TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT O'NEILL

C2021/7404

s.739 - Application to deal with a dispute

Australian Salaried Medical Officers Federation
and
Goulburn Valley Health T/A GV Health, Ms Olivia Gallace
(C2021/7404)

AMA Victoria - Victorian Public Health Sector - Medical Specialists Enterprise Agreement 2018-2021

Melbourne

10.04 AM, TUESDAY, 19 DECEMBER 2023

Continued from 28/09/2023

PN1

THE DEPUTY PRESIDENT: Right. There's no change in appearances.

PN2

MR RINALDI: No, Deputy President.

PN3

MR RYAN: No, Deputy President.

PN4

THE DEPUTY PRESIDENT: All right. Mr Rinaldi?

PN5

MR RINALDI: I think it's our case now.

PN6

THE DEPUTY PRESIDENT: It is.

PN7

MR RINALDI: Thank you, Deputy President. And before we start, we wish you a Merry Christmas because we're very close to it. So we have the three witnesses, Deputy President. Dr Tam, Dr Wadhwa, which for the transcript is spelt - let me get that W-a-d-h-w-a, and then Mr Pullin, P-u-l-l-i-n from the VHIA, the Victorian Hospitals' Industrial Association. They'll be in that order and unless there's any other preliminary matters, I call Dr Tam.

PN8

THE DEPUTY PRESIDENT: All right.

PN9

THE ASSOCIATE: Just remain standing. Please state your full name and address.

PN10

MR TAM: Joseph Chun Minh Tam. My address is (address supplied).

PN11

THE ASSOCIATE: Thank you. Please place the Bible in your right hand and say, 'I do,' after me.

<JOSEPH CHUN MINH TAM, SWORN [10.06 AM]

EXAMINATION-IN-CHIEF BY MR RINALDI [10.06 AM]

PN12

MR RINALDI: Thanks, Dr Tam. Now, there's some little bottles of water the Commission has moved to?---Thank you.

PN13

We won't debate the environmental friendliness of that and in front of you there's a - we call it a book but it's really a lever arch folder called the hearing book, see that?---Right. Yes.

PN14

Does it have tabs in it, numbered tabs on the side or not? Yes, if you open it up?---Yes, it's got a couple of tabs. Four.

PN15

Yes. It does. If you go in - don't worry about the tabs. On the bottom right-hand corner there's a number on each page, of each page of the - - -?---On each page. Yes.

PN16

Yes, if you turn over. Paginated the way through so be careful of the microphone?---Yes.

PN17

And if you could please turn to 736?---Yes, I've got it.

PN18

Great. And can you see there the document is headed Witness Statement of Joseph Chun Minh Tam?---Yes.

PN19

And that's your full name?---Yes.

*** JOSEPH CHUN MINH TAM XN MR RINALDI

PN20

And it says of 22 to 48 Graham Street, Shepparton, that's your business address?---Correct.

PN21

Yes. And if turn over the pages to page 755 that's the end of your statement?---Yes.

PN22

It's dated 24 July this year and that's your signature, is that right, after paragraph 91?---Correct.

PN23

Thank you. And then the following pages from 756 through to 928 you'll see there's a number of attachments that are marked JT1 onwards?---Yes, I do.

PN24

And those are the attachments to your statement?---Yes.

PN25

Now, can I ask you please to turn to page 738 and in particular, at paragraph 11?---Yes.

PN26

I understand you'd like to make a change to the regularity of the monthly meetings that are referred to there in the first line?---Yes.

PN27

And should that be it meets every one to two months, not one to two times per month?---Correct.

PN28

So it meets, Deputy President, every one to two months. Thank you.

PN29

And if I can ask you to turn please, to page 754?---Yes.

PN30

And I think there's a doubling up of the word, 'Task' on page - sorry, the third line, this is very minor, Deputy President, perhaps not necessary but just for clarity. Third line it says:

PN31

In terms of how long the tasks - tasks or the frequency.

PN32

So you just want to delete the first word, 'Task'?---Correct.

PN33

Thank you.

*** JOSEPH CHUN MINH TAM XN MR RINALDI

PN34

MR RYAN: I beg your pardon, your Honour.

PN35

MR RINALDI: 89, third line.

PN36

With those changes, Dr Tam, are the contents of that witness statement true and correct?---Yes.

PN37

Thank you. I tender that, Deputy President.

PN38

THE DEPUTY PRESIDENT: I think on the first day we agreed to simply enter the entire hearing book.

PN39

MR RINALDI: That's right. We did. That's right.

PN40

THE DEPUTY PRESIDENT: So I haven't individually marked any of the material so you'll just both also in submissions need to draw my attention to any relevant material.

PN41

MR RINALDI: No. We - yes. We rely on that witness statement.

PN42

And if you just wait there, Dr Tam, Mr Ryan will have some questions for you?---Thank you.

PN43

Thank you.

CROSS-EXAMINATION BY MR RYAN **[10.10 AM]**

PN44

MR RYAN: Thank you.

PN45

Dr Tam, can I take you to page 737?---Yes.

PN46

And to paragraph 8?---Yes.

PN47

Is it still the case that that's the breakup of staffing?---Well, at the moment, we have the 8.1, the general paediatric consultants have changed so we have some resignations, so we have one, two, three - yes, we have give general paediatricians so it hasn't changed. So the number is still the same.

PN48

Thank you. And in relation to the five general paediatric consultants, you refer to them as paediatricians, how many are fulltime and how many are fractional?---There are three of - at the moment, there are four fulltime paediatricians and one fractional and one of the - if I may, Deputy President, one of the fulltime paediatricians has asked to go down to .5 FTE from March 2023 onwards.

PN49

And if that is the case that it has been asked for, is it agreed to or not?---Yes. We have agreed to.

PN50

Can I take you to paragraph 9 on the same page, you start off by saying:

PN51

My duties at a high level include among other things -

PN52

- if I take you to 9.3, what's your involvement in recruitment?---Well, I would review the positional description of the consultant paediatrician positions and I work with an employment service of health services and I also will select the applicants for interview and I'm also the chair of the interview panel and usually there are three members on the interview panel and one usually is the director of medical services and the other one would be one of the operation manager.

PN53

Now, have you recruited any senior medical staff during your time?---I have recruited altogether now three.

PN54

I go to the next page - - -

PN55

THE DEPUTY PRESIDENT: Just before you move off that page, can you just confirm for me, please, Dr Tam, the reference to the five general paediatric consultants in paragraph 8.1 of your statement, does that - is that where Dr Hassan, Dr Palawela and Dr Verma are or are they elsewhere in that breakdown of staff?---Well, they were part of the five paediatricians but since then, they have been resignations, so we have - at the moment, we still have five paediatricians.

PN56

So is it Dr Palawela's resigned?---No, he hasn't.

PN57

Dr Verma?---No, she hasn't.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN58

Dr Hassan?---Yes.

PN59

All right. Thank you.

PN60

MR RYAN: Your paragraph 9 continues over the page 738 and one of the duties that you've got there is at 9.7. What's involved in preparing rosters for the paediatricians for their ordinary hours?---For the ordinary hours, each one of us have a allocated task and we are given a number of clinics to do and also teaching responsibility and we also got given some portfolio as part of the running of the unit.

PN61

So in the preparation of the rosters, is it the allocation of work or is it the allocation of hours of work, in other words, do you change hours of work on the roster or is it just changing the functions that they perform?---Yes, if I may clarify, I think there are two components of our work. They are the regular, weekly schedule responsibility that is the clinics that we have to attend to and also meetings that we are also expected to attend to as part of the unit responsibility

but yes, that is regular. That doesn't change that much at all but work is - I believe what Mr Ryan referred to maybe part of it is the on-call roster and that is quite involved.

PN62

No, I'm asking you about ordinary hours?---Ordinary hours. So that is quite regular. It's a set - it's a setup for every consultant paediatricians. That doesn't change.

PN63

At paragraph 9.8, you refer to one of your duties is the organisation of cover for staff on leave. That's one of your functions?---Yes.

PN64

All right. If I could ask you to turn to page 930 of the book? Now, 930 is part of the witness statement of Dr Wadhwa. If I can take you to paragraph 12 on page 930, do you read that paragraph?---Paragraph 12?

PN65

Yes, just read it to yourself so you understand it?---Yes.

PN66

Dr Wadhwa is saying in that paragraph that the practice of having the paediatricians organise their own cover has recently changed. When to your knowledge, did it recently change?---If I may explain a bit further. Before I took over as the clinical director anyone of us who wanted to go on leave, we sent out the email and say, 'I need to be away for this period of time and I'm rostered on-call on these certain days. Any one of you can swap with me.' That's how it work and since then, there is concern that we should not have to swap and so I was instructed that when we go on leave, we would ask whether there are any other paediatricians who can saw with us. If there is not work - that doesn't work then I have been instructed to get a locum to cover those on-call shifts.

PN67

And when did that happen? When did that change take place?---I was - roughly would be, I would say, 2022, sort of like November, December, thereabouts from my memory, Deputy President. Yes.

PN68

I'll go back to page 738, paragraph 11 you refer to things called advance trainees from the Victorian Paediatric Unit. What's an advanced trainee?---Advanced trainees are paediatric trainees who have passed their written and clinical exams of the Royal College of Australasia Physicians.

PN69

And do you have any advanced trainees at Goulburn Valley Health?---Yes. From time to time, we normally have up to three advanced trainees. At the moment, we don't but we are having some from February 2024 again.

PN70

Is an advanced trainee the same as a general paediatric consultant?---No.

PN71

But they've finished their training?---If I may explain, the training for paediatrician is the same as a consultant physician or consultant paediatrician is six years of accredited training. Trainees are allowed to sit for the written exam in the third year of their training. If they pass the written exam then they can do the clinical exam in the same year. Once they passed their clinical exam as well, then they are accredited as advanced trainees and they need to have three years of assessor accredit advanced training before they are admitted to the college as a fellow of the RACP and that's when we become consultants.

PN72

All right. So advanced trainees are just doctors in training, it's just a different description?---They are. Yes. They are more experienced.

PN73

If I go over to page 740, paragraph 24, in the paragraph you're talking generally about some of the work that occurs. Your last sentence on paragraph 24 refers to JT1 which is the schedule of CST activities and one nonclinical activity which is the weekly multidisciplinary team, MDT. Is a multidisciplinary team meeting a clinical activity?---Yes, it is. So what I meant, 'Non-clinic clinical activity,' is that clinical time consists of two components. One is clinic and one is non-clinic time. Yes, so the MDT is part of the clinical time but it is not clinic. That's what I meant in the statement, Deputy President.

PN74

Thank you for clarifying that, yes?---Yes.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN75

If I go to page 756 and this is because at paragraph 24, you refer to JT1, so let's go and have a look at JT1 and that's at page 756 of the book?---Yes.

PN76

This list, what you say are the non-clinical and the clinical activities or is this only non-clinical?---They are non-clinic time but as I mentioned earlier on, on Monday morning, the 0800 to 0900 is the MDT meeting there is the non-clinic, clinical time component.

PN77

Yes?---The others are the non-clinical time.

PN78

All right. If we look at - - -

PN79

THE DEPUTY PRESIDENT: So technical support is a reference to non-clinical?---That's right. That's CST, the clinical support time is referring to the non-clinical time.

PN80

MR RYAN: If we have a look at what you've got on the second column on Tuesday, a radiology meeting?---Yes.

PN81

Why is a radiology meeting considered as non-clinical?---Yes. Because this is really a part of the quality assurance program because the medical images were reviewed by the radiologist and we are actually told what the opinion of the radiologist is. This is in additions to the radiological report that normally would have been issued at the time of the request of the investigation so it is part of the learning and it has traditionally been regarded as part of the non-clinical time.

PN82

Isn't the purpose of a radiology meeting to discuss the radiology reports with the paediatricians in relation to patients being seen by other paediatricians?---Yes.

PN83

So isn't that dealing with the paediatricians' clinical role?---Yes. The part of - there's part of the educational program that this regard - is accepted in general as part of the learning educational component of our job because this is - this activity occurs well after the patient was being looked after at the time but usually the patient is - most reports are being discussed about at least a week, if not more, after they have been discharged.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN84

In the third column and the fourth column, you have reference to, in the third column, 'PMMM' and in the fourth column, 'PNMM.' What are those acronyms?---So - right. they are two different type of mortality and morbidity meeting, the PMMM is perinatal maternal morbidity and mortality meetings, so this is really about both the maternal and neonatal or newborn baby complication cases whereas the PNMM is paediatric neonatal morbidity and mortality meeting so this is a different meeting looking at neonates and also children and young people who have been under our care and cases which we believe we have some learning points of them.

PN85

Aren't M and M meetings generally considered clinical work?---No, it normally - similar to the medical imagings because it happened probably months afterwards, it is more for learning purposes rather than decision meeting.

PN86

And in the third column you also have 'CPG and case discussion,' what's CPG?---So it's clinical practice guideline.

PN87

And 'Case discussion'?---And that's a case discussion if any of the paediatricians are - well, think that there's a case that's worthwhile for us to learn from it, so it is a case that is not necessary to be included the M and M but if one of us feel that

we saw a case that's interesting and we have some learning points then we share it with our colleagues.

PN88

And again, you say that's not a clinical discussion?---Our work are all clinically relevant, Ms Deputy President, so it really depends on whether the discussion timing at the time is related to the management of the patient at the time. If it has happened so in real time that is clinical but if it has happened well after the case has been managed and this are regarded to be learning opportunities, not decision-making. So they are regarded as non-clinical time and this is how we always work.

PN89

THE DEPUTY PRESIDENT: And where it says in there that it's considered as clinical or clinical support, when you say it's considered - is that a personal judgment that you make or is it consistent across the - - -?---Yes, miss. It is across the system, Deputy President. It is not just for paediatric unit of junior health.

PN90

All right.

PN91

MR RYAN: If I now take you to - back to page 741, have you got that?---Yes.

PN92

Paragraph 29 you're describing your work and your role?---Yes.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN93

All right. You say in there that you have two clinics a week with a diabetes clinic every five weeks. How often do you do all of these clinics on your own?---Most of the time.

PN94

And when you're not doing them on your own, who are you doing it with?---If I have a senior registrar who is not required to do other duties then as the supervisor, she would - the senior registrar would come to do clinics under my supervision as part of the learning experience.

PN95

All right. When you say, 'Most of the time,' what's the percentage split that you'd advocate?---Well, she's actually rostered to come to my clinic every week but there are times that she is definitely directed to do clinical work because of staff shortages and also if she has to go to conference leaves and other situations - annual leave.

PN96

So if she's rostered to come to your clinic every week, then would that mean that on most occasions you actually have the senior registrar with you?---Well, up to about six months ago, that was correct.

PN97

And what's happened in the last six months?---I mean because we have been short in registrars and also for health reasons so she hasn't really been able to attend my clinic.

PN98

Thank you. At paragraph 31, bottom of the same page, you referred to - and this is the very last sentence on the page:

PN99

The last 30 minutes of the clinic will then be available for catch up time if the clinic is running late. It can also be used with the approval of paediatricians for urgent case review (indistinct) or script writing.

PN100

Does that actually occur?---It has occurred for my clinic and the other consultants would have their own decision-making because it fluctuates from time to time.

PN101

All right. That statement, you say it's true for you?---I think it's true for everyone in the sense that the last half hour of the clinic is for the clinic to run over time because certainly the clinic would allow 30 minutes for review and one hour for new patients. It doesn't always work out. Sometimes it is less. Occasionally it's more. So we allow the last half an hour for this sort of running over to finish so that we don't have to finish beyond the three and a half hours. And so we also have, Deputy President, about 25 per cent failure to attend rate so there's a fair bit of buffer there.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN102

We're only concentrating on these last 30 minutes. The evidence of the paediatricians is that GVH is booking patients into that last 30 minutes?---That is not meant to happen.

PN103

All right. If it's not meant to happen but it does happen?---I'm - well, I'm not aware that it is something that happens on a regular basis and certainly as far as I'm aware, it does not happen but if it happens, there is a mistake made by the clinical support officer. It's certainly not as a direction from me or from the hospital executive and it has happened to my clinic as well, Deputy President, and I have taken it up with the nurse in charge and the clinical support officer.

PN104

Go over the page and paragraph 34 of your statement, you refer to:

PN105

An improvement to efficiency which is to have short appointments and parents are directed to complete necessary forms before coming.

PN106

Does that actually occur in practice?---Yes, it has.

PN107

Across all clinics and across all paediatricians?---That is certainly the recommendation we gave to the paediatricians but it is up to the paediatricians to actually carry out those recommendations.

PN108

Is it up to the paediatricians or is it up to the support staff?---No, the support staff are expected to inform the paediatricians that there is a request for a script or forms to be completed. In the past, Deputy President, we did it in our own time but I suggest to my colleagues that to document the actual workload, extra workload, as a result that's what I suggested they all need to have an appointment so that those activities are firmly documented.

PN109

If I go to paragraph 35, in the middle of the paragraph and this is you describing hours of work, in the middle of the paragraph you have a sentence, it's the eighth line down?---Yes.

PN110

Seventh line down, a sentence that reads:

PN111

On Wednesdays and Thursdays patient clinics start at 9 am and so paediatricians might not start their day until 9 am on those days.

PN112

?---Correct.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN113

That's correct. All right. If I understand that, the logic of that is what you're saying is that if a clinic starts at 9 am the paediatrician only has to walk into the building, walk into the clinic at 9 am, sit down and see the first patient?---That's possible, yes.

PN114

All right. No preparation time. No reviewing anything with staff. No - nothing else, they can literally just walk in and sit down and see the first patient?---Yes. Because the record - I normally would review the patient, only the referral notes or the notes on the previous clinical appointment, take probably two or three minutes.

PN115

All right. So there is no requirement for preparation time doing clinic work?---There's no compulsory but certainly if the requirements - if the paediatricians want to, they can come earlier to do it. So this is something that I said they can do it but because at the moment there's no prescribed working hours for us, we use our own judgment how to work the 38 hours week.

PN116

Do you expect doctors, the paediatricians, to only arrive at GVH at 9 am for a clinic starting at 9 am and simply walking in without knowing who they're going to see or what they're going to see and they just simply go in and sit down and see the patients?---They can come early today but they can also - - -

PN117

No, no. What do you expect?---I expect them to have some preparation if they need to but they can do it in the way they want to do it. They can do it by coming in a bit earlier but they can do it the day before, before they finish work. So what we are expected to do is to do our 38 hours' work.

PN118

All right. And part of the expected work is to be prepared to do clinics?---Yes. You can do that. Yes.

PN119

But then no time is allocated for the preparation for clinics?---Yes. That would be at the discretion of the consultant how they use, when do they do that because we have clinical times which are not clinic time. That's when we do it if you want to.

PN120

If I can go to page 742 at the bottom is paragraph 36 and it goes over to the top of page 743. At the top of page 743 where you're talking about workload, the very first sentence beginning at the top of page 743:

PN121

I am not aware of paediatricians regularly working more than 38 hours per week and have not been shown any records to suggest this.

PN122

That's the current position, is it?---Correct.

PN123

All right. Can I take you to page 912 of the book and this is to one of the attachments to your witness statement. Have you got it? This is the Goulburn Valley Health paediatrician department review report?---Yes.

PN124

And it's marked as JT7 in your witness statement?---Yes.

PN125

All right. And that report on page 912 said that it was issued on 28 March 2022, so it's quite a while ago now?---Yes.

PN126

If you go to page 920 of that report, on page 920 there are recommendations of the review group?---Yes.

PN127

And it appears from the document that was filed that there's some highlighting in the report, I don't know if it was in the original or if it's just as it was filed but if I go to recommendation 4, the fourth recommendation is that:

PN128

There is an overall audit of clinical and clinical support duties performed by the paediatricians with a view to clarifying the expectations of health services in this regard detailing the duties to be performed and when and ultimately maximising productive clinic times with a view to increasing the capacity within the service and reducing undocumented clinical activities.

PN129

That's the recommendation. Given that there's a reference to an overall audit, have you undertaken that audit?---No.

PN130

Are you aware of anyone at GVH who has undertaken that audit?---No.

PN131

So if we go back to page 743, isn't it the case that one of the reasons you're not aware of paediatricians' working hours is that a recommendation made in March 2022 is simply not being implemented, which was to undertake an audit?---No. No formal audit has been taken but certainly - yes.

PN132

If I go to also the last sentence on paragraph 36, on page 743, you say that:

PN133

On some occasions they are paid at a rate of an external locum and this is for paediatricians who have done some on-call on some occasions.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN134

Let me ask a very specific question here. How many times has a paediatrician been paid at a rate of an external locum?---At least once.

PN135

At least once and who got that payment?---Dr Palawela.

PN136

And so in all of the circumstances so far or to your knowledge, only one has been paid that external locum rate?---Correct.

PN137

So it's not on some occasions, there's only been one occasion?---Correct.

PN138

If I ask you to go to page 744 and paragraph 42, you describe what you consider is the on-call roster as two components and there's ward duty and on-call duty. Can you explain what is meant by ward duty?---So ward duty, that occurs during

ordinary working hours and that is Monday to Friday, 0800 to 1700 and then from 1700 onwards till 0800 the next morning, there is the on-call duty time.

PN139

And that describes the timing but what is ward duty?---Ward duty consists of a handover in the morning at 0800 so that the on-call consultant would receive a handover from the night registrar in the presence of the day registrar and the day resident. If there is a change in consultant, then the outgoing consultant also attends so this is a important part where the handover from the night team to the - or the outgoing team to the incoming team or the day team. So afterwards the consultant would conduct a ward round where the consultant will see all the patients in the hospital under the paediatric team's care and then afterwards, the consultant would be available to support the junior staff in terms of patient management. So in the afternoon, at the moment, on Monday, Tuesday and Thursday afternoon, the consultant would supervise a registrar's clinic between 1.30 to 5 o'clock while at the same time also supporting the other junior medical staff providing acute care for our patients.

PN140

That sounds very much like an ordinary day of work for a doctor - for a paediatrician?---It is. Yes, it can - it is a - yes, it's a full day's work, yes.

PN141

At paragraph 43 on that same page, you say that:

PN142

When paediatricians are rostered to be on-call, they would typically be onsite for ward duty from 8 to 5.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN143

And that's the evidence you've just given. How is it that it's on-call work when it is actually just doing a normal day's work?---I think there is a bit of a misnomer and maybe misunderstanding. So when we say, 'On-call,' it actually means the ward work duty that I described as well as the on-call component for the after hours.

PN144

So when a - you've said at 42, 'There's two components, ward duty and on-call'?---Yes.

PN145

So at 43 when you say, 'They're on-call,' you really mean there's two components still?---The two come - that's right.

PN146

So there's a ward duty component and then there's the on-call outside of the normal hours?---Correct.

PN147

At paragraph 44, you identify that paediatricians can be working whilst they're doing offsite on-call and you say they will take - this is the last sentence on paragraph 44:

PN148

Paediatrician will take other phone calls usually from a duty paediatric registrar regarding patient management which may include reviewing medical images on a smart phone.

PN149

That's working from home, isn't it?---Correct.

PN150

At paragraph 45 you say that:

PN151

There are morning ward rounds done on a Saturday morning and a Sunday morning.

PN152

Now, again, is that part of on-call or is that part of ward duty?---It is part of the on-call at the moment.

PN153

So that - doing the ward rounds on a Saturday and Sunday is not the same as doing the ward rounds when you're doing ward duty?---The actual duty itself is the same but it occurs on - outside the normal working hours.

PN154

All right. It's planned and it's regular, isn't it? It's every Saturday and every Sunday?---Correct.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN155

So the doctor is not actually on-call, they're actually told they have a requirement to be at the hospital between these hours on a Saturday morning and a Sunday morning to do the ward work?---That's correct.

PN156

On paragraph 46 you then enter into a discussion around pay rates and payments and you say and you - when you were giving evidence of this, the second sentence beginning on the second line in paragraph 46:

PN157

Where the paediatrician undertakes on-call work in this manner without needing to be recalled, we are not paid extra because our remuneration includes a component for that obligation to be available on-call which is consistent with the rates of pay in the Enterprise Agreement.

PN158

Now, I need to really understand that. Are you saying that the payment in the Enterprise Agreement is for on-call or the payment in the Enterprise Agreement includes the on-call and any work being done whilst on-call?---Yes. My understanding is the obligation is to be on-call.

PN159

Only to be on-call?---Yes.

PN160

And not to do work on-call?---Not quite sure what that means, Deputy President.

PN161

All right. You say, 'Where the paediatrician undertakes on-call work.' What is on-call work?---What I refer to is like what I mentioned earlier, Deputy President, as we are on-call offsite and then we'll be contacted by the junior medical staff for consultation and if necessary, we'll have to return to the hospital so that is what the on-call work consists of.

PN162

But if you return to the hospital, isn't that a recall?---That is a recall.

PN163

And you say that that payment is consistent with the rates of pay in the Enterprise Agreement?---What I referred to is that our remuneration is - consists of our obligations to be available to do the on-call duty but if we are called back to the hospital, we get paid for the hours we actually have to spend on returning to work onsite.

PN164

Does that apply to everyone?---It does.

PN165

Are you familiar with the terms of the Enterprise Agreement?---I am aware of the terms, yes.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN166

If I showed you a copy of the Enterprise Agreement, could you take me to the terms which you specifically rely upon?---I can.

PN167

THE DEPUTY PRESIDENT: Mr Ryan, I'm just not quite sure where this goes. Ultimately, the construction of the obligations under the agreement are a legal question.

PN168

MR RYAN: Yes.

PN169

THE DEPUTY PRESIDENT: A witness' subjective view - I'm not quite sure where that takes me.

PN170

MR RYAN: I'm just trying to work out - the witness is saying that it is consistent with the Enterprise Agreement, therefore the witness is saying or implying that he has sufficient knowledge of the Enterprise Agreement to be able to state as evidence that these payments are consistent with the Enterprise Agreement. That leads to the question is the witness familiar with the Enterprise Agreement.

PN171

THE DEPUTY PRESIDENT: But isn't he simply saying that if a paediatrician is required to return to the workplace, they're paid travelling time and the recall rates under the agreement. That's the first proposition and the second proposition is that their remuneration includes a component for an obligation to be available.

PN172

MR RYAN: And if the witness is saying that a paediatrician gets paid recall rates, any recall to the hospital and that's in the Enterprise Agreement, I need to test that.

PN173

THE DEPUTY PRESIDENT: Well, that's my question. I'm not quite sure why but - - -

PN174

MR RINALDI: You're quite right, Deputy President. It's a legal point. Yes, it is in the Enterprise Agreement. It's not a test of whether Dr Tam knows the clause number or can look it up over - there doesn't seem to be any utility in it, in my submission, but I'm not too troubled. I mean, we can all look at it and talk about the clauses.

PN175

MR RYAN: Yes. I can effectively deal with this in submissions, Deputy President.

PN176

THE DEPUTY PRESIDENT: All right.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN177

MR RYAN: At paragraph 47 you describe the nature of recall work as earlier you described the on-call - you describe in recall work and you describe in recall work for fulltime paediatricians at 47 and you say:

PN178

Recall work is limited to emergencies and unexpected clinical issues, for example, review of patients performing, urgent procedures -

PN179

- and you go on:

PN180

It does not include the performance of usual or ordinary work that paediatricians are expected to complete within their usual working hours.

PN181

If that is your understanding of recall work, where does ward duty fit in when you say on-call is partially ward duty and offsite on-call. Ward duty is not emergencies and unexpected clinical issues?---Yes. The ward work - the ward round that occurs during office hours, is not what I mean by 'On-call,' which I mentioned earlier on, the on-call component actually occurs after hours. So during the normal working hours, we perform ward rounds as part of the normal working hours duties.

PN182

THE DEPUTY PRESIDENT: So can I just make sure I understand what you're saying?---Yes.

PN183

So what you're saying is the on-call component is the outside hours and the work performed during the day is part of their ordinary hours that they are normally rostered to work?---That's right. That's right.

PN184

So the on-call component is just them being available overnight?---That's right. It's just a term that we use because if we are not on-call on that day, we'll be doing something else. We'll be doing clinics or other - or teaching or whatever. So when we are on-call for 24 hours, it is divided into the normal working hours that we do the work rounds and also supervising the registrar's clinics, that occurs during normal working hours. That is actually not on-call because we are actually onsite so - - -

PN185

All right. I've got to say I'm a little bit confused myself now?---Sorry. So from 0800 to - - -

PN186

MR RYAN: Dr Tam?---Sorry.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN187

Let's go back to clause 42 - paragraph 42. You say:

PN188

The on-call roster has two components of duties, ward duty and on-call duty. In the case of a fulltime paediatrician, they work 38 hours a week. In addition to their 38 hours they will be on the on-call roster.

PN189

Is that correct?---Correct. Correct.

PN190

When a fulltime paediatrician is on the on-call roster, does that on-call roster include both ward duty and the offsite on-call work?---Yes.

PN191

So the on-call roster is being used to allocate ordinary hours of work to a fulltime paediatrician which is in addition to their 38 hours?---No, it's not. The on-call component that occur after hours is addition but the ward work that occurs during working hours is part of our 38 hours if that makes sense. Yes.

PN192

All right.

PN193

THE DEPUTY PRESIDENT: All right.

PN194

MR RYAN: If I go back - it's not making sense to me. I'm going to ask the question again?---Sure.

PN195

A doctor is working 38 hours, ordinary hours, and they have completed their 38 ordinary hours, that's their clinic or non-clinical duties in 38 hours. In addition to that time, they have time allocated on the on-call roster, don't they?---That's if I - I'm not sure - - -

PN196

No, no. Do they have - it's additional to their normal work. You work your hours and then you have your on-call roster as well?---If I can elaborate my answer, the work duty component of the on-call requirement is part of the 38 hours.

PN197

THE DEPUTY PRESIDENT: Right.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN198

MR RYAN: All right. If it's part of the 38 hours, how can it be part of an on-call roster?---So I think there's - if I may, I think it is a - really a argument of terminology because when I mentioned specifically 42.2 the on-call duty occurs after hours not during the normal working hours. The work duty, 42.1 is part of the 38 hours if I can say that, Deputy President.

PN199

THE DEPUTY PRESIDENT: All right.

PN200

MR RYAN: Then if that is the case, the only time ward duty is being done as part of an on-call roster is on Saturday and Sunday morning?---That's correct.

PN201

Is there no ward duty work on Saturday or Sunday afternoon?---No.

PN202

So Saturday and Sunday morning that is when ward duty is performed on-call and all other ward duty is not part of an on-call roster?---I think I understand you correctly, yes.

PN203

Does that apply equally to fractional specialists?---Yes. But fractional specialists would do less often of on-call.

PN204

If I go to page 741 and paragraph 29 and you describe your role here that you've got a .5 EFT clinical fraction and you've got two clinics a week and I've asked you about them. You then say:

PN205

During the on-call week I spend my clinical time, which is 18 hours, being on-call.

PN206

So your - if I understand that, in a week where you're on-call you use the on-call period to cover your obligations to go clinical work?---Correct. Because I have to spend 18 hours a week, Deputy President, to do my duty as the clinical director.

PN207

Does anyone else have the luxury of being able to allocate their ordinary clinical hours into their on-call period?---Yes, because during the days of on-call with the other paediatricians, they don't have to do the clinics which they are normally allocated to.

PN208

But does anyone else have the luxury of allocating clinical - ordinary clinical hours to their on-call commitments?---I'm not quite sure what actually you meant.

PN209

On-call is in addition to ordinary hours for a paediatrician, isn't it?---The afterhours on-call is additional to but not during the normal working hours.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN210

But on-call is in addition to ordinary hours, yes?---I'm not sure I understand your question. Once I mentioned - - -

PN211

All right. Then let me rephrase it, Dr Tam?---Yes.

PN212

A fulltime specialist has ordinary hours of 38 per week?---That's right.

PN213

In addition to the 38 hours, they are expected to participate in the on-call roster?---Correct.

PN214

And they are rostered and you have in your evidence they're rostered so many times a year or so many weeks a year to do on-call?---Yes.

PN215

Do any of those paediatricians have the ability to simply move their clinical work from their ordinary hours and say, 'I'm now doing it in the on-call time'?---When they are doing the on-call it's their clinical time and if I may expand a bit further, paediatrician in general has 20 per cent of our contract hour as clinical support time. The other hours are clinical time so for a fulltime paediatrician the clinical support time goes to eight hours which is roughly one day. So when we are on-call usually it's only two days at a time so that means there is another day for clinical support time and the rest of it will be clinical time still. Whereas for a clinical director, it's 50 per cent of the time it's allocated for clinical support time so there's 19 hours. So if a clinical director did two days of nine hours, it's 18 hours, that is all the clinical time been used up for it.

PN216

And you do your two nine-hour days or your 18 hours or 19 hours, you do that in your on-call period?---I'm not sure what that means.

PN217

THE DEPUTY PRESIDENT: So doesn't this go back to the discussion that we were just having which is that the - when someone's on the on-call roster the actual - the work during the day, during the ordinary - is part of the ordinary hours, whether for the clinical director or for any of the paediatricians, the additional beyond the 38 hours is the outside hours component. So in the case of the paediatricians their work during the ordinary hours whilst they're on-call is their clinical work.

PN218

MR RYAN: Yes.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN219

THE DEPUTY PRESIDENT: And the point is that the head of department has a higher proportion of their time for nonclinical duties which they use up more quickly when they are on-call, the balance is different.

PN220

MR RYAN: But - no, that's - I won't debate this with you, Deputy President, in front of the witness. I'll make the submission on this.

PN221

THE DEPUTY PRESIDENT: All right.

PN222

MR RYAN: At page 746 of your witness statement, you refer to, at paragraph 54, talk about, 'Most paediatricians are employed on a fractional basis,' and you also talk about 'They're contracted to be available to perform on-call work.' You mentioned earlier that you're involved in the recruitment process. Do you have anything to do with the preparation of the contracts for fractional specialists?---No.

PN223

That's something that's done by others at GVH?---Correct.

PN224

At page 749 you, at paragraph 69:

PN225

Following the report the respondent implemented a number of changes to improve outpatient clinic efficiency.

PN226

And you have two there. Are those two actually and currently occurring across all of the department?---Yes. I'm not - I can't comment on what happens in other departments before - - -

PN227

No, across your department, not all of the departments?---Yes, all the paediatricians are aware and (indistinct) and the clinical nurse are aware of this.

PN228

All right. If there - they might be aware of it but do you have any way of establishing that it's actually occurring, it's actually taking place?---Well, I don't micromanage my colleagues but they are aware of what we as a - this is our unit policy.

PN229

But you also don't audit the workload of your paediatricians?---Well, not formally but all those work are meant to happen during the allocated clinic times because with (indistinct) formal documentation by a clinical appointment, it is difficult to audit.

*** JOSEPH CHUN MINH TAM XXN MR RYAN

PN230

Let's go down to the next paragraph, paragraph 70 and you also say that these things that have been implemented, 70.3 and 70.4, do they occur in practice?---Yes.

PN231

Across all paediatricians?---Yes. Because 70.3, the virtual waiting list, this is comprised by the clinic nurse and also all the patients have been asked to turn up 15 minutes before their appointment with the paediatricians.

PN232

But do they?---Well, not all patients turn up on time but they are asked on the - to come at the specific time on the letter sent out by the clinic.

PN233

So is that aspirational rather than real? You hope they turn up on time but they don't turn up on time?---Well, I say patients don't always turn up on time.

PN234

I have no further questions of the witness.

PN235

THE DEPUTY PRESIDENT: Any re-examination, Mr Rinaldi?

RE-EXAMINATION BY MR RINALDI [11.12 AM]

PN236

MR RINALDI: Yes, thank you, Deputy President. This one might be one where I would seek lead the witness, perhaps I should tell my friend what I propose to do first and see if he has any objection.

PN237

It's just to clarify this terminology point, Dr Tam, I was talking about particularly in relation to paragraph 29 of Dr Tam's - I think it might be of assistance to the Commission but I probably can't ask it in a non-leading way.

PN238

MR RYAN: If you can lead, I won't object.

PN239

MR RINALDI: You won't? If I can tell you - well, let's maybe just ask the question and see if my friend has a problem.

PN240

Dr Tam, can I just clarify, it seems to me that when you're discussing - looking at the second - sorry, the second sentence of paragraph 29 which reads:

PN241

During the on-call week I spend my clinical time being on-call, that's 18 - clinical time 18 hours being on-call.

*** JOSEPH CHUN MINH TAM RXN MR RINALDI

PN242

Can I correctly understand it, maybe I'm not so tell us, hopefully it assists all of us to understand, do you mean by that being on-call that clinical time that you don't have other allocated clinical duties such as clinics?---No.

PN243

So is that what you mean?---That's right. I think when I mentioned 18 hours, I'm talking about two normal working days of nine hours each day where I would do the same duties as every other paediatrician where they are rostered on-call and then do the work round after the handover, attend to any other patients requiring assessment and management and also supervising the registrar's clinic in the afternoon when there is one.

PN244

Yes. So as opposed to having scheduled clinics, for example?---Yes. So there won't be any scheduled clinic.

PN245

And then in the next sentence of 29, you say, 'However,' so there's a bit of an exception to that:

PN246

I conduct a clinic in my nonclinical clinical director time and extra clinics where there is a patient need.

PN247

?---Correct.

PN248

All right. And then the on-call clinic that you mention in the next sentence, on some Fridays. But I think the main point is the on-call that you're talking about there when you say, 'Being on call,' you mean during ordinary on-call requirements as though you were on a weekend, for example, doing ward rounds and so forth?---Yes. So the 18 hours doesn't take into account the weekends.

PN249

No?---It's only the normal working hours during the week.

PN250

It's during the week and those are 38 hours?---Up to 38 hours.

PN251

Yes. All right. I guess that's of some assistance. And if I could ask you, just going back, you mentioned in the last six months the senior registrar, you were being asked about the clinics on page 741 as well. You said that in the last six months the senior registrar haven't been able to attend your clinics?---Not regularly.

*** JOSEPH CHUN MINH TAM RXN MR RINALDI

PN252

Not regularly and you said because of health and staff shortages?---Because of, yes, conference leave and annual leave and also shortage of junior medical staff so she has been redeployed to cover those shifts.

PN253

Right. Who is that senior registrar?---It's Dr Saghi Elmi at present.

PN254

Doctor?---Saghi, S-a-g-h-i.

PN255

Yes?---Elmi, E-l-m-i.

PN256

Thank you. Sorry. And this may well be related to the first question I asked you but you said in relation to paragraph 35 when Mr Ryan was asking you about that paragraph, if I have your words correctly, you said, 'We have clinical time which is not clinic time.' Is that similar to what I was asking you before, i.e., it's clinical time that's not allocated to specific clinics?---That's right. That's right. We sort of call it as, like, administration time.

PN257

Right. Thank you. No further re-examination. Thank you, Deputy President.

PN258

Thanks, Dr Tam.

PN259

THE DEPUTY PRESIDENT: All right. Dr Tam, thank you very much for your evidence. You're now excused and you're free to go?---Thank you.

<THE WITNESS WITHDREW [11.17 AM]

PN260

MR RINALDI: So the next witness is Dr Vikas Wadhwa. He's here. He's outside so if we could call him. Thank you. I spelt his name for the transcript before, his first name is V-i-k-a-s.

PN261

THE ASSOCIATE: Please state your full name and address.

PN262

DR WADHWA: I'm Vikas Wadhwa and address is (address supplied).

PN263

THE ASSOCIATE: Thank you. Could you please say, 'I do,' after me.

<VIKAS WADHWA, AFFIRMED [11.18 AM]

EXAMINATION-IN-CHIEF BY MR RINALDI [11.18 AM]

PN264

THE DEPUTY PRESIDENT: Please take a seat, Dr Wadhwa?---Thank you, Deputy President.

PN265

MR RINALDI: Yes, Dr Wadhwa. Now, there's a bottle of water, you might want to remove Dr Tam's. Or he should have taken it with him?---Thank you.

PN266

And there's a fresh one for you?---Thank you.

PN267

And you can take a seat. And the folder in front of you we call the hearing book. There are numbered pages in the bottom right-hand corner, consecutively numbered and if you could please turn to page 929. Got that?---Thank you.

PN268

And that's the first page of your witness statement in this proceeding?---That's correct.

PN269

Yes. And the address that is stated there, 2/2 to 48 Graham Street, Shepparton is your business address, that is the address of Goulburn Valley Health?---That's correct.

PN270

Yes. And indeed you're, as you say at paragraph 2, a part-time director of medical services, so you have other - you have another job?---That's correct. I work fulltime for four days at Peter MacCallum Cancer Centre here as a clinical director.

PN271

Yes. And you're one day, I think?---And I have a day allocated to being able to help with Goulburn Valley Health which is predominantly done on a remote fashion.

PN272

Yes?---Thank you.

PN273

And you say in paragraph 2 you've done that since December 2021?---That's correct.

PN274

All right. Thank you. Now, there's a couple of things I'd like to take you to because things have changed since 28 September which was day 1 of this hearing but perhaps before I do that, the actual date of your statement is 25 July which was around the time that it was filed. This is on page 933?---That's correct.

*** VIKAS WADHWA XN MR RINALDI

PN275

So that's your signature appearing on that page after paragraph 23.4?---It is. Thank you.

PN276

Thank you. And the attachments, there's two attachments marked VW1 which is another copy of the Goulburn Valley Health paediatric department review report dated 28 March 2022.

PN277

And, Deputy President, whilst I think of it, it might be convenient to mention that my instructions are - I know that this probably doesn't have any highlighting on it, Mr Ryan rightly raised whether or not that was part of the original. We understand the highlighting's been added later. We're not quite sure by whom so our understanding is the original was not highlighted. This copy is not highlighted, VW1. And then VW2 is an update report from the same people, Dr Priddy and Ms Brown, there's some highlights, are there?

PN278

MR RYAN: Yes.

PN279

MR RINALDI: Sorry, Mr Ryan's just pointed out to me there are a couple of highlights even on this VW1 but our understanding is any highlights have been added later. We're not sure by whom. So and then 15.2, hopefully not highlighted.

PN280

MR RYAN: No.

PN281

MR RINALDI: Subject to checking, is the update of Dr Priddy and Ms Brown's report, 25 October 2022.

PN282

Is that (indistinct) two attachments?---These are the two attachments, yes.

PN283

Thank you. And could I just take you to paragraph 5 on page 929? So I understand Dr Alcock has now left?---That is correct. He has been replaced at the moment, by an interim chief medical officer, Professor Erwin Loh.

PN284

And how do you spell his name?---Erwin, E-r-w-i-n and Loh, L-o-h.

PN285

Thank you. So you said he was the new chief or interim chief medical officer?---That's correct.

*** VIKAS WADHWA XN MR RINALDI

PN286

Is he also the interim executive director medical services?---That's correct. So that's the entire title, he is the executive director of medical services and chief medical officer. It's a single role there.

PN287

Thank you. And when did that change of personnel occur?---That was about four weeks ago, I'm not exactly certain of the exact date but it's November.

PN288

November. Thank you. And can I take you to paragraph 23, please? And this is perhaps a relatively minor point but - and if I take you first to 21, you'll see in the fourth line of 21, there's a reference to 'Six outpatient clinics per week.' In the fourth line of 21?---That's correct.

PN289

And then in 23 there's at 23.1 the first line, 23.2 first line and 23.4 first line, there's reference to 'Patient clinics,' is that a correct or accurate description?---It should be 'Outpatient clinics,' in all of those.

PN290

In all of those instances?---So throughout 23 and into 23.4.

PN291

Thank you. And essentially the reason why the - well, whether they're called patient or outpatient clinics, inpatients don't have clinics, they're being seen as inpatients on a regular basis?---That's correct.

PN292

All right. Thank you. And I think there was - I'm just checking, some change to the personnel since you provided this statement, the personnel that are listed at paragraph 8, in particular, there are now, I understand, more than one fractional consultant paediatricians at 8.2?---So the changing of the staffing is resulting in people coming on as more fractional and the visiting medical officer paediatrician has since resigned.

PN293

So that's 8.4?---That's correct.

PN294

So that person's no longer there?---That's correct.

PN295

And there is no new visiting medical officer paediatrician? Hasn't been replaced?---No, that's not been replaced.

PN296

But there's now more than one fractional consultant paediatrician, so at 8.2, is that right?---So there is actually - yes. So that's the current situation.

*** VIKAS WADHWA XN MR RINALDI

PN297

And how many fractional consultant paediatricians are there?---So there will be a community of paediatricians. That's part - that's also fractional, that's part-time and obviously one of the paediatricians there, Dr Verma, she's not fulltime, so that's fractional and I believe that Dr Palawela has indicated - but I'm not quite sure exactly when that drop from fulltime to fractional will happen but there are obviously at least two people that are actually listed as not fulltime and fractional.

PN298

So that's at least the community paediatrician and Dr Verma?---That's correct.

PN299

And Dr Palawela's indicated he wants to go fractional?---That was indicated. So that may not yet have happened obviously but - - -

PN300

Thank you. All right. And just to clarify at paragraph 10, the paediatrics department, I understand that those - the hours that the department is open, in fact, not Monday to Sunday, is that right?---Well, the health service is open 24/7 but the department standard operations will generally be between Monday and Friday, between those hours so just for clarity, that's - - -

PN301

So in fact, where it says in the second sentence, 'Monday to Sunday for the department's normal hours,' that's the paediatrics department, it should be Monday to Friday?---I think that would be most - more accurate as with any department, I think. Yes.

PN302

Yes. 8 am to 4.30 is correct?---Yes, correct.

PN303

But the health service as a whole is open 24/7?---That's correct. It's an acute health service.

PN304

So if somebody has a paediatric issue on the weekend?---There will always be somebody there.

PN305

All right. Thank you. So with the changes that we have just made, Dr Wadhwa, are the contents of that witness statement true and correct?---The contents are otherwise true and correct. The item at line number 11 refers to Dr Tam and the preparation of rosters which is obviously information that is relied upon and so Dr Tam would probably be in a better position to provide that information more clearly. So I would just like to make that clarity.

PN306

All right. Thank you. So we continue to rely on that as amended, Deputy President, that statement.

*** VIKAS WADHWA XN MR RINALDI

PN307

And if you wait there, please, Dr Wadhwa, Mr Ryan will have some questions for you.

CROSS-EXAMINATION BY MR RYAN [11.28 AM]

PN308

MR RYAN: Dr Wadhwa, at paragraph 3 of your statement, this is on page 929, you say you're an experienced hospital administrator. Do you have any qualification in hospital administration?---I certainly do. I have a Fellowship of the Royal Australasian College of Medical Administrators. In fact, I was mentored by Professor Erwin Loh who is now the president elect for the College of Medical Administrators as well. I have completed a one - I've done one year in the chief medical officer role throughout the COVID pandemic at Peninsula Health and then joined with Goulburn Valley as a part-time director of medical service and part-time clinician following that and have transitioned gradually into this role. In addition to that, I have a Masters of Business Administration, a Masters of Public Health which have supported me and has been requirements for the Fellowship of Medical Administrators.

PN309

You're a dual specialist in a sense?---I am. Yes, two master's and two fellowships along my journey. Thank you.

PN310

Can I take you to paragraph 8.4? You refer to a 'Visiting medical officer paediatrician.' What is a visiting medical officer paediatrician?---It's very - this was a doctor that was employed at GV Health prior to my arrival who had a different attachment. In a visiting is someone who has been paid as a fee for service rather fractional hours. This was an arrangement which is not generally entertained moving forward in the organisation so in that context that was - they were still responsible for doing some on-call obligations, they were happy to do so and they had been already there prior to my arrival.

PN311

Is the MOP the same as a fractional specialist?---So fractional is usually a sessions or hours and paid such. A visiting medical officer has a different bespoke arrangement with the organisation and in many of the health service a VMO will be contracted in a way that the patient leader doctor is paid per service item delivery. For example, if they see 10 patients they will generate more than they would if they saw five whereas with a fractional that it would be irrelevant what the number of patients they saw, it would be based on time, hours and so forth. So there's a difference and, as I said, moving forward, the VMO arrangement is not something that the hospital is entertaining. This was something that was pre-existing.

*** VIKAS WADHWA XXN MR RYAN

PN312

If I take you to paragraph 12 on page 930, you describe there a previous practice and a recent change. Previous practice the paediatricians had to arrange their own leave cover and the recent change is that the respondent will arrange leave cover. When did that recent change occur?---Thank you, Mr Ryan. As part of the work that you and I have done together in this space that has led to this statement being changed from how it was previously in that previously whenever leave was being taken, it was always a callout to see if somebody else within the department could cover which is really quite standard. I mean, I have worked not only at Goulburn Valley and at Peter MacCallum but concurrently I've been a locum consultant throughout Eastern Health where I've been a clinical director for many years and my role has also been around the fractional and then a locum so we've - what is standard across all the health services is generally if leave comes - - -

PN313

Can you answer the question when did the change occur?---It's during the time that we've actually been working with the external review so post the first external review, you - Mr Ryan, you and I have actually worked on this to try and ensure that we provide for that.

PN314

So that's sometime after March 2022 and sometime before July 2023?---I can't give you an exact time on this but I do know that it's been since the first external review that we have worked on trying to ensure that we provide for that

support. May I say that there have been a lot of meetings that Mr Ryan and I have collectively worked on in the paediatric space and so the exact timing of this would be requiring me to go back into records but it has been during - - -

PN315

No, you've answered the question?---Thank you.

PN316

Can I take you to paragraph 14? Can you describe what is clinical and what's not clinical and in your description of clinical work, you include multidisciplinary meetings, what's not mentioned there and I'll ask about it. Are morbidity and mortality meetings considered to be clinical?---Yes. So what's generally considered clinical is that that relates to patient care directly so what's nonclinical would be those overall quality improvement exercises and so forth that are departmental, education, training and so forth, which are not patient specific but if there is a morbidity, mortality meeting that discusses patients and that that becomes clinical so that's - the differentiation is clinical support is that which relates to definite patients that are actually being discussed.

PN317

M and M meetings or morbidity and mortality meetings always occur after the event, don't they because there has to be a presentation to the meeting about either the morbidity of a patient or the mortality that has occurred and the discussion of a patient after the event and it is still clinical work?---It is.

*** VIKAS WADHWA XXN MR RYAN

PN318

Dr Tam in his evidence says that it's only - and this is in relation to meetings and, in particular, M and M meetings, it's only clinical if it happens in real time, in other words, in relation to a real time patient. Do you agree or disagree with that?---So if you - I think it's quite clearly stated in the Enterprise Agreement about what is clinical support time and what is not, so where there is a discussion of patients and where there is reference to patients and management of them. So morbidity and mortality would also include patients who have had morbidity, so it's not really about real time, it's more about whether we're actually talking about individual patients and so in that context, would be clinical time rather than nonclinical.

PN319

Would case discussion meetings be part of clinical work?---Again, if it's talking about individual patients and their clinical course and treatment, it is clinical time. See, nonclinical is really around quality improvement, how do we improve efficiency and quality of service irrespective of a particular patient under discussion. If you are discussing a case, a patient, then that's clinical time.

PN320

Can I take you to page 756 of the book? So this is an attachment to Dr Tam's witness statement where he identifies a range of activities there as being nonclinical. A radiology meeting he says it's clinical support, not clinical. Radiology meetings normally discuss the radiology reports in relation to

patients, aren't they clinical?---Again, there is perhaps - it can be difficult sometimes to be exactly clear. I have not been attending any of these meetings. I do know that some of the radiology meetings we've had have been purely didactic and educational exercises so I can't 100 per cent say that all radiology meetings - they could, you know, certainly if you are discussing a radiology of patients that are actually coming through the department and helping to support management of those patients, absolutely that would be clinical time. If a radiology meeting did not have any cases to discuss and the radiologist provided an educational program to the paediatricians or to any clinicians, one could say that that is not clinical time. That is a purely educational exercise. Having been in my roles over many years, 35 years, in fact, I can say that I've experienced both and so it's always hard to be 100 per cent prescriptive that every meeting will be clinical or nonclinical.

PN321

On that same page, 756, I notice in the third column there's a reference to a PNMM and in the fourth column a PNMM, are these - those morbidity and mortality meetings, would they be clinical?---It would seem, based on the - on what they are that they would be clinical time.

PN322

All right. And in the third column, a perinatal high-risk meeting and it has underneath that:

PN323

Dr Rachna Verma is the paediatric lead. Dr (indistinct) and Tam also attend.

*** VIKAS WADHWA XXN MR RYAN

PN324

Is the perinatal high-risk meeting a clinical meeting discussing clinical patients?---So if it's, as I said, if it's discussing patients in the paediatric unit, then it becomes a clinical meeting. Essentially that's the definition with clinical.

PN325

Well, when would you have a meeting that's a perinatal high-risk meeting that wouldn't be clinical?---I'm just clarifying that, yes, if it's discussing patients in the unit, then it becomes a clinical meeting.

PN326

And in that third column, there's also on the fourth Wednesday it says:

PN327

Paed unit meeting for CPG and case discussions.

PN328

Is that clinical?---I haven't attended this meeting myself. Again, Mr Ryan, if the meeting is really about patients on - and that's what is the focus of that meeting, then it is clinical.

PN329

If I go to the fifth column, the bottom of the fifth column on page 756 it's, 'Regional perinatal and maternal M and M.' Is that also clinical?---I'm sorry, I'm just look - in the final column on the Friday?

PN330

Yes. The fifth column and right down the bottom it's got, '2 pm to 3.30 pm. Regional perinatal and maternal M and M four times a year'?---Yes. This would be hard to be absolute definitive about because it depends on who is presenting, for example, if you're at a regional meeting and (indistinct) for example, is presenting on their cases, it becomes more an exercise in learning and education. If you can understand what the actual purpose of that meeting is, it may well be that it's not discussing individual cases. It may be that there's also some also some data that's also being discussed and if you're part of a regional service group you may not actually count that as clinical time for yourself because they're not your patients, they're not - there's somebody else who's discussing those. So it may well be that the majority of times that is not a clinical meeting for yourself.

PN331

But it could be?---It may well be. It may well fit into if it is your turn to present your patients then it may well be your clinical meeting but it may not be your clinical meeting every other time. Again, look, there is some division here about what's clinical and what's nonclinical but essentially if we keep our focus on are we discussing our patients in our unit as the centrepiece of defining whether it is a clinical time or not, that's what it is but if we're going to tune in and somebody else is talking about what's going on in their service then it becomes purely educational for us.

*** VIKAS WADHWA XXN MR RYAN

PN332

Yes. Thank you?---May I let that page go? Sorry.

PN333

Yes. You can let that page go?---Thank you. Thank you.

PN334

If I take you back to page 931 and at paragraph 19:

PN335

Following the March report, the (indistinct) has implemented a number of changes to improve the paediatric department's outpatient clinic efficiency and improve outpatient service capacity such as -

PN336

- and then you list five items on the next page. In relation to what is at 19.2, has that actually occurred?---I believe that the paediatricians were affecting that and at discussions that both you and I have had subsequent to that external review, we were comfortable that there was a reservation of urgent slots. Maybe not consistently and also not necessarily fully utilised to the best capacity and efficiency but certainly there was progress made to identify urgent slots at the end

of clinics. Again, with process change, this may not have been implemented perfectly and consistently but certainly was underway, yes.

PN337

19.4 has that been implemented and does it happen in every case?---I'm not actually in the clinic so I can't 100 per cent confirm that it's happening at every time though the organisation has provided some additional nursing and patient support officers to be able to help with patients completing these forms. I would have to defer to Dr Tam and the paediatrician group to determine whether it's being done every time.

PN338

And 19.5, is that happening here in every case?---Again, I would say the same answer for 19.4.

PN339

Thank you. Can I go back to - your opening words in 19 is:

PN340

Following the March report the respondent has implemented a number of changes.

PN341

Now, you have the March report attached as an attachment, VW1. If I can take you to page 942, these are the recommendations of that March report. The fourth recommendation of the review report is that:

*** VIKAS WADHWA XXN MR RYAN

PN342

There is an overall audit of clinical and clinical support duties performed by the paediatricians with a view to clarifying the expectations of the health service in this regard detailing the duties to be performed and when and ultimately maximising productive clinic time with a view to increasing the capacity of the service and reducing undocumented clinical activities.

PN343

Has that recommendation been implemented?---I think all of the - - -

PN344

Has that recommendation been implemented? It's a 'Yes,' or 'No' answer?---The complete audit has obviously not been completed but I think it can be said that all of the recommendations were transposed.

PN345

No. Has that recommendation - it says:

PN346

There is an overall audit of clinical and clinical support duties performed by the paediatricians.

PN347

Has that overall audit been completed?---I would say not a complete audit. There is a process with this and this is a process that both Mr Ryan and myself were undertaking collaboratively together with all of the paediatricians. So, Deputy President, may I say that all of the recommendations were extracted from the report, put into a working document that we all shared including Mr Ryan and myself, so that we can collectively work through these items. So I can say as an answer, 'No, we haven't completed all of the works that need to be done,' but that there was every intention that we would do all of that together. Thank you.

PN348

All right. When did an overall audit of clinical and nonclinical support duties performed by the paediatricians commence?---The work plan was underway after the external review and we have had several meetings, exact dates of which I do not have with me at the moment. They would be on the spreadsheet that you have had access to as well, so we would need to refer back to that spreadsheet to look at an updated progress but that is not information solely with me. It is something that you have also had access to.

PN349

But you're here giving evidence for GVH in relation to this and you have put all of this in. You say that an overall audit hasn't been completed. I'm asking the question has it started?---Yes. So all of the - - -

PN350

All right. Has it started?---Yes. All - can I just say that all of this - - -

PN351

No. Has it started?---Again, in a system - - -

PN352

No, no. Has it started? Has an overall audit started?---All right.

*** VIKAS WADHWA XXN MR RYAN

PN353

Is it a 'Yes' or 'No' answer?---I will say no.

PN354

All right. Thank you?---May I also clarify though - - -

PN355

THE DEPUTY PRESIDENT: Mr Rinaldi might ask you some further questions after Mr Ryan?---Sure.

PN356

MR RYAN: Can I take you also to page 952 and this is the second of the reports from the review which is attached to your witness statement and at 952 there are what are referred to as further recommendations and on page 953 is the second of the recommendations. It says:

PN357

Having reviewed the intention to give on-call services, our previous recommendation of a compliment of six FTEs for the paediatric department is appropriate.

PN358

Have you got a six FTE equivalent staffing of the paediatric department?---That is the aim, we are heading towards it. Not quite there yet. We are recruiting. That is expected to be achieved by the first quarter of 2024.

PN359

So a recommendation made on 25 October 2022, we're well over a year later and you're still working towards it?---Mr Ryan, we are still recruiting. We are openly recruiting. It is not easy to get staff into the regional areas as it is in the metro. The recruitment has been open and we should be able to have that completed in the first quarter of next year. It was all approved, can I just say. It's just a matter of time to get adequate staffing.

PN360

I note that - and I'll take you to page 955. That is a table or a chart prepared by the reviewers, it's part of the report, isn't it?---That's correct.

PN361

Yes. And the fourth item down there listed is their recommendation about an overall audit and as of October 2022 they indicated no progress. Yes. And that's still the case?---We'd need to refer back to our working document that you and I have been working with the paediatricians on to see what the latest notes were on that one. Apologies, I don't have it with me but it is in that action plan.

PN362

It's not part of your evidence in this matter, is it?---No, it's not.

PN363

You didn't attach it to your witness statement?---No.

*** VIKAS WADHWA XXN MR RYAN

PN364

Thank you. No further questions, Deputy President.

PN365

THE DEPUTY PRESIDENT: Mr Rinaldi?

RE-EXAMINATION BY MR RINALDI [11.55 AM]

PN366

MR RINALDI: Yes. Thank you, Deputy President.

PN367

So, Dr Wadhwa, a few moments ago when you were asked about the overall audit as per recommendation 4, whether it had started, your answer was, 'No,' but you said, 'May I also clarify,' could you please provide whatever clarification you wish to?---Thank you. So I wanted to just, once again reiterate that Mr Ryan and I

have taken all of these recommendations on seriously and we've converted that into an action plan into which we've incorporated all of the requirements that Goulburn Valley Health needs to do to achieve the targets and I think we have been progressively working through every meeting to try and accomplish as many of these tasks, noting that there were 25 recommendations and each one of those recommendations requires a significant amount of Mr Ryan's and my time as well to try and work with our paediatrician group to try and be able to achieve the desired result for each of those items. So it may well be that item number 4 has some comments that I can't recall at this stage but the intention has always been there to continue to complete that along with the other 24 items and we have made significant progress in completing a number of those items along the journey. Obviously it's nice to get the quick wins and so that some of the simple tasks first gives us a bit of momentum, gives us the time to be able to celebrate with the paediatrician group to say we are covering all of the items that the review has put out and doing a significant audit, it is time-consuming, so it may be something that is to be done but I can't give you any further details on that at this stage.

PN368

And is that intended to be an internal audit, if you like, done by GVH or external?---That's correct. An internal audit.

PN369

All right. Thank you.

PN370

Thank you, Deputy President.

PN371

THE DEPUTY PRESIDENT: Dr Wadhwa, are you familiar with the provisions of the Enterprise Agreement that's in place?---I'm familiar with the Enterprise Agreement. I don't have it at the tips of my finger, I can - - -

*** VIKAS WADHWA RXN MR RINALDI

PN372

And you don't need to go to the particular terms but do you know what the situation is where fractional doctors are on-call and secondly, recalled, what payment entitlements they have?---So most health services including Goulburn Valley will provide for an on-call allowance so that doctors can be on-call. In every health service that I've worked in, the majority of our doctors are fractional. A small number are full timers and we have always done proportionate on-call and I know the Enterprise Agreement is relatively silent on fractional but it does not preclude fractional doctors from being a part of the on-call system.

PN373

But that's one of the questions before me?---But, see, the thing is that having worked at Eastern Health, having worked at Peninsula Health, Goulburn Valley and now at Peter MacCallum, our health service relies on, is dependent on the majority of our workforce which is fractional to participate in on-call and we all sign up for contracts and agreements with the health service to say, 'Yes, we will

be happy to be on the on-call roster.' And as both a consultant at Eastern Health and other places but also as a clinical director and an administrator, we've always participated but also expected of our team to share in the on-call obligations and that's how the system works and that's industry standard everywhere. You know, it may not be - I know that the agreement only talks about full-timers with their on-call and what's included but I would say that it's industry across all disciplines and paediatrics at GV is not an exception. We are basically aligned to all fractional people participating and most health services provide a couple of hours, like, two hours of on-call retainer to hold - to provide for the - no, doctors being on-call and then obviously there's a recall payment for them when they come in to provide services during that on-call period. So there is a remuneration attached to that.

PN374

And that's found in the individual doctor's contract of employment?---That should be in individual contracts or at least part of a global - sorry, part of a universal health service by health service arrangement and there may be differences between the different craft groups and I know that from experience at Eastern that certain craft groups that may be much more likely to be called in and have a disrupted night may be paid slightly different numbers of hours of on-call and certainly weekday to weekends. So weekends would become double session, for example, whereas weeknights might be single sessions of on-call. So just as a example if a person was on-call during the week, they might get paid two hours of on-call allowance whereas on a weekend if they were doing that, they might be paid four hours for the day, for example. It's just how long they've been on-call for.

PN375

All right. Thank you. Is there anything arising from that from either of you?

PN376

MR RINALDI: No.

*** VIKAS WADHWA RXN MR RINALDI

PN377

THE DEPUTY PRESIDENT: All right. Thank you very much, Dr Wadhwa, you're excused and free to go?---Thank you, Deputy President.

<THE WITNESS WITHDREW [12.01 PM]

PN378

MR RINALDI: All right. Thank you. the next witness is Mr Pullin, Daniel Pullin, and he is outside as well. Yes, he is.

PN379

THE ASSOCIATE: Please state your full name and address.

PN380

MR PULLIN: Daniel Knight Pullin of 88 Maribyrnong Street, Footscray.

PN381

THE ASSOCIATE: Thank you. Please place the Bible in your right hand.

<DANIEL KNIGHT PULLIN, SWORN [12.02 PM]

EXAMINATION-IN-CHIEF BY MR RINALDI [12.02 PM]

PN382

MR RINALDI: Thank you, Mr Pullin. You're familiar with this place. You'll see there's some water there for you, hopefully unopened?---Thank you.

PN383

And the hearing book in front of you?---Yes.

PN384

Now, did you say just then that your full name was Daniel Knight Pullin?---Knight.

PN385

Knight. I thought you had a really good second name. All right. Thank you. and the address, your business address is 88 Maribyrnong Street, Footscray?---Correct.

PN386

Which is the address of the VHIA, the Victorian Hospitals' Industrial Association?---That's correct.

PN387

And your statement is page 571 of the hearing book, if you could turn to that, please?---Thank you.

PN388

And do you see there it starts at 571 and it goes through to 576 which just has the date of 25 July 2023 and your name on it?---That's correct.

PN389

Yes. Thank you. And there are some 27 paragraphs, if you turn back to 575 of the last of the paragraphs?---That's correct.

PN390

And then there are a number of attachments. The first one is marked DP1 which is the full report of the 1995 Ministerial Review into the public hospital system of Victoria, which is known as the Lochtenberg Report, correct?---That's correct.

PN391

Because if you look at page 578, you'll see that the chairman was Dr Ben Lochtenberg. For the transcript, that's L-o-c-h-t-e-n-b-e-r-g. Have you had the pleasure of reading that report?---I have.

PN392

And there are also a number of other attachments which are marked 13.2, 13.3, 13.4 and 13.5, or at least that's the way it's tabbed in my copy. But it's DP2, 3, 4 and 5.
So there are 5 attachments in total?---That's correct.

PN393

And they finish at page 735. Just confirm that?---That's correct.

PN394

Thank you, Mr Pullin. Are there any changes you wish to make to make to your witness statement?---There are not.

PN395

Okay, thank you. So we rely on that, Deputy President, and I'll leave you to Mr Ryan.

PN396

MR RYAN: Thank you.

CROSS-EXAMINATION BY MR RYAN **[12.05 PM]**

PN397

MR RYAN: Mr Pullin, if I can take you to the very first paragraph if your statement. Are you giving your evidence on behalf of VHIA?---I am.

PN398

Good. At paragraph 4A, you say you hold a Master of Workplace and Employment Law from Monash University. Are you claiming expertise in workplace and employment law?---I wouldn't say that I am an expert in workplace and employment law, but I have been employed in that field for just under 10 years.

PN399

Okay, so you're not claiming to be an expert?---I wouldn't say that I'm an expert. I wouldn't put it that highly.

PN400

Okay. At paragraph 15, and this is on page 573, you say you were 'assisting in the bargaining'. What does assistance mean in that sense?---Well, as you would know, Mr Ryan, VHIA had a bargaining team which consisted of the CEO – - -

PN401

It's not to me, it's giving evidence to the Commission?---Consisted of the chief executive officer, a senior workplace relations consultant which was myself, and we had a consultant-level employee which, at that time, it may very well have been one of my colleagues, Clinton Temaldon(?), but shortly through bargaining that role was vacated.

PN402

So what is your role as an assistant?---Well, I would say that my role would be to take carriage of parts of the employer claim, parts of the AMA claim, assist in drafting responses and claims in respect to that, preparing material that's required of the VHIA to seek approval from the Victorian Government to commence bargaining, things like minutes in the absence of a consultant-level support staff member through to drafting material for the Fair Work Commission, appearing for the Commission if necessary for any matters involving undertakings and the like. So generally end-to-end management of the bargaining process in support of my chief executive officer.

PN403

Thank you. If I take you to paragraph 13 of your statement. In the second line, 'In my understanding, it's a common practice for fractional specialists to be expected to undertake on-call and recall work in Victorian regional and metropolitan hospitals.' How do you come to that understanding?---Since commencing at VHIA, I've been involved in the Doctors in Training and Medical Specialists bargaining, either as a bargaining representative or between bargaining processes in any of outworkings that come of that. The 2013 agreement, which preceded my time, included a document, a requirement to preserve some terms and conditions – it was called a savings provision – and in the 2018 negotiations, VHIA and the AMA made undertakings to commence a review of those terms and conditions. Now, that did not include every single health service across Victorian public health. It's worth noting it did include GV Health, but it didn't include every single employer, and part of that review was to identify terms and conditions of the enterprise agreements that existed locally prior to 2013 for those health services, and what we identified is, in that body of work, that the majority of those provisions had preserved terms that dealt with on-call and recall, and where they dealt with fractional employees, that was the majority extent of the work that it continued to do. In addition to that, as the person who has been involved in both the Doctors in Training and Medical Specialists agreement, since my commencement at VHIA, I've spoken to – on multiple occasions – I would say every health service that's covered by both agreements, and I would say that I would have a generally good understanding of how health services operate their terms and conditions around on-call and recall, particularly for fractional specialists.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN404

In paragraph 21 on page 574, you quote from one of bargaining claims for the applicant about out-of-hours work, and then you've got another quote, 'Currently, fractional doctors rely on former agreements to inform entitlements about out-of-hours arrangements.' Is that reference to former agreements what you were just talking about?---Yes. And also, we would say, not only former enterprise agreements but local agreements that have been reached, which may not be agreements in the term of approved by either the Commission or its predecessor, but locally reached – what we would call in the industry – craft group agreements that may operate at a department level.

PN405

Okay. Can I take you to page 121 of the book?---Just one second. Thank you. Was that 121, Mr Ryan?

PN406

121, yes?---Thank you. Thank you, Mr Ryan.

PN407

Now, page 121 is schedule F to the 2018 agreement which commences at page 5 of the book?---That is correct.

PN408

Okay. They're the same agreements that you were referring to?---They are the pre-2013 agreements that I was referring to, yes, that were subject to the savings provision that I referred to.

PN409

Yes. That's at page 121 which is schedule F to the 2018 agreement?---Yes.

PN410

If I can ask you to also look at page 287?---Thank you.

PN411

That's appendix 5 to the 2022 agreement?---That's correct.

PN412

Okay. That's the same list as the earlier schedule F?---If there are any variations, they weren't intended, but I would safely say that if they run to 34 agreements then they would be the same list. There was no intention to have a different list.

PN413

Yes. And you're very familiar with all of those former agreements, aren't you?---I am.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN414

Yes. I'd like to take you to - - -?---Sorry, I don't mean to interrupt. I'll qualify that by saying, I'm familiar with the provisions within those that have been subject to discussions around their preservation. I wouldn't say that I'm familiar with each of them and their entire contents, because there's a number of provisions that weren't sought to be preserved by AMA or ASMOF. Sorry, Mr Ryan.

PN415

Yes, that's a very useful correction. Thank you. I'd like to take you to two of those agreements. The first agreement I'd like to take you to is – and it's better if we use the most recent list which is on page 287, which is appendix 5 to the current agreement. The fifth down is Austin Health AMA Medical Staff Certified Agreement 2004?---Yes.

PN416

Okay. If I just show you a copy of that. Now, you've had a look at this agreement in the past?---Yes, again qualified with the extent that it's been necessary with the work that we've been doing and to the claims that have been progressed.

PN417

If we go to the second numbered page in the agreement – this is after the certification page – you've got the agreement itself?---Mm.

PN418

You have the arrangement clause, clause 2?---Yes, thank you.

PN419

You've got that. And you'll note that it is divided up in parts: part 2 is common conditions applying for medical practitioners; part 3 is specific conditions; and part 3 is divided up into two parts, part 3.1 and part 3.2. Part 3.2 deals with visiting medical officers. I'd like to take you to clause 48 of the agreement which is in part 3.2. And also clause 49, on-call – 48 is overtime visiting specialists; clause 49, on-call visiting specialists; clause 50, on-call payments, visiting specialists; and then clause 51, recall payments, visiting specialists other than visiting anaesthetists; and 53, additional services, visiting specialists. Are these the clauses that you'd be looking at in either of the saving provisions?---In the context of Austin Health, they are familiar to me, yes.

PN420

Yes, okay?---That work's incomplete though, at this point.

PN421

And this style of agreement, the Austin Health agreement, that is not identical but common to hospitals that had saved agreements that applied to both full-time and fractional staff?---I would qualify the answer by saying that, when we've been doing this work, we've been focused on provisions specific to the clause that's in question, so we've been looking at the clause alone and not looking at how it's entirely constructed. So I would say that not every one of those saved pre-2013 collective agreements has provisions around on-call, overtime or any of those other provisions that have been raised. And it's also safe to say that not all of those saved pre-2013 agreements apply to fractionals either, but I would say that it's not dissimilar to how it's been structured, but every agreement has different ways and means as to which it prescribes overtime and on-call. It's not consistent.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN422

If I go back to the arrangement clause in clause 2 of the Austin agreement. Just cast your eye over the totality of the arrangement. Does this appear to be a comprehensive enterprise agreement for the employment of full-time and fractional doctors at Austin in 2004?---I'm reluctant to comment without having the opportunity to read the entire agreement, but it appears based on the arrangement that it does cover all medical practitioners which appears to not provide for any exclusions, but I would have to have an opportunity to read it in full. And it does provide for specific conditions for full-time specialists, then visiting medical offers and then clinical academics. But without an opportunity to

review it, I wouldn't be able to speak to whether there are any particular carve outs or people that it wouldn't apply to.

PN423

Okay. Subject to that important qualification, the style of this agreement is such that it looks like it's a comprehensive agreement covering the standard conditions of employment in the public health sector?---I think that's a fair comment to make.

PN424

Thank you?---Sorry, for Austin Health, and again, I'll qualify that. For Austin Health in the context of medical specialists in 2004.

PN425

Yes.

PN426

MR RINALDI: Which leads me to question the relevance which I've been waiting for, and I've obviously allowed my friend to ask questions in case that relevance became apparent. Maybe it's about to, but it hasn't yet.

PN427

MR RYAN: It will be. Well, not yet, not yet. Deputy President, given that I will be relying on this document, it is a Commission document in that sense, but do we need to mark it?

PN428

THE DEPUTY PRESIDENT: We probably don't, but it's not a bad thing to do.

PN429

MR RINALDI: We haven't established its relevance yet, Deputy President.

PN430

THE DEPUTY PRESIDENT: Sorry, what was that?

PN431

MR RINALDI: We haven't established its relevance so I can't see how it can be tendered until it's ruled relevant.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN432

THE DEPUTY PRESIDENT: No, I understand that, but – so if we get to it, we will tender it, in answer to your first question. But what do you say in relation to Mr Rinaldi's objection about relevance? Well, it's not quite an objection, it's a question.

PN433

MR RYAN: The first question for the determination by the Commission is, does the current enterprise agreement effectively prohibit the employment – or prohibit the on-call or recall arrangements in relation to fractional specialists? We're simply establishing that there are documents where fractional specialists are clearly dealt with, and there's going to be further evidence – and I'll leave most of

this for Mr Pullin around how this relates directly to the question that you have to answer. Now, I mean, I don't necessarily want to be debating this in front of the witness. I'm happy to have the debate without the witness present.

PN434

THE DEPUTY PRESIDENT: I think I will allow the questions, and we can deal with your submissions as to the relevance, but I'm going to allow the questions. In light of that, Mr Rinaldi, do you object to the tendering of the document?

PN435

MR RINALDI: Yes, I do. And the answer that was just given by my friend was – that question 1 for arbitration, which is a question specifically about the 2022 Goulburn Valley Health – well, the Medical Specialists (Victorian Public Health Sector) (AMA Victoria/ASMOF) (Single Interest Employers) Enterprise Agreement 2022, how it relates to Goulburn Health. I so far don't see any connection apart from a tenuous one that's been linked to appendix 5 of how the Austin Health – perhaps if it was the Goulburn Valley Health agreement that's at item 16 of appendix 5 might be of more relevance. But as I say, maybe it's going to become apparent what the relevance is or how it's put, but at the moment, I certainly object to the tender of that document on the basis of relevance.

PN436

THE DEPUTY PRESIDENT: All right. Well, it seems like there's no alternative but to have a debate – well, not a debate. We won't have a debate, but you can respond to the relevance objection in the absence of the witness. So, Mr Pullin, if you wouldn't mind stepping down and just stepping outside for a few minutes.

<THE WITNESS WITHDREW [12.23 PM]

PN437

MR RYAN: The contention from the applicant is that the enterprise agreement, the current one, does not permit and does not allow fractional specialists to do on-call/recall. The contention from the respondent is that there is nothing in the enterprise agreement that prohibits it.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN438

Teasing out the operation of clause 7 of the current enterprise agreement which is savings provisions, and teasing out that there are enterprise agreements that are specifically saved with on-call/recall arrangements for fractional specialists is part of establishing that there are some fractional specialists employed under the terms of the current agreement who do have entitlement, rights and obligations in relation to on-call/recall and there are others who do not.

PN439

And that teasing out – and I'll be asking this more with specific questions relating to other aspects of the current enterprise agreement – will, in my submission, lead to my final point which is, the question in number 1 has to be answered in favour of the applicant, and that's because you've got to look at the complete structure of

the enterprise agreement, and part of that structure is the operation of clause 7 with its preservation of the entitlements in preserved agreements. That has to be taken into account when you're looking at the other clauses in the enterprise agreement.

PN440

It really is a simple exercise of, 'If you're going to interpret the enterprise agreement, it's having to look at everything, the totality of it, not focusing on clause A or clause B.' And what I'm doing here quite deliberately, Deputy President, is I wanted to take the witness to the Austin Health agreement, and he's agreed that it looks like a comprehensive agreement. But my next agreement that I'm going to take him to is the Ballarat agreement which is - - -

PN441

THE DEPUTY PRESIDENT: He doesn't have the provisions.

PN442

MR RYAN: No, no. But I'm going to take him to the Ballarat agreement on the basis that that is an agreement that only relates to visiting medical officers. It's not a comprehensive agreement, it's a very specific agreement. But they're all – they are both agreements that are specifically preserved by the operation of clause 7 of the current agreement, the previous agreement and the early-2013 agreement, and they become relevant for the consideration as to what is the meaning and application of the current agreement in relation to fractional specialists employed under the current agreement in relation to the issue of on-call and recall for fractional specialists.

PN443

MR RINALDI: My objection to relevance, Deputy President, is 'What does that have to do with Goulburn Valley Health?' What's done in other health services according to their - - -

PN444

THE DEPUTY PRESIDENT: Well, if it sets up a kind of regime across the entire health service where there is specific savings for such provisions in some but not all cases, that could be – at least arguably – relevant to the construction of the agreement where it is silent in respect of fractional paediatricians. I would have thought it's at least arguable. I'm not saying that it's a - - -

PN445

MR RINALDI: Yes. I understand. But presumably the saved 2002 Goulburn Valley Health agreement is of more relevance than the Ballarat agreement or the Austin - - -

PN446

THE DEPUTY PRESIDENT: Well, as I understand, essentially the proposition is that the agreement is signed on on-call and recall for fractional specialists.

PN447

MR RINALDI: Yes.

PN448

THE DEPUTY PRESIDENT: You both agree 'silence' doesn't mean it's prohibited. I think you both - - -

PN449

MR RINALDI: I don't think Mr Ryan agrees.

PN450

MR RYAN: That's what I'm – my contention is that it is.

PN451

MR RINALDI: Certainly, I agree with that.

PN452

THE DEPUTY PRESIDENT: Sorry, sorry. But in and of itself, I think you agree, that in and of itself, the fact that it doesn't expressly prohibit it does not mean it's permitted. I understand that.

PN453

MR RYAN: Exactly, and therefore it's context, and my argument is one of context in terms of 'How do you interpret the entirety of the agreement?'

PN454

THE DEPUTY PRESIDENT: Yes.

PN455

MR RYAN: And it can't be an interpretation that is limited to Goulburn Valley Health because the agreement - - -

PN456

THE DEPUTY PRESIDENT: Doesn't just apply to Goulburn Valley Health.

PN457

MR RYAN: Exactly.

PN458

THE DEPUTY PRESIDENT: Exactly.

PN459

MR RINALDI: Understood.

PN460

THE DEPUTY PRESIDENT: I'm still not quite sure in terms of the Berry(?) principles of how far it takes you, but I am persuaded that it is relevant, so I'm going to allow the questions.

PN461

MR RINALDI: Potentially relevant, yes. If the Commission pleases - - -

PN462

MR RYAN: Well, at least under Berry, it's not extrinsic material at all because this is material that is specifically referred to in the enterprise agreement. I'm simply teasing out things that are specific - - -

PN463

THE DEPUTY PRESIDENT: We can deal with the submissions when we get to that, but - - -

PN464

MR RYAN: Yes. No, but that's the point of this. So what do we do with the Austin agreement?

PN465

THE DEPUTY PRESIDENT: I'm going to tender it.

PN466

MR RYAN: Okay, thank you.

PN467

MR RINALDI: (Indistinct).

PN468

MR RYAN: Can we get the witness back in first?

PN469

THE DEPUTY PRESIDENT: I'm sorry?

PN470

MR RYAN: Get the witness back in first or?

PN471

THE DEPUTY PRESIDENT: Yes, that's what we're – I don't need the witness in to mark it. I'll mark it exhibit A1.

EXHIBIT #A1 AUSTIN HEALTH AMA MEDICAL STAFF CERTIFIED AGREEMENT 2004

PN472

MR RINALDI: Do you have a spare copy, John?

PN473

MR RYAN: Sorry?

PN474

MR RINALDI: Do you have a spare copy?

PN475

MR RYAN: Yes.

PN476

MR RINALDI: Thank you. (Indistinct) exhibit A1.

PN477

THE DEPUTY PRESIDENT: Welcome back, Mr Pullin.

<DANIEL KNIGHT PULLIN, RECALLED [12.29 PM]

CROSS-EXAMINATION BY MR RYAN, CONTINUING [12.29 PM]

PN478

MR RYAN: Now, Mr Pullin, I want to take you to another one of the agreements that's mentioned in appendix 5 on page 287, and that is number 6 on that list, which is the AMA Ballarat Health Services Visiting Medical Officers Agreement 2003. If I can show the witness a copy of that agreement?---Thank you.

PN479

THE DEPUTY PRESIDENT: I'm going to mark that exhibit A2.

EXHIBIT #A2 AMA BALLARAT HEALTH SERVICES VISITING MEDICAL OFFICERS AGREEMENT 2003

PN480

MR RYAN: Thank you, Deputy President. Mr Pullin, if you go to clause 4 of this agreement, it says 'the party found'?---Yes.

PN481

Specifically, at 4.1.1, it finds 'Employees of Ballarat Health Services who are employed in a fractional capacity as medical specialists, clinical academics and medical administrators.' So you understand that this is a fractional specialist agreement only?---That's correct.

PN482

Yes. It does not apply to full-timers?---That's correct.

PN483

Yes.

PN484

DEPUTY PRESIDENT: Can I just make sure I understand the kind of terminology and the language. So what I now described as fractional specialist, that's a concept that came in following the Lochtenberg Report, and previously they were described as visiting medical officers. Have I got that right?

PN485

MR RYAN: Sort of, and that's because you still have a lot of doctors in a lot of hospitals that will either refer to themselves as VMOs or the hospital will refer to them as VMOs, and they are nothing other than fractional specialists. It seems to be interchangeable, with the exception of what I would say was the very specific evidence of Dr Wadhwa, which is that very unusual category and that – but normally they're interchangeable.

PN486

THE DEPUTY PRESIDENT: So when in these old instruments I'm saying VMOs, I can read that to basically mean fractional specialist? No, it's more complex than that.

PN487

MR RYAN: No – Mr Pullin, when you have the exhibit A2 in front of you, titled AMA Ballarat Health Services Visiting Medical Officers Agreement, and if I can take you to clause 19?---Thank you.

PN488

Clause 19.1 is 'on-call' and clause 19.2 is 'recall', and the reference in the clause is to a 'Visiting Specialist'?---Yes.

PN489

Right. Whereas the title of the agreement is 'Visiting Medical Officers', on the title of the agreement?---That's correct. I was just getting to it, sorry.

PN490

Yes. And in clause 4.1.1?---Yes.

PN491

It refers to 'employees who are employed in a fractional capacity as medical specialists' et cetera?---That's right.

PN492

Do you agree that those three concepts are interchangeable? Visiting, employed in a fractional capacity as a medical specialist, and visiting specialist, as used in this Ballarat agreement?---In the context of this Ballarat agreement, I would agree that the term 'visiting medical officer' on the title page, 'visiting medical officer' at clause 6.13, and in the clause 19, the term 'visiting specialist' are interchangeable for the purpose of this Ballarat agreement, yes.

PN493

Mr Pullin, the exhibit A2 is a visiting medical officer agreement only. In your consideration of all of the agreements in appendix 5 which are all in the saved agreements, isn't it the case that there are some agreements which are visiting medical officer only, and some that are full-time only, and some that are comprehensive and involve both full-time and visiting medical officers?---That's correct, and I would add that there are some that are limited to particular craft groups as well – are limited to anaesthetists, yes.

PN494

Thank you. Now, given that we've identified these two agreements, exhibit A1 and A2, as being on the list of appendix 5, do you agree that these are agreements which are affected by clause 7 of the enterprise agreement?---Of the current enterprise agreement?

PN495

Yes. And if I can take you to page 135 of the book

PN496

MR RINALDI: When you say 'these agreements', you mean exhibit A1 and A2?

PN497

MR RYAN: Yes.

PN498

MR RINALDI: Yes.

PN499

WITNESS: Sorry, I'm at clause 7, and yes, I would say that it's the list in appendix 5 of the current medical specialist agreement is the subject of – are the saving of the saving of local agreements provision.

PN500

MR RYAN: Yes. And in particular, it's clause 7.5A on the bottom of page 135 which specifically refers to the appendix 5 list?---That's correct.

PN501

Okay. And that's for the review purposes?---That's correct.

PN502

Okay. For the purposes of clause 7.1, are these two agreements also covered by clause 7.1?---Yes.

PN503

Okay. And that would also be the case with the pre-existing 2018 agreement?---Sorry, can you please repeat that question? 'The'?

PN504

Okay. The answers you've just given about the list is identified for review purposes in 7.5A, but the two agreements are also covered by 7.1 which is the general provision around savings. You'd agree that that provision also applied generally in relation to the 2018 agreement?---It does. The clause cross-referencing is different.

PN505

Yes?---I understood your question the second I said I didn't understand it, but thank you. The cross-referencing is slightly different. The nomenclature, if I may, and the content are slightly different.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN506

Well, let me just stop you there. If I take you to page 16 of the hearing book. In page 16 of the hearing book is clause 7 of the 2018 agreement?---That's correct.

PN507

Okay. And clause 7.5A refers to schedule F?---That's correct.

PN508

Which we basically agree is the same as appendix 5?---The same, correct.

PN509

And therefore, exhibits A1 and A2 would also be covered by 7.1 of the 2018 agreement?---That's correct, yes.

PN510

Thank you. Now, is it the case that, with all of the agreements that are identified in appendix 5 to the 2002 agreement or schedule F to the 2018 agreement, that wherever they refer to visiting medical officers, the savings provision is being read as applying to fractional specialists?---No, and the reason being is that each of those agreements do have different nomenclature and some of those agreements do refer to different provisions within that mode of employment. So 'visiting medical officer', 'fractional doctor', 'visiting specialist', I wouldn't say it's interchangeable across these schedule 5 or appendix 5 agreements. I'd say, yes, they have to be read in the context of each of those agreements alone.

PN511

Okay. Is it generally the case that – and you are familiar with all of these agreements – that references to visiting medical officers is now translated as being a reference to a fractional specialist?---I think I would agree that it's commonly held in the sector that that term is interchangeable, but when we're examining these pre-2013 collective agreements at appendix 5 of the current agreement, we always read it in the context of how it's expressed in that agreement that's in question.

PN512

Do I understand from that that the approach adopted in some of these agreements where they might use 'VMO' it is used in a sense which is completely different from what is known as a fractional specialist under the 2018 and 2022 agreements?---In some cases, that's correct.

PN513

Yes. Now, in relation to the on-call/recall clauses that I've taken you to in both exhibit A1 and A2, do you agree that those two sets of clauses, in relation to the Austin and Ballarat agreements, that they have continuing operation because of clause 7.1 of both the 2018 and 2022 agreements?---I would say that that position has not been settled between the parties. I would say that's still an outstanding question.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN514

Okay?---And when I say 'parties', I mean the health services to which those pre-2013 collective agreements apply to.

PN515

THE DEPUTY PRESIDENT: Can you just expand on that for me?---Absolutely. Deputy President, it's taken us a very, very long time to titrate these exhibits into what the agreements refer to as – what the 2013 agreement – sorry, 2018 agreement referred to as 'developing schedules' which we weren't able to achieve.

PN516

MR RYAN: Deputy President, if I could interrupt, my next question is going to go to exactly that issue.

PN517

THE DEPUTY PRESIDENT: Okay, great.

PN518

MR RYAN: Mr Pullin, can I ask you: you have been actively working on the implementation of clause 7 in terms of what is saved and what is not saved, and what in those agreements listed in appendix 5 to the 2022 agreement and schedule F to the 2018 agreement are actually caught by clause 7.1 in each of those two agreements?---I would agree that I've been spending a long time working on that.

PN519

Okay. Could I show you an email which you sent to AMA on 15 June this year with an attachment to that email?---Mm.

PN520

You want a couple of copies of this too?

PN521

MR RINALDI: Please, that would be great.

PN522

MR RYAN: Okay.

PN523

MR RINALDI: Thank you.

PN524

WITNESS: Thank you.

PN525

MR RYAN: Are you familiar with this email?---I am.

PN526

Are you familiar with the attachment to the email?---More than I'd like to admit.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN527

Thank you. Now, you have clearly identified in the email that this was a document shared with Commissioner Gregory in September 2019?---That's correct.

PN528

And that was part of a conciliation exercise?---That's correct.

PN529

Which means it can't be used in an arbitration, but you've subsequently sent this to the AMA for other purposes, which is, as I understand, the progression of the

discussions around clause 7.1?---The document itself was prepared in the context of the conciliation, but yes, I did share it with Mr Chan(?) for the purpose of getting our minds back in the game of progressing this savings project.

PN530

Okay. If I take you to the first page of the spreadsheet document, you've got 'Austin Health' and you have 'health service identified', 'outstanding items', 'items the health service proposed to apply to all doctors within the relevant cohort'. That's on page 17, December 2013. And then a column of items which would be limited to doctors who were employed subject to the relevant pre-2013 collective agreements, in other words, pre-17 December 2013 only. Now, 'Austin Health'. You've got a reference to the health service, but is that also a reference to the exhibit A2 which is where you find the terms and conditions which you've inserted into this table?---Yes, but with the qualifier that each of these health services would have a corresponding draft schedule that would contain tracked changes dating back to pre-2019 that would reflect this overarching summary.

PN531

Yes, okay. But as an overarching summary, where it refers to Austin Health in the first column, that is essentially referring to the exhibit A1 because that's where you find the contents to populate this chart?---I would say that the better description is that column A, as in where it says 'A, items the health service proposed to apply to all', the content within that where it says 'superannuation', that superannuation clause was drawn from the exhibit that you referred to.

PN532

Yes. And where in that third column, under 'Austin Health', you've got 'fractional doctors only', you've got 'on-call', 'on-call payments', 'recall payments excluding anaesthetists', 'recall payments anaesthetists', 'additional services', that is drawn from the clauses I took you to in the Austin agreement, exhibit A1?---The titles are, but the content may differ because one of the contentions between the parties and part of the reasons why we were in dispute was around whether some of those terms changed over time; if it gave a specific dollar rate, whether that was indexed over time. So the headings are drawn from the – in this example, the Austin Health pre-2013 agreement, the content may or may not be a direct copy/paste; it may be slightly amended.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN533

Okay. And if we go over to the second page of that spreadsheet document, you've got 'Ballarat'. Now, that's a reference to the exhibit A2 which is the Ballarat VMO agreement?---Again, the headings are drawn from that exhibit, yes.

PN534

Yes. And in the third column where it says 'All agreed items that are contained in the Ballarat Health Services schedule are set out below,' you've got 'on-call' and 'recall'. They also relate to the clauses that I took you in exhibit A2?---Again, with the same qualifier I gave with the Austin answer, that the content may slightly differ if there was dollar rates that had been indexed over time. But the general answer to that is yes.

PN535

Okay. Now, this is the work in progress that was back in 2019. Is the same approach being adopted in terms of columns 3 and 4 across the health services?---Is the position of the health services the same? I'm unsure what the question is, I'm sorry.

PN536

Okay. This is the position as at 2019?---Correct.

PN537

Is the approach of health services generally to have a column 3 to column 4 approach?---Yes. So the work we've been doing this year is to try and – I think as I aptly put in my email, 'some easy low-hanging fruit' were ones where they were very close to being able to be resolved, and most of those health services did have conditions that they were willing to give to all doctors – specialists, sorry, regardless of their commencement date, and there were some provisions that they wanted to preserve only to those doctors who were afforded those conditions under their pre-2013 agreement.

PN538

Yes. So if we just look at Albury Wodonga Health, where it says 'Wodonga Hospital only', and there is elements in the fourth column, 'items which will be limited to doctors who were employed subject to the relevant pre-2013 collective agreement', if that is the way it eventually resolves itself, then the position will be 'A group of doctors who were employed prior to 17 December 2013 will have allowances relating to on-call and recall, but doctors employed after 2013 will not have any saved allowances, they will only have whatever is in the current agreement'?---I agree with the first part of that, is that the doctors who were pre-2013 would be afforded the preserved entitlement from the pre-2013 collective agreement. What I don't agree with is the second component, is that they would only get what's in the EBA. They may very well get an entitlement that has been provided to them locally, and I think that that will be the qualifier to that answer.

PN539

Okay. Yes. Thank you. Could we mark this, Deputy President?

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN540

THE DEPUTY PRESIDENT: No objection, Mr Rinaldi?

PN541

MR RINALDI: I mean - - -

PN542

THE DEPUTY PRESIDENT: Trying to think of one?

PN543

MR RINALDI: It's hard to see how the document advances the answers that were given. And, I mean, I'm always worried about – without prejudice – documents without consent of both parties. But I understand that it's been put as part of the

ongoing work, so I don't think anyone's going to go and post it up on the street, so I probably won't object.

PN544

THE DEPUTY PRESIDENT: All right. I'll mark that exhibit A3.

EXHIBIT #A3 EMAIL AND SPREADSHEET FROM DANIEL PULLIN TO AMA DATED15 JUNE

PN545

THE DEPUTY PRESIDENT: Mr Pullin, just before we move off that document, just so I understand the process under clause 7, and they're – essentially, the objective is for the parties to arrive, at some point in the future, a schedule of hospitals or service-specific conditions that have their origin in the appendix of the list of various collective agreements, having gone through the process in 7.4, and that's where the contention is, presumably, about whether various entitlements do or don't indirectly affect the net cost?---That's correct.

PN546

Okay. I follow.

PN547

MR RYAN: Mr Pullin, can I take you back to your statement? If you go to page 575 of the book?---Just one second, Mr Ryan. I'm sorry. Thank you.

PN548

Okay. At paragraph 27, 'The enterprise agreement ultimately did not include a clause dealing with fractional specialists and on-call and recall work.' And then you go down to say the reasons, and the first reason you've got at 27A is, 'Fractional specialists, for the most part, already received a form of allowance for payment for on-call and recall work.' What do you mean by 'for the most part'?---Well, I couldn't say that every single fractional specialist receives a form of allowance or payment for on-call and recall work, so I would say it was a qualifier. But I would say that, well and truly, more than the majority of health services that I've engaged with on the topic of out-of-hours payments – whether it's on-call or recall payments for fractional specialists – provide a form of allowance or payment for such work.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN549

Okay. You then say that 'What they're getting is a form of allowance or payment.' What's the form of the allowance or what's the form of the payment? Do you have any evidence as to that?---Not with me.

PN550

Okay. What can you say is the form of allowance or the form of payment?---I understand that in some health services, doctors may receive what we call in the sector an 'above-agreement' or an 'above-award payment for additional duties'. I would say that that is reflected – I would say that that is what I was referring to in the context of payment. And allowance, I think, would be probably a little more

obvious insofar as they would receive an allowance for being on call, whether that's a fixed value for that.

PN551

Thank you?---Sorry, and I'll also say that recall is generally a payment as opposed to an allowance for recall, and on-call is more generally an allowance.

PN552

At 27B, one of the reasons you give is, 'These practices vary greatly across the sector and within health services.' What's the evidence for that?---The copy of the document that you just handed, I would say probably speaks to the complexity of that across the sector. If we look at that document, quite a number of those do refer to on-call and recall as a topic that was still outstanding, and I would say that while some of those conferred similar entitlements, those practices varied greatly just in the context of those pre-2013 collective agreements, and that doesn't capture everything that happens in every single department across public health. I would say that, in my experience in discussing these matters with senior representatives of hospitals, that the arrangements do vary greatly, whether it is by way of how the doctors are paid, for how long they're expected to be on call, what they're paid for the recall and the like.

PN553

If we go back to page 574, paragraph 20, you say, 'At no stage during the bargaining for the enterprise agreement or the 2018 enterprise agreement did any representative from the applicant raise any claim or at any time express any view that fractional specialists required an express term within the enterprise agreement to A and B,' and you've got the two things there: required to perform on the roster, and required to perform recall work. Would you agree that that statement applies equally to the VHIA and all respondents to the 2018 and 2022 enterprise agreements?---I wouldn't agree because we wouldn't make that comment, because it's our view and it has been that you don't require an express term within the agreement to participate in on-call or recall work.

PN554

No, but that's not the question I asked?---Sorry, I must have misunderstood.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN555

Your statement is, 'At no stage during the bargaining for the enterprise agreement or the 2018 agreement did any representative from the applicant raise any claim or at any time express any view that fractional specialists required an express term within the enterprise agreement to' do the things. Would you agree that that statement also applies to the VHIA and the respondents? In other words, VHIA and no respondent to either the two agreements raised any claim or at any time expressed any views that fractional specialists required an express term within the enterprise agreement to deal with those two issues?---I can't speak on behalf of respondent health services. We had some health services attend as observers and sometimes some participated more than others. In establishing my commentary at paragraph 20, I reviewed the minutes and the bargaining tracker which I believe was given in – which I believe accurately reflected the conversations between the

parties. I can't unequivocally say that a comment like that wasn't raised by a representative of VHIA or a representative of a respondent without going back and reviewing the minutes.

PN556

But isn't it the position of VHIA that there is no necessity to put any provision in the enterprise agreement for fractional specialists in relation to on-call and recall?---The position of VHIA is that the reason why it wasn't in the agreement was for the reasons stipulated at 27, but I don't see the connection between us not making comment on it at – sorry, us not making comment on it during bargaining and our view of the application of the Lochtenberg provision.

PN557

THE DEPUTY PRESIDENT: Are you about to move on to another matter, Mr Ryan?

PN558

MR RYAN: Yes.

PN559

THE DEPUTY PRESIDENT: All right, that might be convenient time. We'll adjourn for lunch and resume at 2 pm.

<THE WITNESS WITHDREW **[1.00 PM]**

LUNCHEON ADJOURNMENT **[1.00 PM]**

RESUMED **[2.06 PM]**

<DANIEL KNIGHT PULLIN, RECALLED **[2.06 PM]**

CROSS-EXAMINATION BY MR RYAN, CONTINUING **[2.06 PM]**

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN560

MR RYAN: Mr Pullin, to continue our questions, if I can take you to page 573 of the hearing book, at paragraph 13 of your witness statement. You say 'the recommendation set out in the Lochtenberg Report were adopted through the creation of the fractional mode of employment and are consistent with what in my understanding is common practice for fractional specialists to be expected to undertake

PN561

on-call and recall work in Victorian regional and metropolitan hospitals with many arrangements on the, quote, 'price,' end quote, attached to on-call and recall work being negotiated at the department level.' When you say that many arrangements on the price attached to on-call and recall work have been negotiated at department level, how does that work?---As in the negotiations at the department level? How do they work?

PN562

Yes?---Often they involved the health service and the doctors discussing what the clinical needs are for the service, whether it's a 24/7 service, whether it involves weekends, public holidays and the like. And they negotiate to the best of my understanding, based on the competitors or other health services and what other areas are providing, and also what other departments within the health service are offering an arrangement to require those doctors to be on call and what price will be attached to on call and recall for such activities.

PN563

Okay. Can I ask you to go to page 43of the hearing book?---Thank you.

PN564

Now page 43 is clause 31 of the 2018 agreement. If I can ask you to turn over to page 45 and in particular, clause 31.12?---Yes.

PN565

It reads, 'Except as provided in subclauses 31.8, 31.9, 31.10 and 31.11, it is a requirement of this agreement that while this agreement is in operation,' then there are four subparagraphs. Are you familiar with clause 31.12?---I am.

PN566

Okay. Can you explain what is your understanding of each of the parts of 31.12(a)?---So, are you asking for me to provide my advice on 31.12(a)(i) through to (iv)?

PN567

Yes, and take them in sequence?---Well, I'll start out by making the comments that you've got 31.1 – so 31.8 through to 11 that provides for upwards of nearly two pages' worth of additional considerations that would need to be taken into account. I'm happy to provide my interpretation of those on the fly. But it would require me to have some time to read 31.8 through to 31.11 in their entirety.

PN568

Okay, leaving aside 31.8 through to 31.11, and accepting that there are exceptions - - -?---Thank you.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN569

What's your understanding of 31.12(a)(i)?---I would say that 31.12(a)(i) sets what I would say is an expectation that doctors are paid the rates in the agreement.

PN570

Okay. Is it an expectation or is it more than an expectation ?---I would say that – well, it does say 'general rule,' but what I would say is that if you are a health service as defined and the employer is a doctor as defined then you must provide them the rates of pay specified in part 1(b) and the clause carries on.

PN571

And what's your understanding of clause 31.(a)(ii)?---My understanding of 31.12(a)(ii) is that it provides for both a requirement on both the health service as defined and a doctor as defined to accept or seek payment that exceeds or is less

than the provisions of the agreement if it is the performance of work that the agreement applies to.

PN572

Do you understand it can be a prohibition clause? You are prohibited from doing certain things?---I would agree that the health service and the doctor are prohibited from engaging in the behaviour set out in 31.12(a)(ii).

PN573

And what is the behaviour that they're prohibited from engaging in?---I would say as provided in the clause that the health service must be paying, the doctor must not seek or accept any payment for the performance of work to which this agreement applies in excess of or less than the rates provided in the agreement unless such payment is required to be paid under the term of the agreement or by the act as defined.

PN574

Okay. And what is your understanding of 31.12(a)(iii)?---I would say that it carries on from Roman (ii) and it provides that the health service as defined must not pay to a doctor and they must not seek any monetary payments for the performance of work to which the agreement applies, other than what is required under the agreement or the act.

PN575

So, again it's a prohibition clause prohibiting both the health service and the individual doctor from doing certain things?---Yes.

PN576

And 31.12(a)(iv), what's your understanding of that?---I would say it prohibits a doctor from making any further claims or increasing their rate of pay or other monetary payments, whether it's under their contract or some other arrangement while the agreement was in operation.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN577

Okay. In 1, 2 and 3 there is a reference to, 'for the performance of work to which this agreement applies.' Does that expression, 'the performance of work to which this agreement applies,' does that cover on-call and recall work for fractional specialists?---In the context in my reading of the agreement, and I believe I gave evidence to this effect around how the fractional arrangements were generated, we would say that the fractional clause already contemplates the work that's referred to by 'on-call' and 'recall.' So, the agreement sets out in the coverage provision, and I guess this is where and I think Mr Ryan would likely agree with me in this regard, there are some pieces of work that are performed by doctors as defined that may include out of hours payments that would be covered or captured under the coverage clause at 4.2. And the coverage clause at 4.2 clarifies that the agreement doesn't cover any person in relation to ordinary work performed wholly or on a fee for service or scheduled fee basis, including by way of example, the Commonwealth Medical Benefits Schedule or the CMBS. And that's relevant

insofar is that there are some on-call and recall arrangements that provide for the payment of CMBS.

PN578

Is on-call and recall ordinary work?---No.

PN579

Okay, so clause 4.2 does not apply?---I'd accept that.

PN580

And in fact, too, 31.12 which is what I'm asking you about, where it talks about the performance of all work to which this agreement applies, when a fractional specialist is recalled to work are they not performing work to which this agreement applies?

PN581

MR RINALDI: Commissioner, I'm troubled by this line of questioning – I beg your pardon, Deputy President, because these are the ultimate issues that you need to decide to answer the questions. And to some extent I don't mind the academic exchange between Mr Ryan and Mr Pullin but the evidence that Mr Pullin can give, unless it's opinion evidence of an expert and he has already said that he doesn't regard himself as an expert to that extent. It's of no assistance to the Commission and it's a matter for submissions. And whilst again I've let it to go see sort of where it was going, in my submission - - -

PN582

THE DEPUTY PRESIDENT: It's not determinative but - - -

PN583

MR RINALDI: That opinion that Mr Pullin might give, and if he gives one, if you allow that to be answered obviously I may or may not agree with it in my submission.

PN584

THE DEPUTY PRESIDENT: Exactly. You can both make submissions.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN585

MR RINALDI: But I just think that sort of illustrates the point that the opinion of the witness, however expert he may be - - -

PN586

THE DEPUTY PRESIDENT: I made the same point about Dr Tam and I think Mr Ryan understands that. I don't imagine this is going to go for too much longer.

PN587

MR RYAN: No.

PN588

THE DEPUTY PRESIDENT: No. All right.

PN589

MR RINALDI: So, it isn't. So, I object to the question of what his interpretation of the agreement is because that's a legal question for the decision of the Commission and not a question for a witness.

PN590

MR RYAN: I'm asking questions and it might be an opinion of the witness but the witness is giving evidence in his capacity as - - -

PN591

THE DEPUTY PRESIDENT: I know. I'm going to allow it,

PN592

Mr Ryan.

PN593

MR RYAN: So, if I ask the question again of you because I don't think you've answered it, if a fractional specialist is recalled to work to perform work on a recall, is that not the performance of work to which this agreement applies?---Yes, I would agree.

PN594

Okay. So, it is the case then isn't the payment of that work prohibited by clause 31.12?---Again it depends. And I would say that how a fractional doctor's hours of work and what work the do is determined as set out in clause 30 of the agreement that Mr Ryan is referring to. And it does capture the ability to consider the hours of work for a fractional doctor which includes direct public patient care and related activities, which we would say incorporates the possibility of being on-call, to be recalled to do such work.

PN595

THE DEPUTY PRESIDENT: I'm not sure that was the question though.

PN596

MR RYAN: If a fractional specialist is performing recall work you'd disagree that this is the performance of work to which this agreement applies. You've already agreed that clauses 31.12(a)(ii), (iii) and (iv) act as prohibitions on the doctor asking for payment or the health service making a payment?---Mm.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN597

So, does that operate to prohibit the payment of recall payments for a fractional specialist?---I could see how it could be read that way, yes.

PN598

And that's as far as your answer is, it could be read that way?---Well, I would qualify that by saying that we've spent some time this afternoon talking about the pre 2013 collective agreements which both agreements, both the 2018 and the most recent agreement give life to on-call and recall provisions, so I would say to the extent that those arrangements are not captured within the pre 2013 collective agreement then I would say that 31.12(a)(1) through (iv) could be read to say that

a doctor or a health service must not pay or seek to accept payment for out of hours work which includes on-call and recall.

PN599

Okay. Do you agree that clause 31, or 31.12 in particular, the general rule, and the exceptions that are mentioned in 31.8, 9, 10 and 11, do you agree that the provisions that I've taken you to which are from the 2018 agreement are similar if not identical to the provisions in both the 2013 agreement and the 2022 agreement?---I would have to take the time to check that.

PN600

Okay. Then let me take you to page 181 of the book. Page 181 is clause 31.11 of the 2022 agreement?---Yes, 31.11 in the most recent agreement is identical save for cross referencing to 31.12 of the predecessor agreement.

PN601

I'll also ask you about the 2013 agreement just for the sake of completeness. Can I show you a copy of the 2013 agreement?---Thank you.

PN602

Now if I could take you to clause 13 of the 2013 agreement?---Mm.

PN603

And it's pages 13, 14 and 15. And if I could take you to, in particular, to clause 13.6?---Yes, so clause 13.6 of the 2013 agreement, save for cross referencing purposes is identical to the agreement that followed.

PN604

So, this is a provision that's been in three successive agreements?---That's correct.

PN605

The prohibition?---That's correct.

PN606

Given that we have these clauses in all three agreements and given your evidence at paragraph 13 on page 573 - - -?---Thank you. And was that paragraph 13?

PN607

Yes?---Thank you.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN608

How can any health service negotiate with any fractional specialist employed after 17 December 2013 a price for

PN609

on-call or recall?---So, the Lochtenberg provisions set out a consideration for – I think the term they refer to is 'reasonable' – sorry, yes, 'participating in on-call rosters where other activities are not significantly restricted.' And we would say that that was built into the price. As to how health services negotiate or why they negotiate the price that's attached to our of hours work for fractionals or for full-

time specialists where the agreement doesn't provide for an entitlement, where and if the agreement doesn't provide for an entitlement that would have been negotiated on the basis of necessity. It's an absolute need for there to be services out of hours in a number of clinical areas. It's not exclusively but there are areas within health services both in metropolitan Melbourne and regional and rural Victoria - - -

PN610

You're not answering the question. You're explaining the why. I asked the question bluntly, how can any health service negotiate with any fractional specialist employed after 17 December 2013, a price for on-call and recall? And that's given what we now have as the consistent clause in all three agreements?---Well, the how has to be read in the context of the health services really having no other alternative but to provide for an entitlement for these employees for doing work that's in unsavoury hours.

PN611

Is that, had no alternative other than breach the agreement?---No, I wouldn't agree with that, Mr Ryan. What I would say - - -

PN612

So, if it's not in breach of the agreement how is it consistent with the prohibition that you've just gone through in clause 31.12 of the 2018 agreement and 31.11 of the 2022 agreement, and clause 13.6 of the 2013 agreement? It's the same wording and the same prohibition. How is it legal for them to do something which is specifically prohibited by those clauses?---I wouldn't agree with you that it's specifically prohibited to pay a fractional doctor for work that may fall outside of operating hours. The agreement actively contemplates that a health service is required to pay for a fractional doctor if they perform work outside of their fraction. So, I'm trying to find the clause now to refer the parties to. But it would be clause twenty – this is the current agreement. This would be clause 29 – clause 29.5. And it provides that 'work required by the health service to be performed by a fractional specialist in excess of their fractional allocation will be compensated by (a), payment at no less than the applicable hourly rate prescribed for ordinary work at appendix ii, or in accordance with an agreed local arrangement.'

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN613

So, your evidence has been that this common practice has gone back to the Lochtenberg times which is the 1990's, which means that for the entire duration of the 2013 agreement and 2018 agreement there was a prohibition on payment of on-call and recall rates for fractional specialists because it's for the performance of work covered by the agreement. Isn't that your evidence? Do you agree with those propositions as I put them to you?---Are you asking about the agreements that preceded the current agreement?

PN614

Yes?---Okay. We would say that the local arrangement still had work to do having regard to the contracts that were struck between the doctors and the health service.

PN615

Both arrangements though say only those safe provisions which identified in appendix (v) of the current agreement and the schedule left of the 2018 agreement?---Not in the context of clause 29.5(b), no. That would be – we would say that that's not limited to the provisions of the savings clause.

PN616

No but the - - -

PN617

THE DEPUTY PRESIDENT: But 29.5 is a new clause, isn't it?---It's the current agreement clause, yes, in this - - -

PN618

But it didn't exist in the former agreements?---No, that's correct. And I've given evidence as to the basis upon which the parties agreed to insert 29.5 in my witness statement.

PN619

Yes.

PN620

MR RYAN: Can I take you to page 17 of the hearing book. Again this is the 2019 agreement?---Thank you.

PN621

And to clause 8?---Thank you.

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN622

Now clause 8.1, 'Subject to 8.2, until the nominal expiry date of this agreement a health service doctor or employee organisation covered by this agreement must not pursue any extra claim.' And if you want me to I'll take you to similar wording in the 2022 agreement and similar wording in the 2013 agreement. Where the enterprise agreement does not provide for a term which deals with on-call and recall work for fractional specialists, this is the making of a claim by either side on the other, a blatant breach of clause 8.1. It's a claim in relation to an issue which is not covered by the enterprise agreement?---No. And I'll qualify that by saying that my witness evidence provided spoke to how the Lochtenberg arrangement which led to fractional doctors receiving inflated rate of pay, acknowledged that there is on-call and recall to a reasonable extent built into the price for fractional doctors. So, we would say that to that extent that it's built into the price, requiring a fractional doctor to perform on-call and recall, we wouldn't say is an extra claim because it's already been contemplated in the price for a fractional doctor.

PN623

Lochtenberg was when, 1995?---That's correct.

PN624

The preserved agreements which were pre 2013 that dealt with that were enterprise agreements relating to setting a price for on-call and recall for those doctors covered by those preserved agreements?---I can't speak to what the specific purpose, whether that was a specific goal of the bargaining parties at the time. But quite a number of those pre 2013 collective agreements do provide the terms for an on-call and recall.

PN625

And recall for full-timers is the specific term of the 2013, 2018 and 2022 agreements?---That's correct.

PN626

So, the concept of setting a price for full-timers has been specifically dealt with in the enterprise agreements?---I would say that's a fair comment to make, yes.

PN627

And the setting of a price for fractional specialists has not been dealt with in the enterprise agreements?---The price, no. That's correct.

PN628

Okay. And making a claim in relation to the performance of work or making a payment in relation to work which is covered by the agreement, are matters which are both prohibited under either clause 8, making claims, or clause 31, making payment?---Yes.

PN629

No further questions?---Thank you.

PN630

THE DEPUTY PRESIDENT: Mr Rinaldi, any re-examination?

PN631

MR RINALDI: No, thank you, Deputy President.

PN632

THE DEPUTY PRESIDENT: All right, Mr Pullin, thanks for your evidence. You're excused?---Thank you, Deputy President.

<THE WITNESS WITHDREW **[2.34 PM]**

*** DANIEL KNIGHT PULLIN XXN MR RYAN

PN633

THE DEPUTY PRESIDENT: All right, Mr Ryan?

PN634

MR RYAN: Deputy President, primarily I rely upon the written submissions we filed. My oral submissions will be extremely brief. In relation to the questions after question 1 that you have to answer, the critical issue, I say that has been established by the evidence is first of all that neither – or GVH does not know what its paediatricians do or have been doing because it has not bothered to conduct an audit. There is a lack of awareness of what they are doing. The

doctors, on the other hand, have put in detailed evidence as to what they were doing in terms of excessive workload.

PN635

The evidence in my submission should be preferred. And it's especially clear that given that since GVH generated the review – it wasn't done by agreement, it wasn't done under anyone's direction, they generated the review into the paediatrics, they asked for and they got a recommendation back in March 2022 which said do an overall audit, and it's never been undertaken. We say that that's a pretty clear indication that they do not want to know what is exactly going on with the paediatricians.

PN636

And even with the evidence today from Dr Tam and Dr Wadhwa, it is very clear that they do not know exactly what is happening in the paediatric department. We say that each of those questions after question 1 should be answered in our favour on the basis of preference being given to the witnesses for the applicant. They were credible, clear and their evidence is sufficient, we say, to answer those questions in the way that we propose.

PN637

Going to question 1, and this is a more difficult issue and a more difficult question - - -

PN638

THE DEPUTY PRESIDENT: Just before you move off that, I mean, your witnesses in terms of their own accounts give some fairly detailed material. But it seems to me that there's very little in the way of objective markers or indicators to enable an objective assessment to be undertaken to assess whether the six clinics or five, or whatever the particular question is, so - - -

PN639

MR RYAN: Definitely. I accept that.

PN640

THE DEPUTY PRESIDENT: All right.

PN641

MR RYAN: Which is, it's a case of the evidence is what it is.

PN642

THE DEPUTY PRESIDENT: Yes. The related question which I'll ask both of you, which is in relation – and it's probably a separate question in respect of point 1 and 3, and perhaps the others is, is it your submission – well, which standard applies in terms of answering the question? Is it the correctness standard or is it a *House v King* evaluative judgment?

PN643

MR RYAN: It has to be a *House v King*.

PN644

THE DEPUTY PRESIDENT: Well, it's just that in the context of interpreting enterprise agreements it's generally not *House v King*. There's a right answer and a wrong answer, so hence my question.

PN645

MR RYAN: I think it has to be a balance of probabilities because what we're dealing with here it, it's a contest between the parties as to how work is performed and what's going on. I would have said it's a *House v King* test.

PN646

THE DEPUTY PRESIDENT: How do you make that out in relation to the first two questions which are just strictly interpretation questions it seems? And question 11, probably.

PN647

MR RYAN: Yes. Interpretation questions, and I'll accept that you just follow the Full Bench authorities on those. I'm happy with that. And I suspect at some point too and this is something that we alluded to in an earlier stage, the questions may not have been asked directly. In other words, we might not have asked the right questions to actually resolve some of these elements of the dispute, in which case depending upon how you answer the questions will determine a lot of about what goes on.

PN648

And even as Dr Wadhwa made very clear, there's still a lot of co-operative work being done by the parties in terms of a whole range of issues in the paediatric space, so that's not going to stop. We just have the problem with this particular form F10 leading to an arbitration with those questions that just have to be answered.

PN649

Deputy President, it might be that the critical question is the first question relating to, does the enterprise agreement prohibit it. I rely upon the written submissions but I also rely upon the material I've taken you to through the witness evidence of Mr Pullin. Enterprise agreements can deal with the issue of on-call and recall for fractional specialists.

PN650

There's no magic in that. We've got a whole lot of them that deal with that. They're part of the schedule F to the 2018 agreement and as part of the 2022 agreement. They are all picked up by clause 7 of the agreements, which is they're saved. And I concede the correctness of

PN651

Mr Pullin's evidence that resolving the saved issues is still a work in progress. But it's the very fact that enterprise agreements can and have dealt with on-call and recall for fractional specialists.

PN652

Which then means that in the absence of any term of the 2018 or 2022 agreement dealing with on-call and recall for fractional specialists, this is something that is

simply silent and they can do what they like elsewhere. Is it something that's permitted or is it something that's prohibited?

PN653

And very clearly, having regard to the structure and the purpose of clause 31.11 in the current agreement and clause 8, as well, the notice of claim clause, the combined effect of those two clauses makes it absolutely clear that a hospital cannot make a claim on a doctor or on anyone, or a group of doctors or on the organisation. Nor can a doctor, a group of doctors or the association make a claim on any health service that is an extra claim.

PN654

So, we cannot deal with the issue of on-call and recall for fractional specialists because it is an extra claim. So, that's the work of the work or the subject matter. We also have a provision where the hospital cannot pay for work which is performed under the agreement if it's not a specific payment in the enterprise agreement. A doctor cannot ask for it. So, clause 31.11 operates as a prohibition on the payment, and clause 8 operates as a prohibition on making the claims that actually something occurred.

PN655

Those clauses aren't specific. They have been in each of the three agreements that I have referred to. They seem to be honoured in the breach. But the evidence of Dr Wadhwa, Dr Tam and Mr Pullin is it is common practice, it is a common understanding that you will simply have a contract and you will agree with the contract that as a fractional specialist you will perform on-call recall and you will be paid something.

PN656

Payment could be anywhere. It could be very different in different forms. But it seems that there is a common practice, common practice that is not permitted by the enterprise agreement may be common but it's wrong. It might lead to another round of class actions the way we unfortunately had a whole lot of class actions in relation to junior doctors.

PN657

But just because it's common practice doesn't mean that it's permitted. And the question before the Commission is not, is it common practice. But the question before the Commission is, does the enterprise agreement prohibit it. And the answer to that question must be yes. And this is one of those very, very simple exercises.

PN658

The parties have put specific terms into an enterprise agreement prohibiting payment that is not in the enterprise agreement. And there's the specific term prohibiting making claims on each other in relation to matters not in the enterprise agreement. And we say that's the end of it. That question can be answered in the way proposed by the applicants in this matter.

PN659

I would urge you, Deputy President, to have careful regard to the transcript of this matter because it's very easy when you run an oral submissions straight after the evidence to gloss over. I have to gloss over because it needs to be relatively short. But it doesn't mean I'm ignoring those things which are very clearly stated in the evidence. And having regard to the evidence, especially the evidence of Mr Pullin, I think is directly relevant to answering the question and the answer will be in our favour. If the Commission pleases.

PN660

THE DEPUTY PRESIDENT: I don't think either party has made reference to clause 47 in the current agreement, Mr Ryan. So, 47.2 concerns the annual leave clause. And that provides that doctors who are required to be available to facilitate an on-call roster are entitled to five weeks annual leave pro rata each year. Now doctors, I think from the definition, includes fractional specialists.

PN661

MR RYAN: Yes.

PN662

THE DEPUTY PRESIDENT: So, isn't that an indication that the agreement is not silent in relation to fractional specialists being able to participate in the on-call roster? And the proposition might be that the payment is encompassed in their rates in the schedule? What's the flaw with that proposition?

PN663

MR RYAN: The reference to on-call roster would have to have regard to the other clauses of the agreement which relate to on-call. And the only clause in the enterprise agreement that relates to on-call is the clause relating to on-call work being performed by full-time specialists, and that is clause 26.

PN664

THE DEPUTY PRESIDENT: Twenty-six.

PN665

MR RYAN: With the corresponding requirement of clause 27 which relates to full-time doctors. On-call and recall go hand in hand. The understanding therefore of clause 47.2 has to be that it is in relation to those doctors who have a requirement under the terms of the agreement to be in an on-call roster. And it's not that - - -

PN666

THE DEPUTY PRESIDENT: So, what would the words in brackets, 'pro rata,' have – what work would they have to do in relation to a full-time doctor?

PN667

MR RYAN: I'm not certain. And I say that because going through my mind in terms of practical incidences and case I've dealt with, full-time doctors who participate in an on-call roster for part of the year but not all of the year, and then there are full-time doctors who participate in an on-call roster on an ongoing, never-ending basis, I understand that even doctors who participate in the on-call roster even occasionally will get an entitlement to extra leave.

PN668

I've not had the question as to, are you getting the full five weeks. But I think that the default is that they just get the five weeks. So, I am not certain and I generally can't enlighten you, Deputy President, as to what is the meaning of that in terms of pro rata. I can understand very clearly having read it, it would appear – it would appear on its face value to relate to a person who is not a full-time doctor.

PN669

I mean, that would appear to be an obvious reading of it but I'm not certain that it is. But I do go back to say in any event there is no provision in relation to the enterprise agreement that relates, first of all, to making the claim on a doctor to work or a fractional specialist to work any form of on-call or recall. And there is a prohibition in the enterprise agreement in terms of paying a fractional specialist for any on-call or recall work.

PN670

So, the prohibitions, I would say, that are so clear and explicit in clause 8 and clause 31 would suggest that you don't read clause 47.2 on its face value but you limit it back to a situation where on-call is permitted by the enterprise agreement. And that's only in relation to

PN671

full-timers. But that's as far as I could take that submission, Deputy President.

PN672

THE DEPUTY PRESIDENT: All right. And your proposition is that 29.5 and – sorry, I appreciate it's a new term, that provides for payment in excess of the relevant fraction, that that cannot be relied on to provide the basis for payment and an associated obligation – well, to at least request an employee undertake on-call or recall to work duties.

PN673

MR RYAN: It certainly can't. I - - -

PN674

THE DEPUTY PRESIDENT: But the exception you make is that if they are essentially on-call during ordinary hours, that's the distinction you make?

PN675

MR RYAN: 29.5 can't apply to on-call.

PN676

THE DEPUTY PRESIDENT: Because?

PN677

MR RYAN: It's not the performance of work, it's the availability. On-call by its nature is the availability to work. So, you can't have a payment that relates to the performance of work and say it applied to a situation where it's not the performance of work but it's an availability allowance, which is what on-call is. So, even with 29.5 you cannot have a payment for on-call and therefore – and because of the clause 8, no extra payments, you can't make a claim for on-call.

PN678

In relation to 29.5, and Mr Pullin's witness statement goes to this where he says this clause is put in and this is what was asked for by the associations, at that point it appears, and I wasn't involved in bargaining so I'm just looking at it from that perspective, it appears that there was a request for some form of payment for work that is performed outside of ordinary hours.

PN679

We do not have an overtime clause in this enterprise agreement, at all. So, overtime is not on-call or recall, this is just work outside of ordinary hours, has not been paid for at all under the earlier agreements because there was no overtime clause. There's no overtime clause for full-time specialists and there's been no overtime clause for fractional specialists. 29.5 was at least putting something in place.

PN680

If nothing else, I would say it's a pseudo overtime clause because it doesn't pay even the penalty rate. It only pays an ordinary rate.

PN681

THE DEPUTY PRESIDENT: And just before you sit down, can you point me to which schedule of rates applies to the members that have given evidence? So, that's Dr Verma and Dr Palawela.

PN682

MR RYAN: Yes.

PN683

THE DEPUTY PRESIDENT: It's just because I don't quite follow the distinction and circumstances where you've got doctors who don't receive additional private practice income.

PN684

MR RYAN: Okay. Dr Palawela and Dr Hassan, when Dr Hassan was there, they were full-time specialists. They were full-time specialists not receiving private practice income. So therefore their rates of pay are those set out on page 251 of the hearing book which is full-time doctors who don't receive additional private practice income. And both - - -

PN685

THE DEPUTY PRESIDENT: And that's even though, I think it was Dr Palawela gave evidence that he did do some work at another hospital on weekends.

PN686

MR RYAN: That's right.

PN687

THE DEPUTY PRESIDENT: That's a different - - -

PN688

MR RYAN: Yes. The private practice income relates to receiving private practice income from the employer you are employed with.

PN689

THE DEPUTY PRESIDENT: Right.

PN690

MR RYAN: You have to receive it from the employer you're employed with. It's not as if you're full-time at GVH and on your Saturdays and Sundays you go up and work somewhere else. That's not counted.

PN691

THE DEPUTY PRESIDENT: Okay. Okay, so they are both - - -

PN692

MR RYAN: So, in relation to Dr Verma she is a 30 hour a week part-time employee fractional specialist. And on that basis she is covered by table 1.5.

PN693

THE DEPUTY PRESIDENT: 1.5.

PN694

MR RYAN: Which is on page 257. And that is because she's a fractional doctor doing 17.6 or more hours per week.

PN695

THE DEPUTY PRESIDENT: Okay. Thank you.

PN696

MR RYAN: The fractional specialist pay rates are a mess. Not only do they go over the years of service but they go up according to the hours you work, which it's not a simple chart to follow, Deputy President.

PN697

THE DEPUTY PRESIDENT: All right. Thank you.

PN698

MR RYAN: Thank you.

PN699

THE DEPUTY PRESIDENT: Mr Rinaldi?

PN700

MR RINALDI: Thank you, Deputy President. Well, we have a curious situation that's arisen this afternoon in this case, in that there's a new ground of submissions put that I didn't detect in the written submission.

PN701

THE DEPUTY PRESIDENT: I've got to say I didn't pick up this issue either in the submissions.

PN702

MR RINALDI: No. It seems to be new. So obviously

PN703

Mr Ryan's refreshed by his – invigorated by his recent leave. And I'm happy to - - -

PN704

THE DEPUTY PRESIDENT: If you need an opportunity to provide something in writing - - -

PN705

MR RINALDI: I'm happy to deal with it but perhaps if we could preserve the right, having finished, to add anything in writing if necessary by a certain time.

PN706

THE DEPUTY PRESIDENT: Yes.

PN707

MR RINALDI: So, it does seem to be a new point. But - - -

PN708

THE DEPUTY PRESIDENT: And you've got the killer response anyway.

PN709

MR RINALDI: It's an interpretation point and I have a killer response anyway, so it'll be dead by the end of this afternoon, Deputy President. But I still will reserve the right in case there are further killer points, to put something in writing if we can, just in case we can deal with that at the end as the timing of that – but what's curious, you know, more than the fact that the argument has arisen this afternoon and with respect of some ingenious argument even though there is a killer point in response to it, is that it's curious that when you look at Mr Pullin who has obviously been involved in these negotiations for a long time, if you look at his witness statement at page 574 of the hearing book, paragraph 21, you've got, you know, reference to the log of claims which he exhibits to his statement about out of hours work, noting that currently fractional doctors rely on former agreements to inform the entitlements about out of hours arrangements.

PN710

Now, in terms of former enterprise agreements Mr Ryan took the Commission to the Austin Health Agreement and the Ballarat Agreement and they were marked as exhibits A1 and A2 over my objections. Obviously there was the potential that they might be relevant because of the multi employer agreement that we're dealing with, in this case the 2022 agreement. But to the extent that the saved provisions pursuant to section 7 of that agreement it might be relevant.

PN711

They might be relevant to those health services, Austin and Ballarat but they were not relevant for the purposes of this case to Goulburn Valley Health because the Goulburn Valley Health agreement which is the 2002 agreement, so if, Deputy President, we look at Appendix 5 of the current 2022 enterprise agreement at page 288 of the hearing book, item 16 near the top of that page, the relevant saved

agreement was the AMA Goulburn Valley Health Full-time specialist Medical Officers Certified Agreement 2002.

PN712

Now we don't have a copy of that available but we do have it on my learned instructing solicitor's computer and we can provide one if you need it. But of course it's an agreement certified by the Commission. Please let us know if you wish us to provide a copy. Agreement ID is AG833216. That only applies to full-time doctors, so there's a definition of 'officer' in that agreement down below and that only is defined as only applying to full-time doctors.

So, in terms of the saved provisions that might affect these rights of fractional employees to be paid for on-call or recall, they're not in the enterprise agreements. They are in what is – so the former agreements that is referred to in paragraph 21 that's taken from page 6 of the log of claims of Mr Pullin's statement, in my submission is not simply former enterprise agreements but also former informal or unregistered local agreements.

PN713

Now then we get the sort of irony where in that bargaining, as Mr Pullin goes to at paragraph 24 of his witness statement at page 575 of the hearing book, the applicant sought that at a minimum the enterprise agreement should provide the fractional specialists are paid for work performed as required by the employer. This is reflected in the minutes from meeting 48. Attached and marked DP4 is a true copy of those minutes. AMA required work should be paid.

PN714

That's exactly what the hospital wants. But now the AMA comes to the Commission and says, no, you can't require the – we don't want to paid and we don't want to be required to be on-call or to do recall. You can't do it and you're not allowed to. Well, I'll deal with the answer to that in

PN715

a moment. But the outcome of negotiations as it noted by Mr Pullin in paragraph 25 was reflected in the explanation of terms provided by VHIA to GVH for distribution as part of the ballot to approve the enterprise agreement. And there should be a copy of that as DP5.

PN716

And the answer that Mr Pullin gave to my friend's questions ultimately was discovered – the answer is, it's clause 29.5. And if you look at clause 29 or the reference to clause 29 and the explanation of terms on page 731 of the hearing book it says, 'Amendments made to the existing clause,' so that's the addition of the new 29.5 which as you rightly noted, Deputy President, is a new provision, 'to clarify that fractional doctors are entitled to be paid for all hours worked by the health service to be worked.'

PN717

So, that's fractional doctors. Now the explicit provisions as have been noted already about on-call and recall in the 022 agreement, and of course again I'm talking about the Medical Specialist Victorian Public Health Sector AMA

Victoria/ASMOF Single Interest Employers Enterprise Agreement 2022-2026. And at page 176 of the hearing book are the relevant provisions for on-call or recall which are specific to full-time doctors.

PN718

So, 'Full-time doctors in clause 26.1 will hold themselves available to perform duty outside ordinary hours. Payment for this availability is included in the rates of pay for full-time doctors in part 1 of Appendix II.' And then the recall provision is clause 26 and effectively they will be, if they're recall for duty away from the place at which the doctor is available for contact will in respect of each recall, be paid an amount equal to one 38th of the weekly wage. And if it's on – there's an hour and a half – I'm just trying to work out how it works – they'll also be paid for the time spent at the place to which the doctor – that's for the payment for time spending travelling, ordinary time, 'and will also be paid for the time spent at the place to which the doctor is recalled at an hourly rate of time and a half on week days and double time on weekends or public holidays.'

PN719

Obviously that doesn't deal with – those two clauses are specific to full-time doctors. They don't deal with part-time doctors. However, as Mr Pullin point out, 29.4 covers the situation because it says, 'Work required by the health service to be performed by a fractional specialist in excess of their fractional allocation as determined pursuant to clause 30 will be compensated by, a) payment of no less than the applicable hourly rate prescribed for ordinary work, or b) in accordance with an agreed local arrangement.'

PN720

And we emphasise and rely on those words, 'in accordance with an agreed local arrangement.' The exclusion for the CMBS is not relevant as Mr Ryan already dealt with that with Mr Pullin. So, with due respect to Mr Pullin and you'll recall I objected to him being asked to provide the legal answer which is a matter for the Commission to decide, his opinion when asked, 'Is a fractional specialist who is recalled to work doing work to which this agreement applies,' and Mr Pullin agreed that it was.

PN721

In my respectful submission and again with respect to

PN722

Mr Pullin that's incorrect. It is not work to which this agreement applies because work to which this agreement applies in terms of on-call and recall work is only work done by full-time doctors because of clauses 26 and 27. This is not work for a fractional specialist being recalled to work, it is not work to which this agreement applies.

PN723

And the agreement is silent as to what happens in relation to that work if there is any such work.

PN724

And that's why our submission has been, and again we do rely on our written submissions and have made the point repeatedly in those submissions and I won't go over those, that the lack of a prohibition or the lack of dealing with the topic doesn't mean there's to be inferred a prohibition. Indeed it means there's to be inferred a freedom of the parties to decide what they want to do, which is consistent with 29.5.

PN725

THE DEPUTY PRESIDENT: So, your submission is that fractional doctors undertaking recall or on-call work is not work for - - -

PN726

MR RINALDI: Covered by this agreement.

PN727

THE DEPUTY PRESIDENT: Then doesn't it follow then that 29.5 wouldn't apply? Because it's not work in excess of their fractional allocation?

PN728

MR RINALDI: No, because - - -

PN729

THE DEPUTY PRESIDENT: Aren't you having it both ways?

PN730

MR RINALDI: Because it's work in excess of their fractional location. So, the work required by the agreement is the fractional location. And work in excess - - -

PN731

THE DEPUTY PRESIDENT: But it clearly contemplates under the agreement that work will be performed in excess of - - -

PN732

MR RINALDI: And that it can be required by the health service. That contemplates it.

PN733

THE DEPUTY PRESIDENT: But it must follow that that's work performed, whatever the language is under the agreement, doesn't it?

PN734

MR RINALDI: Work to which this agreement applies.

PN735

THE DEPUTY PRESIDENT: If the agreement, as you say in your submission confers a right on the service to direct fractionals to work on-call or recall - - -

PN736

MR RINALDI: Yes, which- - -

PN737

THE DEPUTY PRESIDENT: That has to be under the agreement.

PN738

MR RINALDI: Which, as Dr Wadhwa said, you know, the whole health system would fail because most doctors are fractionals in practice.

PN739

THE DEPUTY PRESIDENT: I understand that. But it just seems like you're having a bet both ways.

PN740

MR RINALDI: Yes. And I'm just going back to where the words come from. 'Performance of work to which this agreement applies.' So, the question was that was put by Mr - - -

PN741

THE DEPUTY PRESIDENT: Does the work?

PN742

MR RINALDI: That's in 31.11. And Mr Ryan was saying, well, there's a prohibition there. And he's also saying there's an extra claim contrary to clause 8. And in my submission it's not an extra claim because it's contemplated by 29.5 that there can be such work required. But whether - - -

PN743

THE DEPUTY PRESIDENT: But that work is not work to which - - -

PN744

MR RINALDI: Yes. And my submission is it's not work to which this agreement applies because it's outside of the agreement. It's additional. But I do take your point, Deputy President that the fact that it can be required by the health service under the first words of 29.5 - - -

PN745

THE DEPUTY PRESIDENT: I'm not agreeing with you. But I'm just pointing out what appears to be - - -

PN746

MR RINALDI: Yes, testing - - -

PN747

THE DEPUTY PRESIDENT: Yes.

PN748

MR RINALDI: And inconsistency. So, I mean – and obviously when we get to principles of interpretation of enterprise agreements we have all the usual comments like, Justice Madgwick in *Kucks v CSR* that they're not to be interpreted into like legislation and they were framed by people of a practical bent of mind and so forth. So, obviously it is largely about what is the practical industrial purpose and intention.

PN749

It seems very unlikely that the parties intended to stop the availability of these fractional doctors who are the bulk of the doctors employed in public health from being required to do on-call or recall. And equally unlikely that the parties intended that they wouldn't be paid for it if they did. And as far as that goes, so that prohibition, even though it's been there for a long time in 31.11 as it now is, surely can't – and it does sit uneasily with the other provisions, I accept that – surely can't be intended to overcome 29.5.

PN750

And in my submission 29.5, to the extent that there is any inconsistency, and bearing in mind that 31.11 is entitled, 'General rule,' and that suggests that there may be an exception to it, I would suggest and submit that 29.5 overrides it. It's been put in subsequently, as well, which is another reason for support for the idea that it's intended to vary the preceding position. And perhaps as Justice Madgwick said, the practical peace of mind of those people who were involved in negotiating and the drafting, and in this case not altering 31.11, is perhaps just an oversight.

PN751

THE DEPUTY PRESIDENT: I'm not sure that's a killer point. But just for - - -

PN752

MR RINALDI: But 29.5 probably is the killer point. It's subsequent, it's specific. It displaces the general rule.

PN753

THE DEPUTY PRESIDENT: In terms of Mr Pullin's evidence and the submissions in relation to what happened during bargaining, what are the – so I'm just bearing in mind the Berri principles and the caution that you need to apply in taking into consideration what happened during bargaining.

PN754

MR RINALDI: Yes.

PN755

THE DEPUTY PRESIDENT: What are the objective background facts, or what are the matters in there that you say I can legitimately take into consideration, consistent with the Berri principles? Because there's some subjective assessments. There's some conclusions, Mr Pullin's opinion as to why there wasn't specific provisions. It doesn't seem to me I can make anything of that.

PN756

MR RINALDI: No. I think probably the best evidence about that that is part of the objective background facts are the minutes that is appended to his witness statement, minutes of the bargaining, the bargaining tracker.

PN757

THE DEPUTY PRESIDENT: And presumably the log of claims.

PN758

MR RINALDI: And the log of claims, yes.

PN759

THE DEPUTY PRESIDENT: That had a claim for additional payment for a fractional specialist.

PN760

MR RINALDI: That's right. Yes. And if I understood correctly the question you were asking my friend about, is it a correctness standard or a *House v King* standard, I mean if your question was directed to how do we interpret the enterprise agreement - - -

PN761

THE DEPUTY PRESIDENT: No, it's what my job is in answering the 11 questions.

PN762

MR RINALDI: I see. Yes.

PN763

THE DEPUTY PRESIDENT: Is it your submission that there's a correctness standard or a *House v King* standard, or a mix? It seems to me that 1, 2 and 11 would clearly be the correctness standard. And the remainder are probably more akin to a *House v King*.

PN764

MR RINALDI: Perhaps it's my failure but I don't comprehend at the moment how a House and King could be relevant at all. *House v King* was - - -

PN765

THE DEPUTY PRESIDENT: Well, in relation to the ones where it's about, for example – well, this is why I'm asking for your views - - -

PN766

MR RINALDI: Yes.

PN767

THE DEPUTY PRESIDENT: As to what you say the appropriate test is.

PN768

MR RINALDI: Yes. Well, in my submission all of the 11 questions are pure interpretation questions.

PN769

THE DEPUTY PRESIDENT: Right.

PN770

MR RINALDI: And they're all either yes, no, right or wrong.

PN771

THE DEPUTY PRESIDENT: Okay.

PN772

MR RINALDI: It's a correctness test. There's no sort of spectrum or continuum of potential answers.

PN773

THE DEPUTY PRESIDENT: There's only one correct answer.

PN774

MR RINALDI: Yes.

PN775

THE DEPUTY PRESIDENT: Okay.

PN776

MR RINALDI: It's not a discretionary decision which is really what *House v King* is about.

PN777

THE DEPUTY PRESIDENT: Yes.

PN778

MR RINALDI: So, yes. In my submission it's clearly just simply a correctness. And in each case for the reasons we've set out in our written submissions and I won't repeat, we say the answers are as stated in the written submissions. Those clauses don't prevent those things occurring. Neither do the sections of the Fair Work Act. What might be of some minor assistance or maybe slightly more than minor to the Commission is if I just quickly mention some of the hearing book references that are – because of course the submissions were done before the hearing book.

PN779

So, perhaps Deputy President it's worth noting that at paragraph 10.1.3 of the – these are just some of the pertinent hearing book references that I've noted, 10.1.3 - the reference to Mr Pullin's witness statement is at hearing book 573 to 575. And we're referring there especially, although we've said 14 to 27 in the footnotes, especially 26 and 27, the last two paragraphs of his witness statement. Sorry, I thought I had some more but those are the only ones I've got.

PN780

THE DEPUTY PRESIDENT: That's okay.

PN781

MR RINALDI: So, otherwise we rely on - - -

PN782

THE DEPUTY PRESIDENT: I agree that that's of modest assistance to the Commission.

PN783

MR RINALDI: It is. I think I'll go back to – yes. So, yes, but otherwise rely on the written submissions. I'll come back to my notes on the oral submissions today and see if there's anything I wanted to add. So, I think the answer that we've already dealt with at 29.5 in my submission being a later provision and

specifically dealing with the ability of the health service to require work to be performed that is to be compensated at not less than the fractional rate or in accordance with the agreed local arrangement and if obviously had agreed local arrangements, we say that trumps 31.11, clause 31.11 to the extent that that might be perceived to be an issue.

PN784

And it's not an extra claim or an extra payment under clause 8 or prohibited by clause 8 because it's contemplated and permitted by clause 29.5. The other point that Mr Ryan made – sorry, before I go to that, your point, Deputy President about clause 47.2 and you're right, I don't think either party has referred to it, is a good one.

PN785

It does indicate again that fractional doctors can be required to use the words, doctors who are required, and as you've pointed out, 'doctors' includes both fractional and full-time under the definition, by the health service to make themselves available to participate in the health services on-call roster, and there is a second limb of it, 'and regularly accept calls from the health service are entitled to five weeks annual leave.'

PN786

And as you have rightly pointed out, the words, 'pro rata,' surely to have any meaning or effect or any work to do, that's a reference to fractional employees. So, it's contemplated by the agreement that fractional employees will get pro rata additional leave and it's contemplated that that is because they are on the on-call roster and they can be required to accept calls.

PN787

And that leads on to Mr Ryan's submission that being on the on-call roster is not work. It's just being available for work. But in my submission it's well established that being available for work is in itself work. The famous dictum by Justice Dixon, I think it was in *Watson v Automatic Fire Sprinklers* that he also serves who only stands and waits. And I think these days we can say, she also serves who only stands and waits.

PN788

So, to participate in an on-call roster is work in my submission and it is work that can be required by health services to be performed by a fractional specialist in excess of their fractional allocation under 29.5. Whether that is seen as work under this agreement, work that is, to use the words of 31.11, work to which this agreement applies,' or not – as I've said, 29.5 should be taken to override the otherwise prohibition under 31.11. And 29.5 also is not an extra claim, so not contrary to clause 8.

PN789

THE DEPUTY PRESIDENT: So it would follow then that

PN790

Dr Verna at the moment, at least since the current agreement has been operating, will have been paid no less than the hourly rate for every hour or overnight she's on call?

PN791

MR RINALDI: That's my understanding, yes. And if it hasn't been that's another issue. But that's my understanding.

PN792

THE DEPUTY PRESIDENT: Would you give me a note - - -

PN793

MR RINALDI: About that.

PN794

THE DEPUTY PRESIDENT: And you're welcome to, Mr Ryan if you've got a different view. It's just that I had - - -

PN795

MR RYAN: I would have thought that we would not be in a dispute if GVH was paying all of its fractional specialists the hourly rate for being on call.

PN796

THE DEPUTY PRESIDENT: That's what I would have thought. And I think back in one of the documents that the allowance for being on call was certainly a lot less than the ordinary hourly rate.

PN797

MR RINALDI: Sorry. I might have misunderstood your question. The recalls, I think had to be at the hourly rate.

PN798

THE DEPUTY PRESIDENT: Sure. But you're saying that being on call - - -

PN799

MR RINALDI: Is work.

PN800

THE DEPUTY PRESIDENT: You were saying that Mr Ryan's submission that on call doesn't trigger the – clearly 29.5 doesn't apply, is it right because his proposition was that's just about being available for work and not performing work.

PN801

MR RINALDI: Yes.

PN802

THE DEPUTY PRESIDENT: You said, well, being available for work is the same.

PN803

MR RINALDI: Yes.

PN804

THE DEPUTY PRESIDENT: And therefore 29.5 does apply. Well, on that scenario that would indicate that payment for all time being on call attracts the payment under 29.5.

PN805

MR RINALDI: You get a payment in your remuneration rate that covers the on call, in the same way as full-time doctors. So, if you look at clause 26 they get an amount including the rate of pay. That's the same with the fractional. What is additional payment, actual payments above what's rolled into the rate are for recalls, just like 27 is for full-time doctors.

PN806

THE DEPUTY PRESIDENT: All right. That just begs the question which is at the heart of this, which is why 26 – that there's no similar provision for fractional doctors.

PN807

MR RINALDI: And that the answer is as Mr Pullin says in his witness statement, because of the differences in the various health services - - -

PN808

THE DEPUTY PRESIDENT: I know but that's a – I'm not – and this is why I asked - - -

PN809

MR RINALDI: Varying across the sector.

PN810

THE DEPUTY PRESIDENT: Whether they are objective background facts that I can legitimately take into consideration - - -

PN811

MR RINALDI: Yes.

PN812

THE DEPUTY PRESIDENT: In interpreting the agreement. That that's an opinion - - -

PN813

MR RINALDI: In my submission that is - - -

PN814

THE DEPUTY PRESIDENT: Well, that's an opinion of

PN815

Mr Pullin. What is the objective background fact established in the evidence in that respect?

PN816

MR RINALDI: Well, I think probably only the only objective backgrounds facts to the underlying practices apart from

PN817

Mr Pullin's evidence are the other enterprise agreements, the old enterprise agreements that have been saved. And they obviously indicate a variety of approaches. Some of them are full-time only, some are VMO only, from the two examples that have been submitted as exhibits by my friend today. On the evidence there's probably not much more than that.

PN818

THE DEPUTY PRESIDENT: So, the only evidence is the - - -

PN819

MR RINALDI: Of the variance of - - -

PN820

THE DEPUTY PRESIDENT: Existence of the early agreements.

PN821

MR RINALDI: Yes.

PN822

THE DEPUTY PRESIDENT: And that's - - -

PN823

MR RINALDI: Of different approaches among the different health services which supports the evidence of Mr Pullin that the practices vary across the sector and within health services. And then as he says, he was there in the bargaining.

PN824

THE DEPUTY PRESIDENT: Yes but he can't give evidence of – you have to take great caution - - -

PN825

MR RINALDI: Yes.

PN826

THE DEPUTY PRESIDENT: In treating evidence of bargaining negotiations, and particularly in the context where the agreements are no longer made between the union and the employer and it's the employees who make them.

PN827

MR RINALDI: So, in my submission you can have regard to what Mr Pullin says in 26 and 27 of his witness statement. But I understand in terms of objective background facts, some of that is in the nature of his opinion or his experience of the bargaining and maybe not as weighty, as persuasive as something that's objective. But we do have - - -

PN828

THE DEPUTY PRESIDENT: But even that, I mean, the thing I'm struggling with – look, I could say really there are very strong opinion arguments, it seems to me. But isn't it plausible that no agreement was able to be reached in relation to the treatment of fractional specialists so it was simply not permitted? It doesn't

follow just because no agreement was reached that it was left to health services to do whatever they wanted.

PN829

MR RINALDI: It's at a local level. Well, in my submission it would be – if something is going to be prohibited it should be expressly prohibited.

PN830

THE DEPUTY PRESIDENT: Well, except if you apply that approach and prohibit everything that's with an express term – I mean, where are the outer boundaries of that?

PN831

MR RINALDI: Yes. But something like this that's so sort of obvious, you know, an elephant in the room if you like, in my submission it's far more plausible and compelling and as a matter of interpretation correct, to say, well, if there's not a prohibition on – you know, it would have been so easy for the parties to include if they intended that in 26 and 27. 'There shall be no on-call or recall for fractionals, or a new 28.

PN832

THE DEPUTY PRESIDENT: Well - - -

PN833

MR RINALDI: And it's crying out for clarity if that's the intention. Whereas to leave it to the local level which had been traditionally the case it seems, is consistent with, you know, you just leave it out. It's too hard. It's not in the too hard basket. Leave it out. Leave it up to local conditions. But as to what has been paid I don't want there to be any misunderstanding if I misunderstood your question, Deputy President.

PN834

I'm not suggesting that Dr Verma for example, should be paid some hourly rate for being on call. It's rolled into the rate as it is for full-time doctors. But then there are at least a minimum hourly rate for the recalls. And according to the – and I don't know the full details, I can't recall, of what the local agreement is between them but whatever it is that should be complied with.

PN835

THE DEPUTY PRESIDENT: But if it's rolled into the rate why is there a need for local arrangements? If it's already comprehended - - -

PN836

MR RINALDI: No, that's on-call. That's on-call.

PN837

THE DEPUTY PRESIDENT: Yes. But I'm talking about on-call.

PN838

MR RINALDI: But recall is what I'm - - -

PN839

THE DEPUTY PRESIDENT: Yes. I understand recall – what you're saying is 29.5 applies in respect of recall. Someone actually has to return to the workplace. They get paid for every hour in accordance with the - - -

PN840

MR RINALDI: Yes.

PN841

THE DEPUTY PRESIDENT: But my question is in relation to on-call, and I've just lost my train of thought - - -

PN842

MR RINALDI: About rates of pay? On-call incorporated into the rate of pay.

PN843

THE DEPUTY PRESIDENT: Yes. Why is there a need for local arrangements if the salary rates for fractionals already encompass a component for on-call, and on your construction the services are able to require them to work at? What is left to - - -

PN844

MR RINALDI: Well, the local arrangement I suppose for on-call for fractionals is that it's dealt with in their contracts because it's not dealt with expressly in the enterprise agreement. And I did have contracts exhibited to I think Dr Tam's statement. In the case of Dr Verma it's JT4.1 at page 815 of the hearing book. And at page 817 - - -

PN845

THE DEPUTY PRESIDENT: Yes, there's a contractual obligation. I see that.

PN846

MR RINALDI: Clause 5.

PN847

THE DEPUTY PRESIDENT: Yes.

PN848

MR RINALDI: 5.1, 'The practitioner will be required to participate in any after hours roster.' There's a definition of what 'after hours recalls' are, regarded as appearing between - - -

PN849

THE DEPUTY PRESIDENT: That's what I'm saying. That's right in terms of hours and things.

PN850

MR RINALDI: So there's your local arrangement. What it doesn't spell out there is how much the payment is for those after hours recalls. And that's something –

PN851

Mr Pullin accepted. That hasn't been – that's up to the local health service. And the weekly hours summary page at 844 with Dr Verna's contract says, 'a practitioner will require to participate in the on-call roster,' as well.

PN852

And as far as recall goes, interestingly it's under the heading, 'Entitlements under the workplace agreement' on page 842. Recall, point 2, 'The onus on supporting the claim lies with the practitioner. GV Health will provide a claim form.' But again the amount that's paid for the recall is not spelt out in the contract. Obviously that's left to an informal agreement between them.

PN853

And I think the terms of Dr Hassan's contract are the same, 5.1 at page 849 and 5.2, and again, similar terms. This page in the on-call roster requires at page 880 the recall dealt with at point 2 on page 878. We do note by the way that Dr Hassan wasn't available for cross-examination and my friend said on the last occasion he would seek to rely on his material but it's a question of weight and my submission shouldn't be afforded much weight at all, in the absence of being able to be tested. Then Dr Palawela, his contract has the same provisions at clause 5, 501(2) at page 883, the requirement to participate in the on-call roster at page 911, and the recall provision at point 2 on page 909.

PN854

The fact that the audit either hasn't commenced or hasn't gone very far is an interesting but not ultimately particularly relevant point in my submission and it's noteworthy that that was part of a collaborative arrangement that Mr Ryan was involved in. And I'm not seeking to apportion blame as to why it hasn't got going but it's a joint project and if it hasn't got very far that's maybe unfortunate. But you can't say that's some sort of breach or of the like by Goulburn Valley health.

PN855

So, I think Deputy President, subject to if we may reserve the right to just review perhaps with the benefit of the transcript the argument that was put this afternoon which was new and to put in a written submission if necessary, in response to that. I mean, I think if it was something like a direction that any further written submission be provided by a certain time. If my friend wanted to put in anything further I wouldn't oppose that because as he said, he hasn't had a chance to read the transcript.

PN856

But if he doesn't intend to then we'll just respond to the oral submissions by a particular time. Obviously we're now on 19 December. I would sort of seek something like four weeks if I'm able to do that, given the time of year if that's acceptable.

PN857

THE DEPUTY PRESIDENT: That's fine. Mr Ryan, anything in closing?

PN858

MR RYAN: Two matters in reply. The Commission needs to be very careful about trying to understand the contract of

PN859

Dr Verma. The documentation that you've just been taken to which is in the hearing book is the full-time contract entered into by Dr Verma at the beginning. Immediately after that at page 845 and at page 846 is the addendum for the contract and this is where Dr Verma converted to part-time.

PN860

So, provisions relating to the requirement to do the

PN861

on-call roster is not in the addendum.

PN862

THE DEPUTY PRESIDENT: And it's just a one page - - -

PN863

MR RYAN: It's a two-pager, one on either side, yes. I just draw that to your attention and I make no more than that. The other issue I'd simply reply to is the notion of on-call for the purposes of interpreting any aspect of this document or the agreement, I would say consistent with Berri principles, consistent with principles of interpretation, where you have 'on-call' defined in once clause of an enterprise agreement, if it's used elsewhere then it would be used in the same sense.

PN864

And 'on-call' is defined in the general sense in clause 26 where 'all full-time doctors will hold themselves available to perform duty outside ordinary hours. Payment for this availability is included in the pay rates.' Now that is specific to the full-timers. That's the notion of on-call. It is availability.

PN865

So when we asked the question, question 1, 'Does the Medical Specialist Victoria Agreement,' et cetera, 'prevent Goulburn Valley Health requiring a fractional paediatrician to participate in an on-call roster.' 'On-call' has to be availability. It has to be. Because that's what we're all here talking about. The question in 29.5 is not an availability payment. However, I think Mr Rinaldi misspoke when he referenced Justice Dixon and said he who holds himself available as working – I'd be delighted if clause 29.5 applied to work on the basis that holding yourself available to work which is the roster, the on-call roster, if that was paid under 29.5 I'm certain it would solve problems across all health services for the doctors. But it would create mass hysteria amongst hospital administrators.

PN866

I recognise that 29.5 is a payment for work. If you didn't have the on-call roster you could still have fractional doctors being required to come back to work subject to the application of the reasonable additional hours test in the Fair Work Act. And one of those tests is are you being paid for the performance of reasonable additional hours.

PN867

The answer to that question in that test of reasonableness would be here's a payment, not at the penalty rate but there's at least a payment for it. It has value. Certainly it has direct application but it is not the same as the question which is asked which is the on-call issue. Thank you, Deputy President.

PN868

THE DEPUTY PRESIDENT: And did you want any time to file anything or reserve your right?

PN869

MR RYAN: No.

PN870

THE DEPUTY PRESIDENT: No. All right, thank you.

PN871

MR RYAN: Subject only to Mr Rinaldi might come up with a tone in which case I might have to, after having read that tone make a comment on it. But - - -

PN872

MR RINALDI: So, you don't want to do one in advance. That's fine. But if we do, which we may not - - -

PN873

MR RYAN: No.

PN874

MR RINALDI: If we put in a written submission and you want to have a reply, that's okay.

PN875

MR RYAN: At this stage I'm not even seeking a right to have a reply. I'd be seeking the right to at least ask the Commission if I can reply.

PN876

THE DEPUTY PRESIDENT: All right.

PN877

MR RYAN: And I'd be guided by the Commission on that basis.

PN878

THE DEPUTY PRESIDENT: Okay. So, we'll issue a direction with an opportunity to file if you consider it necessary, by 17 January.

PN879

MR RINALDI: Yes.

PN880

THE DEPUTY PRESIDENT: And then Mr Ryan, if you having read that want an opportunity then just advise my chambers and you will have one.

PN881

MR RYAN: I will. Thank you, Deputy President.

PN882

THE DEPUTY PRESIDENT: All right. Thank you all for your helpful submissions and evidence. I'll reserve my decision. I wish you all a happy Christmas and New Year and the Commission is adjourned.

PN883

MR RYAN: Thank you, Deputy President.

ADJOURNED INDEFINITELY [3.39 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs