

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 27/10/2021 2:58:08 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33
File Number: VID419/2021
File Title: THE AUSTRALIAN SALARIED MEDICAL OFFICERS' FEDERATION
& ANOR v WESTERN HEALTH
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 27/10/2021 2:58:13 PM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Reply

VID 419 of 2021

Federal Court of Australia
District Registry: Victoria
Division: Fair Work

THE AUSTRALIAN SALARIED MEDICAL OFFICERS' FEDERATION and another named in the Schedule

Applicants

WESTERN HEALTH

Respondent

Save for any admissions, the Applicants join issue with the Defence dated 8 October 2021, and otherwise reply as follows:

1. To the allegations in Parts D, E, and F of the Defence regarding the 'Western Health Overtime Protocol', the Applicants say that:
 - (a) clause 36.3(a) of the 2018 Agreement and clause 32.3.1 of the 2013 Agreement provide that the Respondent must have a protocol "whereby overtime that cannot be authorised in advance but has been worked will be paid if it meets appropriate, clearly defined criteria" (**Overtime Protocol**);
 - (b) any such Overtime Protocol can only apply to the circumstances in clause 36.3(a) of the 2018 Agreement and clause 32.3.1 of the 2013 Agreement, namely to overtime "that cannot be authorised in advance";
 - (c) where the claims made by the Second Applicant and Group Members in the Statement of Claim are claims for overtime that has been authorised in advance, the Overtime Protocol cannot apply to those claims;

Filed on behalf of:	The Australian Salaried Medical Officers' Federation and another (the Applicants)		
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- (d) further and alternatively to paragraph 1(c) above, clause 36.3 of the 2018 Agreement and clause 32.3.1 of the 2013 Agreement do not, on their proper construction, impose any obligation on the Second Applicant or any Group Member;
- (e) further or alternatively to paragraphs 1(b) and 1(c) above, clause 36.3 of the 2018 Agreement and clause 32.3.1 of the 2013 Agreement do not, on their proper construction, exhaustively provide the ways in which unrostered overtime can be authorised by a Health Service including the Respondent;
- (f) to the extent there is any conflict between the terms of the 2013 Agreement and the 2018 Agreement, and the terms of an Overtime Protocol concerning an employee's entitlement to be paid for working authorised hours in excess of rostered hours, the terms of the 2013 Agreement and the 2018 Agreement prevail and the Overtime Protocol is of no effect.

2. To the whole of the allegations in Part F of the defence (Estoppel by Conduct), the Applicants refer to and repeat paragraph 1 above and say further that:

- (a) as pleaded in the Statement of Claim, the Respondent directed the Second Applicant and Group Members to perform the work pleaded, knew that the Second Applicant and Group Members could not perform that work during rostered hours, knew that the Second Applicant and Group Members worked overtime to perform that work, and did not direct them not to do such overtime, and as a result:
 - (i) the Respondent cannot have made the assumption pleaded in paragraph 589 of the Defence;
 - (ii) the conduct of the Second Applicant and Group Members cannot have amounted to a representation as pleaded at paragraph 591 of the Defence;
 - (iii) the Respondent cannot have acted in reliance on any such assumption or representation, as pleaded at paragraph 592 of the Defence, or in any

event any such reliance cannot have been reasonable, as pleaded at paragraph 174 of the Defence;

(iv) the Respondent's failure to take steps as pleaded at paragraphs 592(c) and 594(b) cannot be explained by any such assumption or representation.

(b) in any event, estoppel is unavailable as a matter of law to defeat a claim of contravention of section 50 of the FW Act.

3. Further, as to the allegations in paragraph 594, the Applicants say that the Respondent has had the benefit of the work performed during unrostered overtime by the Second Applicant and Group Members.

Date: 27 October 2021



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Signed by Andrew Grech
Lawyer for the Applicants

This pleading was prepared by C W Dowling SC, and J E Hartley of counsel

Certificate of lawyer

I, Andrew Grech, certify to the Court that, in relation to the Reply filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 27 October 2021



Signed by Andrew Grech
Lawyer for the Applicants

Schedule

VID 491 of 2021

Federal Court of Australia

District Registry: Victoria

Division: Fair Work

First Applicant: **The Australian Salaried Medical Officers' Federation**

Second Applicant: **Joanne Peel**

Respondent: **Western Health**