

## NOTICE OF MOTION

### COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2020/00356588

### TITLE OF PROCEEDINGS

Plaintiff	Dr Amireh Fakhouri
First defendant	The Secretary for the NSW Ministry of Health
Second defendant	The State of NSW

### FILING DETAILS

Prepared for	Plaintiff
Legal representative	Rebecca Gilsenan, Maurice Blackburn Lawyers
Legal representative reference	RXG/3052894
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### PERSON AFFECTED BY ORDERS SOUGHT

#### Plaintiff

**The Secretary for the NSW Ministry of Health and State of NSW** (Defendants)

### HEARING DETAILS

This motion is listed at

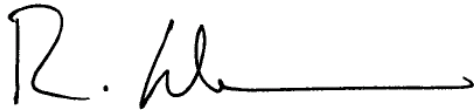
**Note:** The plaintiff requests that the motion be dealt with at the interlocutory hearing listed before Garling J on 1 December 2021.

**ORDERS SOUGHT**

- 1 The plaintiff be granted leave pursuant to s 64 of the *Civil Procedure Act 2005* (NSW) to file a further amended statement of claim in the form of Annexure A to this notice of motion.
- 2 Further or in the alternative to order 1, the proceedings be transferred to the Federal Court of Australia (NSW Registry) pursuant to s 5(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).
- 3 The defendants pay the plaintiff's costs of the notice of motion.
- 4 Such further or other orders as the Court considers appropriate.

**SIGNATURE**

Signature of legal representative



Capacity

Solicitor for the plaintiff

Date of signature

18 November 2021

**NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT**

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

## Annexure A

Form 3A (version 7)  
UCPR 6.2

### **FURTHER AMENDED STATEMENT OF CLAIM**

#### **COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Common Law
List	General (Class Actions)
Registry	Sydney
Case number	<u>2020/00356588</u>

#### **TITLE OF PROCEEDINGS**

Plaintiff	<b>Dr Amireh Fakhouri</b>
<u>First Defendant</u>	<b>The Secretary for the NSW Ministry of Health</b>
<u>Second Defendant</u>	<b><u>The State of New South Wales</u></b>

#### **FILING DETAILS**

Filed for	<b>Dr Amireh Fakhouri, Plaintiff</b>
Legal representative	Rebecca Gilsenan, Maurice Blackburn Lawyers
Legal representative reference	RXG/3052894
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#### **TYPE OF CLAIM**

Contractual dispute (Common Law)  
Breach of contract (employment related)

## RELIEF CLAIMED

- 1 A declaration pursuant to ss 23 and 75 of the *Supreme Court Act 1970* (NSW) and/ or s 355C of the *Industrial Relations Act 1996* (NSW) that the First Defendant has contravened the Awards (as defined in paragraph 3c below), by failing to pay the Plaintiff and Group Members all remuneration payable under the Awards.
- 2 In the alternative to Order 1, a declaration pursuant to ss 23 and 75 of the *Supreme Court Act 1970* (NSW) and/ or s 355C of the *Industrial Relations Act 1996* (NSW) that the Second Defendant has contravened the Awards (as defined in paragraph 3c below), by failing to pay the Plaintiff and Group Members all remuneration payable under the Awards.
- 3 An order against the First Defendant for recovery of remuneration payable under the Awards (as defined in paragraph ~~3b~~ 3c below) pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).
- 4 In the alternative to Order 3, an order against the First Defendant for recovery of a debt, being remuneration payable under the Awards (as defined in paragraph 3c below).
- 5 In the alternative to Order ~~4-3~~, an order against the Second Defendant for recovery of remuneration payable under the Awards (as defined in paragraph ~~3b~~ 3c below) pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).
- 6 In the alternative to Order 5, an order against the Second Defendant for recovery of a debt, being remuneration payable under the Awards (as defined in paragraph 3b below).
- 7 An order that the First Defendant pay interest pursuant to section 100 of the *Civil Procedure Act 2005* (NSW) and/ or section 372 of the *Industrial Relations Act 1996* (NSW).
- 8 In the alternative to Order ~~3-7~~, an order that the Second Defendant pay interest pursuant to section 100 of the *Civil Procedure Act 2005* (NSW) and/ or section 372 of the *Industrial Relations Act 1996* (NSW).
- 9 A declaration that any underpayment of ordinary rates of pay gives rise to obligations on the First Defendant pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth).

- 10 In the alternative to Order 59, a declaration that any underpayment of ordinary rates of pay gives rise to obligations on the Second Defendant pursuant to the Superannuation Guarantee (Administration) Act 1992 (Cth).
- 11 Costs.
- 12 Such further or other order as the Court thinks fit.

## COMMON QUESTIONS, PLEADINGS AND PARTICULARS

### A. PLEADINGS

#### PARTIES

- 1 The Plaintiff brings this proceeding as a representative proceeding pursuant to Part 10 of *the Civil Procedure Act 2005* (NSW):
- a. in her own right; and
  - b. on behalf of all persons who, at any time in the period from 16 December 2014 to ~~16 December 2022~~ April 2021 (**Relevant Period**):
    - i. were employed by the ~~Defendant~~ First Defendant, or in the alternative the Second Defendant, in the positions of:
      1. Junior Medical Officer;
      2. Intern;
      3. Resident Medical Officer;
      4. Registrar; and
      5. Senior Registrar,
    - ii. were required to, from time to time, work in excess of their rostered ordinary hours (**Overtime**);
    - iii. were not paid all of their entitlements for the Overtime; and
    - iv. have not, as at the date of commencement of this proceeding, commenced proceedings against the First Defendant, or in the alternative the Second Defendant, ~~Defendant~~ in respect of the non-payment or underpayment of his or her full entitlements for the Overtime,
- (Group Members).**

- 2 The Plaintiff:

- a. was employed by the First Defendant, or in the alternative the Second Defendant, Defendant from about January 2015 until about February 2017, and from about August 2017 until about February 2018 (**Fakhouri Employment Period**);
  - b. was employed in the positions of:
    - i. Intern from about January 2015 until about May 2016;
    - ii. Resident Medical Officer from about June 2016 until about February 2017; and
    - iii. Senior Resident Medical Officer from about August 2017 until about February 2018,
  - c. as pleaded below at paragraphs 31, 33, 35 and 37, was required to work, from time to time:
    - i. in accordance with a roster which provided for more than 80 hours of work in a fortnight (**Rostered Overtime**);
    - ii. in excess of her ordinary hours, other than as notified on the roster (**Unrostered Overtime**); and
    - iii. shifts which commenced before 08:00 or finished after 18:00, Monday to Friday, and shifts on Saturday and Sunday (**Paid Meal Break Shifts**),
  - d. as pleaded below at paragraph 39, was not paid her entitlements for the Rostered Overtime, the Unrostered Overtime and all hours rostered on the Paid Meal Break Shifts; and
  - e. has not, as at the date of commencement of this proceeding, commenced proceedings against the First Defendant, or in the alternative the Second Defendant, Defendant in respect of the non-payment or underpayment of her full entitlements for the Rostered Overtime, the Unrostered Overtime and the Paid Meal Break Shifts.
- 3 The Plaintiff and each Group Member were, at times during the Relevant Period:
- a. taken to have been employed by the First Defendant for the purposes of these proceedings;

### Particulars

Section 116H of the *Health Services Act 1997* (NSW).

- b. further, and in the alternative to (a) above, taken to have been employed by the Second Defendant:

**Particulars**

Section 115(1) of the *Health Services Act 1997* (NSW).

- c. during the times that they were employed, they were covered by the:
- i. *Public Hospital Medical Officers (State) Award 2014*, in the period from 1 July 2014 until 30 June 2015;
  - ii. *Public Hospital Medical Officers (State) Award 2015*, in the period from 1 July 2015 until 30 June 2016;
  - iii. *Public Hospital Medical Officers (State) Award 2016*, in the period from 1 July 2016 until 30 June 2017;
  - iv. *Public Hospital Medical Officers (State) Award 2017*, in the period from 1 July 2017 until 30 June 2018;
  - v. *Public Hospital Medical Officers (State) Award 2018*, in the period from 1 July 2018 until 30 June 2019; and
  - vi. *Public Hospital Medical Officers (State) Award 2019*, in the period from 1 July 2019,
- (collectively, the **Awards**),
- d. entitled to the benefits of the Awards, at the relevant times;
- e. entitled to be paid the salaries set out in the:
- i. *Health Professional and Medical Salaries (State) Award 2014*, in the period from 1 July 2014 until 30 June 2015;
  - ii. *Health Professional and Medical Salaries (State) Award 2015*, in the period from 1 July 2015 until 30 June 2016;
  - iii. *Health Professional and Medical Salaries (State) Award 2016*, in the period from 1 July 2016 until 30 June 2017;
  - iv. *Health Professional and Medical Salaries (State) Award 2017*, in the period from 1 July 2017 until 30 June 2018;
  - v. *Health Professional and Medical Salaries (State) Award 2018*, in the period from 1 July 2018 until 30 June 2019; and

- vi. *Health Professional and Medical Salaries (State) Award 2019*, in the period from 1 July 2019,
- f. entitled to the benefit of the Ministry of Health Circular No. 83/250 (**Circular**);

**Particulars**

Clause 10 of the Awards.

- g. required to:
  - i. work in accordance with his or her rostered hours; and/ or
  - ii. perform work outside of the rostered hours.

4 The ~~Defendant~~First Defendant was, at all material times:

- a. responsible for the management and oversight of NSW Health; and
- b. the employer of each of the Group Members for the purposes of these proceedings.

**Particulars**

Section 116H of the *Health Services Act 1997* (NSW).

4A Further, and in the alternative to paragraph 4 above, the Second Defendant was, at all material times:

- a. responsible for the management and oversight of NSW Health; and
- b. the employer of each of the Group Members for the purposes of these proceedings.

**Particulars**

Section 115(1) of the *Health Services Act 1997* (NSW).

**THE AWARDS**

5 Pursuant to each of the Awards, the ordinary hours of work for the Plaintiff and each of the Group Members were not permitted to exceed an average of 38 hours per week.

**Particulars**

Clause 6(i) of each of the Awards.

6 Pursuant to each of the Awards, the Plaintiff and each of the Group Members was to be rostered to work no more than 80 ordinary hours in a fortnight.

**Particulars**



Clause 6(i) of each of the Awards.

Overtime

- 7 Pursuant to each of the Awards, all time worked by the Plaintiff and each of the Group Members in excess of 80 hours in a fortnight was to be paid as overtime (**Fortnightly Overtime**) at the following rates:
- a. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;
  - b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and
  - c. at the rate of double time (200%) for all overtime performed on a Sunday.

**Particulars**

Clause 11(i) of each of the Awards.

- 8 Pursuant to each of the Awards, the Plaintiff and each of the Group Members was entitled to be paid at overtime rates for all time worked in excess of 10 hours in any one shift, irrespective of the total hours worked in the respective fortnight (**Daily Overtime**).

**Particulars**

Clause 6(v) of each of the Awards.

- 9 Pursuant to each of the Awards, all Daily Overtime worked by the Plaintiff and each of the Group Members was to be paid as overtime at the following rates:
- a. at the rate of time and one-half (150%) for the first two hours worked in excess of 10 hours in any one shift;
  - b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 10 hours in any one shift; and
  - c. at the rate of double time (200%) for all hours worked in excess of 10 hours in any one shift on a Sunday.

**Particulars**

Clause 11(i) of each of the Awards.

Payment for meal breaks

- 10 Pursuant to each of the Awards, the First Defendant, or in the alternative the Second Defendant, was required to comply with the Circular in relation to meal breaks.

### Particulars

Clause 10 of each of the Awards.

- 11 Pursuant to the Circular, the Plaintiff and each of the Group Members, whose shift commenced before 08:00 or finished after 18:00, Monday to Friday, was entitled to receive payment for all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift.

### Particulars

Clause 2.2(ii) of the Circular.

- 12 In the premises pleaded above at paragraph 11, the Plaintiff and each of the Group Members, whose shift commenced before 08:00 or finished after 18:00, Monday to Friday, was entitled to receive payment for any meal breaks taken during that shift.
- 13 Pursuant to the Circular, the Plaintiff and each of the Group Members, who worked on Saturday or Sunday, was entitled to receive payment for all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift.

### Particulars

Clause 2.2(ii) of the Circular.

- 14 In the premises pleaded above at paragraph 13, the Plaintiff and each of the Group Members, who worked on Saturday or Sunday, was entitled to receive payment for any meal breaks taken during that shift.
- 14A Payment for any meal breaks taken during shifts referred to in paragraphs 12 and 14 above which formed part of the employee's ordinary hours was to be paid at the Plaintiff's and each of the Group Members' ordinary rate of pay.
- 14B Ordinary rate of pay for the Plaintiff and each of the Group Members is "ordinary time earnings" for the purposes of the *Superannuation Guarantee (Administration) Act 1992 (Cth)*.

### UNROSTERED OVERTIME

- 15 Pursuant to each of the Awards, the time during which the Plaintiff and each of the Group Members were, and are, required by the First Defendant, or in the alternative the Second Defendant, to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant, may call on them to perform is to be treated as time worked.

### Particulars

Clause 9 of each of the Awards.

- 16 On each and every occasion where a Group Member, including the Plaintiff, was “treating a critically ill patient or a patient’s condition ha[d] changed dramatically” at the completion of a Group Member’s shift, the Group Member was required to work Unrostered Overtime until other adequate medical attention could be arranged.

**Particulars**

- i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member’s duty as a doctor to provide care to patients in these circumstances.
  - ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, as a circumstance in which each Group Member was required to work Unrostered Overtime in the First Defendant’s, or in the alternative the Second Defendant’s, policy directives:
    1. PD2010\_074, titled “Employment Arrangements for Medical Officers in the New South Wales Public Health System” (**2010 Policy Directive**), at clause 8.2.1;
    2. PD2015\_034, titled “Medical Officers – Employment Arrangements in the NSW Health Service” (**2015 Policy Directive**), at clause 9.2.1;
    3. PD2016\_059, titled “Medical Officers – Employment Arrangements in the NSW Public Health Service” (**2016 Policy Directive**), at clause 9.2.1;
    4. PD2017\_042, titled “Employment Arrangements for Medical Officers in the NSW Public Health Service” (**2017 Policy Directive**), at clause 9.2.1; and
    5. PD2019\_027, titled “Employment Arrangements for Medical Officers in the NSW Public Health Service” (**2019 Policy Directive**), at clause 9.1.1.
- 17 On each and every occasion where a Group Member, including the Plaintiff, was “treating a patient who require[d] transfer”, the Group Member was required to work Unrostered Overtime until the transfer process was complete.

### Particulars

- i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.
- ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, Defendant as a circumstance in which each Group Member was required to work Unrostered Overtime in clause:
  1. 8.2.2 of the 2010 Policy Directive;
  2. 9.2.2 of the 2015 Policy Directive;
  3. 9.2.2 of the 2016 Policy Directive;
  4. 9.2.2 of the 2017 Policy Directive; and
  5. 9.1.2 of the 2019 Policy Directive.

18 On each and every occasion where a Group Member, including the Plaintiff, was "already working in theatre and the procedure continue[d] past the scheduled end of [the Group Member's] shift", the Group Member was required to work Unrostered Overtime until their responsibilities concluded.

### Particulars

- i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.
- ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, Defendant as a circumstance in which each Group Member was required to work Unrostered Overtime in clause:
  1. 8.2.3 of the 2010 Policy Directive;
  2. 9.2.3 of the 2015 Policy Directive;

3. 9.2.3 of the 2016 Policy Directive; and
4. 9.2.3 of the 2017 Policy Directive; and
5. 9.1.3 of the 2019 Policy Directive.

19 On each and every occasion where a Group Member, including the Plaintiff, was “responsible for the admission and/ or discharge of a patient at the completion of a shift”, the Group Member was required to work Unrostered Overtime until their responsibilities concluded.

#### **Particulars**

- i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member’s duty as a doctor to provide care to patients in these circumstances.
- ii. Further, the fact that each Group Member was required to provide such care in those circumstances is recognised by the First Defendant, or in the alternative the Second Defendant, Defendant as a circumstance in which each Group Member was required to work Unrostered Overtime in clause:
  1. 8.2.3 of the 2010 Policy Directive;
  2. 9.2.4 of the 2015 Policy Directive;
  3. 9.2.4 of the 2015 Policy Directive;
  4. 9.2.4 of the 2017 Policy Directive; and
  5. 9.1.4 of the 2019 Policy Directive.

20 On each and every occasion where a Group Member, including the Plaintiff, was unable to complete patient transfer/discharge summaries during their normal rostered hours and performed work outside of their rostered hours for this purpose, the Group Member was required to work Unrostered Overtime until the summaries were completed.

#### **Particulars**

- i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member’s duty as a doctor to provide care to patients in these circumstances.

21 On each and every occasion where a Group Member, including the Plaintiff, was requested by a superior to attend a late ward round outside of their rostered shift, the Group Member was required to work Unrostered Overtime until the ward round was completed.

#### **Particulars**

- i. The requirement of a Group Member to work the Unrostered Overtime was a necessary or essential function of each Group Member's duty as a doctor to provide care to patients in these circumstances.

22 On each and every occasion when a Group Member, including the Plaintiff, worked Unrostered Overtime in one or more of the circumstances pleaded in paragraphs 16 to 21, or was otherwise required by the First Defendant, or in the alternative the Second Defendant, Defendant to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant, Defendant called on him or her to perform, the Group Member was required by the First Defendant, or in the alternative the Second Defendant, Defendant to be in attendance at a hospital.

23 In the premises, on each and every occasion when a Group Member, including the Plaintiff, worked Unrostered Overtime in one or more of the circumstances pleaded in paragraphs 16 to 21, or otherwise worked Unrostered Overtime as he or she was required by the First Defendant, or in the alternative the Second Defendant, Defendant to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant, Defendant called on him or her to perform, the First Defendant, or in the alternative the Second Defendant, Defendant was required to treat the Unrostered Overtime worked by the Group Member as time worked for the purposes of the Awards.

#### **Particulars**

Clause 9 of each of the Awards.

24 In the premises, on each occasion when a Group Member, including the Plaintiff, worked Unrostered Overtime in one or more of the circumstances pleaded in paragraphs 16 to 21, or otherwise worked Unrostered Overtime because he or she was required by the First Defendant, or in the alternative the Second Defendant, Defendant to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second

Defendant, Defendant called on him or her to perform, the First Defendant, or in the alternative the Second Defendant, Defendant was required to pay the Group Member for all Unrostered Overtime hours worked.

## UNDERPAYMENT

- 25 The First Defendant, or in the alternative the Second Defendant, Defendant was required to pay the Plaintiff and each of the Group Members for all time worked by him or her in the period after 15 December 2014.
- 26 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, Defendant was required to make payment to the Plaintiff and each of the Group Members for all Fortnightly Overtime:
- a. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;
  - b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and
  - c. at the rate of double time (200%) for all overtime performed on a Sunday.
- 27 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, Defendant was required to make payment to the Plaintiff and each of the Group Members for all Daily Overtime:
- a. at the rate of time and one-half (150%) for the first two hours worked in excess of 10 hours in any one shift;
  - b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 10 hours in any one shift; and
  - c. at the rate of double time (200%) for all hours worked in excess of 10 hours in any one shift on a Sunday.
- 28 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, Defendant was required to make payment to the Plaintiff and each of the Group Members, whose shift commenced before 08:00 or finished after 18:00, Monday to Friday, for all hours worked, including any meal breaks taken during that shift.
- 29 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, Defendant was required to make payment to the Plaintiff and each of the Group Members, who worked on Saturday or Sunday, for all hours worked, including any meal breaks taken during that shift.

- 30 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work Unrostered Overtime so as to:
- a. treat a critically ill patient or treat a patient whose condition had changed dramatically at the completion of a shift, until other adequate medical attention could be arranged;
  - b. treat a patient who required transfer, until the transfer process was complete;
  - c. complete a procedure in theatre where such a procedure continued past the scheduled end of a shift;
  - d. conclude responsibilities for the admission and/ or discharge of a patient at the completion of a shift;
  - e. complete patient transfer/discharge summaries which they were unable to complete during their normal rostered hours;
  - f. attend a late ward round outside of their rostered shift at the request of a superior; and/ or
  - g. be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant~~Defendant~~ called on them to perform.

**Particulars**

- i. Particulars will be provided after discovery.
- ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

- 31 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work in excess of 80 hours in a fortnight.

**Particulars**

- i. Particulars will be provided after discovery.
- ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

- 32 In the premises pleaded above, on each occasion that the Plaintiff and each of the Group Members worked as set out in paragraphs 30 and 31 above, the First Defendant, or in the alternative the Second Defendant~~Defendant~~ was required to



make payment to the Plaintiff and each of the Group Members for all Fortnightly Overtime:

- a. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;
- b. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and
- c. at the rate of double time (200%) for all overtime performed on a Sunday.

33 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work in excess of 10 hours in a shift.

**Particulars**

- i. Particulars will be provided after discovery.
- ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

34 In the premises pleaded above, on each occasion that the Plaintiff and each of the Group Members worked as set out in paragraphs 30 and 33 above, the First Defendant, or in the alternative the Second Defendant~~Defendant~~ was required to make payment to the Plaintiff and each of the Group Members for all Daily Overtime:

- a. at the rate of time and one-half (150%) for the first two hours worked in excess of ten hours in any one shift;
- b. at the rate of double time (200%) for all hours after the first two hours worked in excess of ten hours in any one shift; and
- c. at the rate of double time (200%) for all hours worked in excess of ten hours in any one shift on a Sunday.

35 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant~~Defendant~~, work shifts which commenced before 08:00 or finished after 18:00, Monday to Friday.

**Particulars**

- i. Particulars will be provided after discovery.

- ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

36 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, Defendant was required to make payment to the Plaintiff and each of the Group Members, on each and every occasion when his or her shift commenced before 08:00 or finished after 18:00, Monday to Friday, for all hours worked, including any meal breaks taken during that shift.

37 During the Relevant Period, the Plaintiff and some Group Members did, at the requirement of the First Defendant, or in the alternative the Second Defendant, Defendant, work shifts on Saturdays and Sundays.

#### Particulars

- i. Particulars will be provided after discovery.
- ii. Particulars of Group Members' claims will be provided following the initial trial of the Plaintiff's claim.

38 In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, Defendant was required to make payment to the Plaintiff and each of the Group Members, on each and every occasion when he or she worked on a Saturday or Sunday, for all hours worked, including any meal breaks taken during that shift.

39 In the period after 15 December 2014, the First Defendant, or in the alternative the Second Defendant, Defendant did not pay the Plaintiff and each of the Group Members their full entitlements, for all time worked, pursuant to:

- a. clause 6 of each of the Awards;
- b. clause 10 of each of the Awards; and/or
- c. clause 11 of each of the Awards.

40 By reason of the matters pleaded in paragraph 39 above, the First Defendant, or in the alternative the Second Defendant, Defendant has contravened:

- a. clause 6 of each of the Awards;
- b. clause 10 of each of the Awards; and/or
- c. clause 11 of each of the Awards.

41 In the premises, the Plaintiff and each Group Member were not paid their full entitlements pursuant to the Awards, and were thereby underpaid, in the period after 15 December 2014.

### Particulars

The difference between the amount that the Plaintiff and each Group Member was entitled to receive for all time worked in the period after 15 December 2014, and the amount paid to the Plaintiff and each Group Member by the First Defendant, or in the alternative the Second Defendant, Defendant in the period after 15 December 2014.

42 In the premises, the Plaintiff and each of the Group Members are entitled to an order pursuant to section 365 of the *Industrial Relations Act 1996* (NSW) that the First Defendant, or in the alternative the Second Defendant, Defendant is obliged to compensate them for the underpayment of entitlements owed to them pursuant to the Awards.

42AA Further and in the alternative to paragraph 42 above, in the premises, the Plaintiff and each of the Group Members are entitled to an order under the general law for the recovery of debt against the First Defendant, or in the alternative the Second Defendant, being the underpayment of entitlements owed to them pursuant to the Awards.

42A During the Relevant Period, the First Defendant, or in the alternative the Second Defendant:

- (a) in the premises pleaded in paragraphs 14A and 14B above, was required to include in the calculation of "ordinary time earnings" for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth) the payments that should have been made to the Plaintiff and Group Members in respect of meal breaks taken during shifts, which formed part of the employee's ordinary hours, where they had worked them as pleaded in paragraphs 35 and 37 above;
- (b) did not comply with this requirement.

### **COMMON QUESTIONS**

The questions of law or fact common to the claims of Group Members in this proceeding are:

43 Whether, on the proper interpretation of the Awards, the First Defendant, or in the alternative the Second Defendant, Defendant was required to pay each Group Member for:

- a. all time worked by each of the Group Members in excess of 80 hours in a fortnight at the following rates:

- i. at the rate of time and one-half (150%) for the first two hours worked in excess of 80 hours in a fortnight;
  - ii. at the rate of double time (200%) for all hours after the first two hours worked in excess of 80 hours in a fortnight; and
  - iii. at the rate of double time (200%) for all overtime performed on a Sunday.
- b. all time worked in excess of 10 hours in any one shift, at overtime rates, irrespective of the total hours worked in the respective fortnight at the following rates:
  - i. at the rate of time and one-half (150%) for the first two hours worked in excess of 10 hours in any one shift;
  - ii. at the rate of double time (200%) for all hours after the first two hours worked in excess of 10 hours in any one shift; and
  - iii. at the rate of double time (200%) for all hours worked in excess of 10 hours in any one shift on a Sunday.
- c. all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift, if his or her shift commenced before 08:00 or finished after 18:00, Monday to Friday; and
- d. all time he or she was required to be in attendance, from the start time of his or her shift until the finish time of his or her shift, on Saturday or Sunday.

44 Whether in each of the following circumstances, the First Defendant, or in the alternative the Second Defendant, Defendant required Group Members to be in attendance at a hospital for the purpose of carrying out and performing functions as called on by the First Defendant, or in the alternative the Second Defendant: Defendant:

- a. treating a critically ill patient or patient whose condition had or has changed dramatically at the completion of the Group Member's shift;
- b. treating a patient who required or requires transfer, until the transfer process was or is complete;
- c. continuing to work in theatre where the procedure continued or continues past the scheduled end of the Group Member's shift;

- d. completing the admission and/ or discharge of a patient at the completion of a shift, where the Group Member was or is responsible for that admission and/ or discharge;
- e. completing patient transfer/ discharge summaries which were unable to be completed during their normal rostered hours;
- f. attending a late ward round outside of their rostered shift at the request of a superior; and/or
- g. being in attendance at a hospital, on request, for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant, Defendant called on him or her to perform.

45 Whether, on the proper interpretation of the Awards, in each of the circumstances identified in paragraph 44, the First Defendant, or in the alternative the Second Defendant, Defendant required Group Members to be in attendance at a hospital for the purpose of carrying out such functions as the First Defendant, or in the alternative the Second Defendant, Defendant called on them to perform and should be treated as time worked within the meaning of clause 9 of each of the Awards.

46 Whether, on the proper interpretation of the Awards, the First Defendant, or in the alternative the Second Defendant, Defendant was required to pay each Group Member for all hours that he or she worked outside of his or her rostered hours.

#### **SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Solicitor on record

Date of signature

22 April 2021

## NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim, by filing a defence and/or making a cross-claim.**
- 2 If money is claimed, and you believe you owe the money claimed, by:**
  - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
  - Filing an acknowledgement of the claim.
  - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed, by:**
  - Paying the plaintiff that part of the money that is claimed.
  - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at [www.ucprforms.justice.nsw.gov.au](http://www.ucprforms.justice.nsw.gov.au) or at any NSW court registry.

#### **REGISTRY ADDRESS**

Street address	Law Courts Building, 184 Phillip Street, Sydney, NSW 2000.
Postal address	Supreme Court of NSW, GPO Box 3, Sydney, NSW 2001.
Telephone	1300 679 272

**AFFIDAVIT VERIFYING**

Name Amireh Fakhouri  
 Address 2 Stockyard Street, Truganina, Victoria 3029  
 Occupation Doctor  
 Date 22 April 2021

I say on oath:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the amended statement of claim are true.

SWORN at 2 Stockyard Street, Truganina, Victoria 3029

Signature of deponent

Name of witness Jonathan Peck

Address of witness Level 21, 380 La Trobe Street, Melbourne, Victoria 3000

Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]  
 #I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]  
 #I have confirmed the deponent's identity using the following identification document:

\_\_\_\_\_  
 Identification document relied on (may be original or certified copy)<sup>†</sup>

Signature of witness

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

\_\_\_\_\_  
 [\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]



## FURTHER DETAILS ABOUT PLAINTIFF

### Plaintiff

Name Dr Amireh Fakhouri  
 Address 2 Stockyard Street  
 Truganina Victoria 3029

### Legal representative for plaintiff

Name Rebecca Gilsenan  
 Practising certificate number 32587  
 Firm Maurice Blackburn Lawyers  
 Address Level 32  
 201 Elizabeth Street  
 Sydney NSW 2000  
 DX address 13002 Sydney Market Street  
 Telephone (02) 8267 0959  
 Fax (02) 9261 3318  
 Email rgilsenan@mauriceblackburn.com.au

## DETAILS ABOUT DEFENDANT

### Defendant **First Defendant**

Name Ms Elizabeth Koff  
 The Secretary for the NSW Ministry of Health  
 Address 1 Reserve Road  
 St Leonards NSW 2065

### Second Defendant

Name The State of New South Wales  
Address Crown Solicitor's Office  
60 – 70 Elizabeth Street  
Sydney NSW 2000

