

**SECOND FURTHER AMENDED STATEMENT OF CLAIM**

*[Filed pursuant to leave granted by the Court on 18 November 2022]*

**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
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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) that:
- a. the First Defendant has contravened the Awards (as defined in paragraph 3c below) by failing to pay the Plaintiff and Group Members remuneration payable under the Awards, consisting of remuneration for the following time worked as pleaded in paragraphs 2c – 2d and 31 – 39 below (**Unpaid Remuneration**):
    - i. Rostered Overtime;
    - ii. Unrostered Overtime;
    - iii. Unpaid Meal Breaks; and
    - iv. Paid Meal Break Shifts.
  - b. the Plaintiff and Group Members are entitled to recover from the First Defendant such Unpaid Remuneration as is owed to them 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) that:
- a. the Second Defendant has contravened the Awards (as defined in paragraph 3c below) by failing to pay the Plaintiff and Group Members remuneration payable under the Awards, consisting of Unpaid Remuneration; and
  - b. the Plaintiff and Group Members are entitled to recover from the Second Defendant such Unpaid Remuneration as is owed to them under the Awards.
- ~~3 An order against the First Defendant for recovery of remuneration payable under the Awards (as defined in paragraph 3b below) pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).~~
- ~~4 In the alternative to Order 1, an order against the Second Defendant for recovery of remuneration payable under the Awards (as defined in paragraph 3b below) pursuant to section 365 of the *Industrial Relations Act 1996* (NSW).~~
- 3 An order against the First Defendant for recovery of a debt, being Unpaid Remuneration payable to the Plaintiff and Group Members under the Awards as read with Chapter 7 Part 2 (including s 376) of the *Industrial Relations Act 1996* (NSW) and the general law.

4 In the alternative to Order 3, an order against the Second Defendant for recovery of a debt, being Unpaid Remuneration payable to the Plaintiff and Group Members under the Awards as read with Chapter 7 Part 2 (including s 376) of the *Industrial Relations Act 1996* (NSW) and the general law.

5 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).~~

6 In the alternative to Order 35, 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).~~

7 A declaration that, for the purposes of paying superannuation contributions in respect of the Plaintiff and Group Members pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**), “ordinary time earnings” within s 23 of the SGA Act includes all as yet unpaid earnings payable to the Plaintiff and Group Members over the Relevant Period for meal breaks (**Ordinary Time Meal Breaks**):

a. which took place during the first 80 hours of work in a fortnight; and

b. met one of the following criteria:

i. occurred during a day shift, Monday to Friday, and was a meal break during which the Plaintiff or Group Member was required to work;

ii. occurred during a shift that commenced before 08:00 or finished after 18:00, Monday to Friday; or

iii. occurred on a Saturday or Sunday, ~~any underpayment of ordinary rates of pay gives rise to obligations on the First Defendant pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth).~~

78 A declaration that s 8 of the *Aware Super Act 1992* (NSW) (formerly entitled the *First State Superannuation Act 1992* (NSW)) (**Aware Super Act**) requires the First Defendant, or alternatively the Second Defendant, to make superannuation contributions for the Plaintiff and Group Members in respect of all as yet unpaid earnings payable to them over the Relevant Period for Ordinary Time Meal Breaks.

~~89 In the alternative to Order 5, 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).~~

9 Costs.

10 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 2021-27 April 2022 (**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~~ and 38B, 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period (**Rostered Overtime**);
  - ii. in excess of her ordinary hours, other than as notified on the roster (**Unrostered Overtime**);
  - iii. during an unpaid meal break on day shifts, Monday to Friday (**Unpaid Meal Breaks**); and
  - iv. 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, work performed during Unpaid Meal Breaks 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, work performed during Unpaid Meal Breaks 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 until 30 June 2021; and
  - vi.vii. *Public Hospital Medical Officers (State) Award 2021*, in the period from 1 July 2021,
- (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 until 30 June 2021;
  - vi.vii. *Health Professional and Medical Salaries (State) Award 2021*, in the period from 1 July 2021,
- 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).

4AA For the purposes of the SGA Act, the First Defendant and/ or the Second Defendant is:

- a. an employer (s 12); and
- b. obliged to pay superannuation guarantee charge on its superannuation guarantee shortfall (s 16).

4AB During the Relevant Period, for the purposes of the SGA Act:

- a. the superannuation guarantee shortfall of the First Defendant, and/ or the Second Defendant, comprised (inter alia) the total of its individual superannuation guarantee shortfalls for each quarter (s 17);
- b. each individual superannuation guarantee shortfall described in (a) above was calculated according to a formula, the integers of which included (s 19):
  - i. the quarterly salary or wages base for the employer in respect of the employee for the quarter; and
  - ii. the charge percentage for the employer for the quarter;
- c. the individual superannuation guarantee shortfalls of the First Defendant and/ or the Second Defendant for each quarter included the shortfalls for the Plaintiff and Group Members in respect of their employment with the First Defendant and/ or the Second Defendant during that quarter (s 19);
- d. The the First Defendant and/ or the Second Defendant was entitled to reduce its charge percentage for an employee for a quarter if it made a contribution for the benefit of that employee to a complying superannuation fund (s 23); and
- e. The the amount by which the First Defendant and/ or the Second Defendant was entitled to reduce its charge percentage as described in (d) above was calculated according to a formula, the integers of which included the total of the employee's ordinary time earnings and sacrificed ordinary time earnings (s 23).



4AC Pursuant to the Aware Super Act, the First Defendant and/ or the Second Defendant is:

- a. an employer to which that Act applies (s 6(1)); and
- b. required to make a superannuation contribution in respect of each of its employees (other than excluded employees) equivalent to the salary contribution percentage for the employee for each financial year, or part, of which the employee is an employee (s 8(1)).

4AD During the Relevant Period, for the purposes of the Aware Super Act:

- a. the salary contribution percentage for an employee for a financial year was a percentage of the person's salary or wages for the financial year, being that percentage set out in s 8(2) or in regulations made under s 8(2A) (as applicable);
- b. an employee's "salary or wages" meant, in the case of an employee who was not an executive officer, the total of:
  - (i) earnings in respect of ordinary hours of work (s 4(1)(a)(i));
  - (ii) earnings consisting of over-award payments, shift-loading or commission (s 4(1)(a)(ii)); and
  - (iii) other allowances, payments or benefits prescribed by the regulations (s 4(1)(a)(iii)-(iv)); and
- c. the Plaintiff and Group Members were employees in respect of whom the First Defendant and/ or the Second Defendant was required to make superannuation contributions under s 8(1).

## **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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period.

### Particulars

Clauses 6(i) and 6(vi) 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period. 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period;
  - 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period; 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

9A Pursuant to each of the Awards, the First Defendant, or in the alternative the Second Defendant, was required to provide the Plaintiff and each of the Group Members a break from duty of 30 minutes' duration for the purpose of taking a meal break, on day shifts, Monday to Friday.

**Particulars**

Clause 10(i) and (ii) of each of the Awards.

9B Pursuant to each of the Awards, on occasions when the Plaintiff and each of the Group Members were required to work during the meal break referred to above at paragraph 9A, the Plaintiff and each of the Group Members was entitled to receive payment for the work performed during any such meal breaks.

**Particulars**

Clause 10(iii) of each of the Awards.

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, other than on day shifts, Monday to Friday.

**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 9B, 12 and 14 above which formed part of the employee's ordinary hours:

- a. was to be paid at the Plaintiff's and each of the Group Members' ordinary rate of pay; and  
~~—constituted earnings in respect of ordinary hours of work for the purposes of the definition of "ordinary time earnings" in the SGA Act; and~~
- b. constituted earnings in respect of ordinary hours of work for the purposes of the definition of "salary or wages" in the Aware Super Act.

~~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 (Gth).~~

### 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period;
  - 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period; 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.

29A In the premises pleaded above, the First Defendant, or in the alternative the Second Defendant, was required to make payment to the Plaintiff and each of the Group Members, who were required to work during a meal break on day shifts, Monday to Friday, for all time worked.

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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period.

#### 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period;
- 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period; 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.

38A 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, perform work during their unpaid meal break on day shifts, 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.

38B In the premises pleaded above, the First Defendant, or in the alternative the Second 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 during their unpaid meal break on day shifts, Monday to Friday.

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 In the premises, the Plaintiff and each of the Group Members are entitled to an order under the general law (as read with Chapter 7 Part 2, including s 376, of the *Industrial Relations Act 1996* (NSW)) for the recovery of debt against the First Defendant, or in the alternative the Second Defendant, being the underpayment of remuneration owed to them pursuant to the Awards.

### SUPERANNUATION OBLIGATIONS AND PRACTICES

~~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.~~

42B During the Relevant Period, the First Defendant or alternatively the Second Defendant was contractually obliged to pay superannuation contributions to the Plaintiff's nominated superannuation fund, in an amount that would reduce to zero

its charge percentage in respect of the Plaintiff's ordinary time earnings (within the meaning of the SGA Act).

**Particulars**

- i. In respect of the period 19 January 2015 to 5 February 2017, the contractual obligations arose from the combined operation of:
  1. the letter to the Plaintiff from the Manager, Statewide eRecruit Operations, HealthShare NSW for and on behalf of the First Defendant, signed and dated 29 September 2014, section entitled "Superannuation";
  2. the document entitled "Acceptance of Offer of Temporary Employment" signed by the Plaintiff on 13 October 2014;  
and
  3. the document entitled "Superannuation Fund Election Form (SCG)" filled out and signed by the Plaintiff on 13 October 2014.
  
- ii. In respect of the period 7 August 2017 to 4 February 2018, the contractual obligation arose from the combined operation of:
  1. the letter to the Plaintiff from the Manager, Statewide eRecruit Operations, HealthShare NSW for and on behalf of the First Defendant, signed and dated 16 November 2016, section entitled "Superannuation";
  2. the document entitled "Acceptance of Offer of Temporary Employment" signed by the Plaintiff on 19 November 2016;  
and
  3. the document entitled "Superannuation Fund Election Form (SCG)" filled out and signed by the Plaintiff on or about 6 August 2017.

42C Further or in the alternative to paragraph 42B above, during the Relevant Period, the First Defendant or alternatively the Second Defendant adhered to a policy or practice pursuant to which it complied with its obligations as an employer under the SGA Act by:

- a. paying superannuation contributions to its employees' nominated superannuation funds in respect of their ordinary time earnings in an amount that would reduce to zero its charge percentage in respect of those earnings; and
- b. upon becoming aware that it had undercalculated the requisite superannuation contribution required to reduce its charge percentage to zero with respect to a given employee's ordinary time earnings, by paying an additional superannuation contribution in respect of the relevant employee that reduced its charge percentage to zero.

42CA Further or in the alternative to paragraph 42B above, during the Relevant Period, the First Defendant or alternatively the Second Defendant was required by s 8(1) of the Aware Super Act to pay superannuation contributions for the Plaintiff and Group Members calculated by reference to their salary or wages.

42D By reason of the matters pleaded in paragraphs 14A and 42B above, where the Plaintiff worked shifts in the circumstances pleaded at paragraphs 35 and 37 above, the First Defendant and/ or the Second Defendant was legally obliged to pay superannuation contributions to the Plaintiff's nominated superannuation fund that:

- a. were calculated by reference to the Plaintiff's ordinary time earnings in respect of those shifts; and
- b. (b) — included within the calculation of ordinary time earnings described in (a) above the payments that should have been made to the Plaintiff in respect of meal breaks (**Meal Break Earnings**).

42DA By reason of the matters pleaded in paragraphs 14A and 42CA above, where the Plaintiff and Group Members worked shifts in the circumstances pleaded at paragraphs 35 and 37 above, the First Defendant and/ or the Second Defendant was legally obliged to pay superannuation contributions to the Plaintiff's and Group Members' nominated superannuation funds that:

- a. were calculated by reference to the Plaintiff's and Group Members' salary or wages for those shifts (including their earnings in respect of ordinary hours of work: Aware Super Act, s 4(1)(a)(i)); and
- b. included within the calculation of earnings in respect of ordinary hours of work, for the purposes of calculating the salary or wages described in (a) above, the payments that should have been made to the Plaintiff and Group Members in respect of Meal Break Earnings.



42E By reason of the matters pleaded in paragraphs 14A and 42C above, where the Plaintiff and Group Members worked shifts in the circumstances pleaded at paragraphs 35 and 37 above, the First Defendant and/ or the Second Defendant was obliged, pursuant to its own policy or practice, to pay superannuation contributions to the nominated superannuation funds of the Plaintiff and Group Members that:

- a. were calculated by reference to the ordinary time earnings of the Plaintiff and Group Members in respect of those shifts; and
- b. (b) included within the calculation of ordinary time earnings described in (a) above the Meal Break Earnings.

42F During the Relevant Period, the First Defendant and/ or the Second Defendant failed to pay superannuation contributions to the Plaintiff and Group Members that included all of their Meal Break Earnings within the calculation of ordinary time earnings.

42G The declaration sought in prayer 7 above has utility by reason of the matters pleaded in:

- a. paragraphs 42B, 42D and 42F above; and/ or

**Particulars**

If the declaration is granted, the First Defendant and/ or the Second Defendant will be contractually obliged to ensure that its superannuation contributions in respect of the Plaintiff account for her Meal Break Earnings.

- b. paragraphs 42C, 42E and 42F above.

**Particulars**

If the declaration is granted, the policy and practice of the First Defendant and/ or the Second Defendant will require it to ensure that its superannuation contributions in respect of the Plaintiff and Group Members account for their Meal Break Earnings.

42GA During the Relevant Period, the First Defendant and/ or the Second Defendant failed to pay superannuation contributions to the Plaintiff and Group Members that included all of their Meal Break Earnings within the calculation of their salary or wages (within the meaning of the Aware Super Act).

42GB The declaration sought in prayer 8 above has utility by reason of the matters pleaded in paragraphs 42CA, 42DA and 42GA above.

### Particulars

If the declaration is granted, the First Defendant and/ or the Second Defendant will be required, by force of s 8(1) of the Aware Super Act, to ensure that its superannuation contributions in respect of the Plaintiff and Group Members account for their Meal Break Earnings.

### 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period, 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period;
    - 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, pro rated for any pay period during which the Group Member was not employed for the whole of the pay period; 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.

ba. all time he or she was required to work during a meal break on day shifts, Monday to Friday;

- 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.

47 Whether payment for any meal breaks during shifts referred to in paragraphs 9B, 12 and 14 which formed part of each Group Member's ordinary hours:

- a. were to be paid at the Group Members' ordinary rate of pay; and
- b. constituted earnings in respect of ordinary hours of work for the purposes of the definition of "ordinary time earnings" in the SGA Act.

48 Whether, during the Relevant Period, the First Defendant or the Second Defendant adhered to a policy or practice pursuant to which it complied with its obligations as an employer under the SGA Act by:

- a. paying superannuation contributions to its employees' nominated superannuation funds in respect of their ordinary time earnings in an amount that would reduce to zero its charge percentage in respect of those earnings; and
- b. upon becoming aware that it had undercalculated the requisite superannuation contribution required to reduce its charge percentage to zero with respect to a given employee's ordinary time earnings, by paying an additional superannuation contribution in respect of the relevant employee that reduced its charge percentage to zero.

49 If the answer to question 48 is "yes": where the Group Members worked shifts in the circumstances pleaded at paragraphs 9B, 35 and 37, whether that policy or practice obliged the First Defendant and/ or the Second Defendant to pay

superannuation contributions to Group Members' nominated superannuation funds that:

- a. were calculated by reference to Group Members' ordinary time earnings in respect of those shifts; and
- b. included within the calculation of ordinary time earnings described in (a) above the payments that should have been made to Group Members in respect of meal breaks.

50 Whether payment for any meal breaks during shifts referred to in paragraphs 9B, 12 and 14 which formed part of each Group Member's ordinary hours constituted earnings in respect of ordinary hours of work for the purposes of the definition of "salary or wages" in the Aware Super Act.

**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

29 November 2022

## 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.

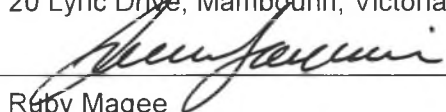
Telephone                1300 679 272

**AFFIDAVIT VERIFYING**

Name Amireh Fakhouri  
 Address 20 Lyric Drive, Mambourin, Victoria 3024  
 Occupation Doctor  
 Date 29 November 2022

I say on oath:

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


SWORN at 20 Lyric Drive, Mambourin, Victoria 3024  
 Signature of deponent   
 Name of witness Ruby Magee  
 Address of witness 122 Yarra Street, Geelong VIC 3220  
 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.
- 2 I have confirmed the deponent's identity using the following identification document:

Driver Licence (No. 090884676)

Identification document relied on (may be original or certified copy) †

Signature of witness 

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

[†"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 20 Lyric Drive  
 Mambourin VIC 3024

**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  
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 Fax (02) 9261 3318  
 Email rgilsenan@mauriceblackburn.com.au

**DETAILS ABOUT DEFENDANT****Defendant First Defendant**

Name Ms ~~Elizabeth Koff~~ Susan Pearce  
 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