p.492

(13] RFD Hungerford J. p.515

[14] 18 May 1988 (unreported)

(15] RFD Hunaerford J. p.537