DECISION

Fair Work Act 2009
s.266—Industrial action related workplace determination

Specialist Diagnostic Services Pty Ltd t/a Dorevitch Pathology Workplace Determination

(B2017/756)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT CLANCY
COMMISSIONER CIRKOVIC

SYDNEY, 13 SEPTEMBER 2018

Industrial action related workplace determination

Introduction and statutory framework

[1] Specialist Diagnostic Services Pty Ltd t/a Dorevitch Pathology (Dorevitch) is a private company that operates in Victoria with some sites in New South Wales. Its primary business function is to provide pathology and medical diagnostic services to health professionals in both commercial and Government organisations, such as hospitals. Dorevitch is currently covered by the *Mayne Health Dorevitch Pathology Certified Agreement 2004* (2004 Agreement). The nominal expiry date of the 2004 Agreement was 1 July 2007. The 2004 Agreement is expressed to bind Mayne Health Pathology Pty Ltd t/a Mayne Health Dorevitch Pathology (as Dorevitch was then known) and the Health Services Union through its (Victorian) Branch No 1 and Branch No 4. The 2004 Agreement is a pre-reform certified agreement which continues to apply under Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

[2] Dorevitch, the Health Services Union of Australia (HSU) and the Australian Nursing and Midwifery Federation (ANMF) have been engaged in periodic bargaining for a proposed replacement agreement. There was a period of bargaining which occurred in 2009-2010 but which did not result in any agreement being reached. A new round of bargaining commenced in 2016 and continued into 2017, during which employees of Dorevitch took protected industrial action.

[3] On 23 August 2017, the Minister for Industrial Relations for Victoria made an application under s 424 of the *Fair Work Act 2009* (FW Act) in relation to industrial action being engaged in by Dorevitch and the HWU. On 25 August 2017, the Commission made an interim order[1] (Suspension Order) pursuant to s 424(4) of the FW Act to suspend the protected industrial action until further order of the Commission. On 4 September 2017, the Commission made an order pursuant to s 424(1) of the FW Act (Termination Order) to terminate the industrial action, on the basis that pathology services were a critical component

[1] PR595602

of the delivery of health services and that the industrial action would threaten to endanger the life, personal safety, health or welfare of a part of the population through the limitation on the availability of pathology services. [2]

[4] The Termination Order was a "*termination of industrial action instrument*" as defined in s 266(2)(a) of the FW Act. In relation to such instruments, s 266(1) provides for the arbitration of outstanding bargaining issues through the making of a "*workplace determination*" as follows:

> **Industrial action related workplace determination**
>
> (1) If:
>
> (a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
>
> (b) the post-industrial action negotiating period ends; and
>
> (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;
>
> the FWC must make a determination (an ***industrial action related workplace determination***) as quickly as possible after the end of that period.

[5] The "*post-industrial action negotiating period*" referred to in s 266(1)(b) is defined in s 266(3). In summary, it is a period of 21 days after the date the relevant termination of industrial action instrument was made, or 42 days where the Commission has determined to extend the period in accordance with s 266(4). In this case, the post-industrial action negotiating period was extended by the Commission to 42 days, and ended on 16 October 2017.

[6] Sections 267 and 268 establish requirements concerning the content of an industrial action related workplace determination as follows:

> **267 Terms etc. of an industrial action related workplace determination**
>
> *Basic rule*
>
> (1) An industrial action related workplace determination must comply with subsection (4) and include:
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> (a) the terms set out in subsections (2) and (3); and
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> (b) the core terms set out in section 272; and
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> (c) the mandatory terms set out in section 273.

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[2] PR595823; [2017] FWC 4610

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(2)) for the determination.

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period.

Coverage

(4) The determination must be expressed to cover:

(a) each employer that would have been covered by the proposed enterprise agreement concerned; and

(b) the employees who would have been covered by that agreement; and

(c) each employee organisation (if any) that was a bargaining representative of those employees.

268 No other terms

An industrial action related workplace determination must not include any terms other than those required by subsection 267(1).

[7] Section 274(2) provides that an "*agreed term*" for the purpose of s 267(2) "*is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement*".

[8] Section 272 provides for the core terms that must be included in a workplace determination. It provides that a determination:

- must include a nominal expiry date which is not more than 4 years after its operative date
- must not include terms that are not about permitted matters or would be unlawful if the determination were an enterprise agreement or designated outwork terms
- must include terms that would pass the better off overall test under s 193 if the determination were an enterprise agreement; and

- must not include a term that, if the determination were an enterprise agreement, would require the agreement not to be approved because it contravened s 55 or because of the requirements in Subdivision E of Division 4 of Part 2-4.

[9] Section 273 provides for the mandatory terms of a workplace determination as follows:

> **273 Mandatory terms of workplace determinations**
>
> *Mandatory terms*
>
> (1) This section sets out the mandatory terms that a workplace determination must include.
>
> *Term about settling disputes*
>
> (2) The determination must include a term that provides a procedure for settling disputes:
>
> (a) about any matters arising under the determination; and
>
> (b) in relation to the National Employment Standards.
>
> (3) Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).
>
> *Flexibility term*
>
> (4) The determination must include the model flexibility term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).
>
> *Consultation term*
>
> (5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

[10] The "*model consultation term*" referred to in s 273(5) is set out in Schedule 2.3 of the *Fair Work Regulations 2009* (FW Regulations).

[11] Section 275 sets out a number of matters which the Commission is required to take into account in determining the content of a workplace determination:

> **275 Factors the FWC must take into account in deciding terms of a workplace determination**

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

(a) the merits of the case;

(b) for a low-paid workplace determination--the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive;

(c) for a workplace determination other than a low-paid workplace determination--the interests of the employers and employees who will be covered by the determination;

(d) the public interest;

(e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time.

[12] Section 276(1) provides that "*A workplace determination operates from the day on which it is made*".

[13] At the end of the post-industrial action negotiation period in this matter on 16 October 2017, Dorevitch, the HSU and ANMF, being the bargaining representatives for the proposed agreement the subject of the Termination Order, had not settled all of the matters that were at issue during bargaining for the agreement. Accordingly, the Commission is required to make a workplace determination which resolves the outstanding issues in accordance with the provisions of the FW Act to which we have earlier referred.

[14] Pursuant to this task, this Full Bench heard evidence adduced by the parties and received submissions on 13-16 March 2018 and 27-29 March 2018.

Issues to be determined

[15] The parties have filed a number of draft workplace determinations setting out their respective positions on a wide range of issues which were the subject of dispute during bargaining. The parties' respective positions evolved and moved closer to each other over the course of the proceedings, and the final versions of the determinations sought by Dorevitch on the one hand and by the HSU (supported by the ANMF) on the other hand were provided to

the Commission on 29 March 2018 immediately before the commencement of closing submissions.

[16] There is a contest between the parties as to which issues were not agreed at the end of the post-industrial action negotiating period on 16 October 2017. As earlier set out, s 267(2) requires that terms agreed as at that date must be included in the workplace determination; the Commission does not have the authority to arbitrate in respect of those terms. The identification of the non-agreed terms is therefore a matter of some significance to the exercise of power under s 267.

[17] It is not in dispute that the following matters were *not* agreed as at 16 October 2017 and must therefore be the subject of arbitration by the Commission:

- classifications and rates of pay;
- the nominal expiry date;
- the definition of "shiftworker";
- definitions of "union" and "unions";
- whether the dispute settling procedure (which was otherwise agreed) was to be applicable to individual flexibility arrangements and the taking of parental leave;
- whether paid leave was to be provided to employees participating in the dispute settling procedure;
- whether Dorevitch should be required to provide reasonable training to employees being made redundant;
- certificates of service;
- rostering arrangements;
- recall to work on overtime and other issues relating to overtime;
- whether shift penalties should be indexed;
- the public holidays entitlement;
- whether employees may take a day off in lieu for working on public holidays;
- the calculation of pay for public holidays;
- public holidays for part-time employees;
- provision of evidence to access personal/carer's leave entitlements;
- the method of accrual of personal carer's leave

- union facilitation provisions sought by the HSU; and

- the maximum period for accident make-up pay.

[18] There was a large number of terms appearing in each party's draft determination which were agreed. They will be included in the final workplace determination which we will make. It is not necessary to determine whether these terms were agreed before or after 16 October 2017; even if they were agreed afterwards we see no reason why they should not be included in the final determination having regard to the matters identified in s 275(a)-(h).

[19] That leaves four matters in relation to which the HSU with the support of the ANMF contend there were agreed terms as at 16 October 2017 but which Dorevitch contends were not agreed, and one matter which Dorevitch contends was agreed but the HSU and the ANMF contend was not agreed. There is also an additional matter which, at the hearing, the parties treated as in dispute but which we consider to have in fact been agreed. We will deal with each of these in turn.

Termination of employment – serious misconduct

[20] The HSU submitted that the termination of employment provisions were agreed terms as at 16 October 2017, and did not include the following provision appearing in Dorevitch's draft determination (using Dorevitch's numbering):

> 12.5 Any employee may be instantly dismissed for serious misconduct and will only be paid up to the time of dismissal.

[21] The HSU relied on a notated working draft of an enterprise agreement which the parties used for the purpose of their negotiations (working document).[3] The working document shows that the termination of employment provisions which are currently to be found in clauses 12.1-12.7 of Dorevitch's draft determination, except for clause 12.5, were agreed. However, it cannot necessarily be inferred from this that there was agreement to an entire termination of employment clause which excluded clause 12.5 as at 16 October 2017. Although the terms of the working document arguably identify agreement about the entirety of a termination of employment provision at some point in time, it is impossible to exclude the possibility that Dorevitch advanced a claim for clause 12.5 sometime prior to 16 October 2017 such as to make the issue not agreed as at that date.

Redundancy – calculation of redundancy pay

[22] The HSU submitted that the sentence "*In addition, in cases of redundancy, pro rata long service after 7 years will be paid as part of the severance pay*" appearing after the table of redundancy pay entitlements in clause 19.5 in the HSU's final draft determination was agreed as at 16 October 2017. It also submitted that the following provision in the HSU's draft determination was also agreed:

> "**19.11 Redundancy calculation**

[3] Exhibit 11 – Statement of Jennifer Joy Fraumano dated 9 February 2018, annexure JF32

All redundancy payments will be paid at the employee's base rate of pay plus the following:

19.11.1 over Workplace Determination payments for ordinary hours of work;

19.11.2 shift work premiums;

19.11.3 Saturday and Sunday premiums, where they are part of ordinary time."

[23] The HSU relied upon the working document, which included the language of clause 19.11 (with the words after "*base rate of pay*" marked up) followed by the language of the sentence in clause 19.5 (also marked up), and the accompanying notation LK38, which simply reads "*Agreed*".

[24] We consider that notation LK38 relates only to the sentence in clause 19.5 of the HSU's draft relating to long service leave. We consider that this demonstrates this was agreed as at 16 October 2017, and it must therefore be included in the determination which we will make.

[25] However we are not satisfied that clause 19.11 of the HSU's draft determination was agreed. It is apparent that that provision was not the subject of notation LK38 in the working document, but the separate LK37 notation: "*Existing terms. JF to respond and mentioned payments on base rate of pay. Unions point is to retain the existing payment structure*". "*JF*" is a reference to Dorevitch's bargaining representative, Jennifer Fraumano. This notation strongly indicates that this was not agreed to by Dorevitch.

Payment of wages - frequency and method

[26] The HSU submitted that the following provisions were agreed terms as at 16 October 2017 (using the numbering in the HSU's final draft determination):

"22.1.3 Subject to any individual arrangements between the employer and the employee wages will be paid no later than a Thursday after the completion of the pay period.

22.1.4 Where an underpayment of wages occurs by reason of an error in calculation by the employer involving 2.5% or more of the employee's net weekly wage, the payment will be corrected within 24 hours at the request of the employee. This will not apply where the employer and employee are in genuine dispute as to whether the monies are owed to the employee."

[27] The basis for their contention was a notated working draft of an enterprise agreement which the parties used for the purpose of their negotiations (working document). They relied specifically on a notation in the working document next to the payment of wages provisions (LK67) stating "*12-10-17 agreed to delete*". We do not accept that this demonstrates that the provisions were agreed. They were not contained in the working document. The notation appears opposite an agreed payment of wages provision from which certain words were shown as struck out. We consider that this is what the notation refers to.

Public holidays – rostered days off

[28] The HSU and the ANMF submitted that the following provisions were agreed terms as at 16 October 2017 (again using the numbering in the HSU's final draft determination):

> "37.7 If the public holiday falls on the employee's rostered day off, he or she will be entitled to one and a half ordinary day's pay or, if the employee and employer so agree:
>
> 37.7.1 the employee may take one day off within four weeks of the public holiday; or
>
> 37.7.2 have one day added to his or her annual leave."

[29] Reliance was placed on the working document. The contested provisions appear in the document, and next to them is notation LK143 stating "*20-9-17 agreed*". We consider this demonstrates that the provisions were agreed, and accordingly they must be included in the determination which we will make.

Reasonable overtime protection

[30] Both of the proposed determinations contain a provision setting out the matters to which regard may be had in relation to when an employee may refuse to work overtime on the basis that it is unreasonable. The list of matters is agreed save that clause 25.4.1 of Dorevitch's proposed determination contains includes two matters which are not contained in the HSU's proposed determination. The two additional matters are:

> "(f) Any notice given by the employer of any request or requirement to work the additional hours.
>
> (g) Any notice given by the employee of his or her intention to refuse to work additional hours."

[31] The list of matters in Dorevitch's proposed determination reproduces all the matters specified in s 62(3) of the FW Act which may be taken into account in determining whether additional hours requested to be worked are reasonable or unreasonable. Dorevitch says that its whole list was agreed as at 16 October 2017, and relies upon the draft reasonable overtime protection clause (clause 24.2.4) in the working document. That document includes matter (f) above in clear terms (listed as the fourth matter). Accordingly we consider that was agreed, and the provision will be included in the determination we will make. The fifth matter listed in the working document is: "*any other requirement subject to section 62 of the Fair Work Act*". Dorevitch submits that this incorporates all the s 62(3) matters, including clause 25.4.1(g) in its proposed determination. However the difficulty with this submission is that the accompanying notation (LK104) to the fifth matter listed in the working document is: "*13-10-17 unions position – subject to agreement by Dorevitch*". There is no indication that the matter was subsequently agreed to by Dorevitch. Accordingly we do not consider that there was agreement as to clause 25.4.1(g) as at 16 October 2017.

Recall to work overtime

[32] In clause 25.8 of Dorevitch's proposed determination of 29 March 2018, which concerns "*Recall to work overtime*", the following provisions are included:

> "(c) Where an employee is:
>
> (i) recalled to duty between the hours of 6.00am and the commencement of their next rostered period of duty; and
>
> (ii) has had at least ten (10) hours off duty immediately prior to that recall,
>
> such employee will be;
>
> (iii) paid for the recall; and
>
> (iv) be released after completion of such recall worked until they have had two (2) consecutive hours off duty, the employee will still receive payment for their rostered ordinary hours. To avoid doubt, clause 25.8 (b) does not apply in the circumstances of recall performed under this clause.
>
> . . .
>
> (e) No employee will present for duty on a voluntary basis, unless they have had ten (10) consecutive hours off duty."

[33] The "*Recall to work overtime*" provisions in the HSU's proposed determination (clauses 26.19-26.25) were the same as those proposed by Dorevitch except that they did not include the above provisions. At the hearing of the matter, the parties treated this as an issue remaining in dispute. However a perusal of the "*Recall to work overtime*" clause in the working document (clause 24.6) shows that it includes the following provisions:

> "24.6.3 Where an employee is recalled to duty between the hours of 6.00am and the commencement of their next rostered period of duty, having had at least ten (10) hours off duty immediately prior to that recall, such employee will be paid for the recall and be released after completion of such recall worked until he/she has had two consecutive hours off duty without loss of pay for rostered ordinary hours occurring during such absence.
>
> . . .
>
> 24.6.5 No employee ~~shall~~ will present for duty on a voluntary basis, unless they have had ~~eight~~ ten consecutive hours off duty."

[34] In relation to the latter of the above provisions, there is an accompanying notation (LK122) which states: "*13-10-17 unions position – subject to agreement by Dorevitch – AGREED*".

[35] It is apparent on the face of the working document that these provisions were agreed, and we infer that they were agreed as at 16 October 2017. They deal with the same subject matter as the provisions in Dorevitch's proposed determination said to be in dispute. Accordingly they must be included in the workplace determination to be made.

Evidence

[36] Evidence was given by the following persons:

For Dorevitch:

- Andrew John Merrey, Business Support Manager, Dorevitch;
- Rebecca Sekic, Human Resources Coordinator, Dorevitch;
- Lynette Ann Corrie, Metropolitan Operations Manager, Dorevitch;
- Jennifer Joy Fraumano, Consultant and Director of Fraumano & Associates; and
- Andrew Roger Goodsall, Health Care Analyst contracted by MST Marquee (part of MST Financial).

For the HSU:

- Scott Michael Crawford, Industrial Officer, HSU Victoria No.1 Branch;
- David Eden, Assistant Secretary, HSU Victoria No.1 Branch;
- Ray Collins, Union Organiser, HSU Victoria No.1 Branch;
- Biljana Mirovski, Pathology Collector, Dorevitch;
- Erina Wilson, Pathology Collector, Dorevitch;
- Jane Flanigan, Pathology Collector, Dorevitch;
- Rebecca Whyte, Laboratory Assistant, Dorevitch;
- Debbie Simon, Data Entry Clerk, Dorevitch;
- Lyndsey Turner, Pathology Collector, Dorevitch;
- Toni Dye, Courier, Dorevitch;
- Fiona Duncan, Pathology Collector, Dorevitch;
- Chataigne Anger-Coulter, Pathology Collector, Dorevitch;
- Robyn McDonald, Pathology Collector, Dorevitch;
- Halia Johnstone, Pathology Collector, Dorevitch;
- Karen Bigelow-Dillon, Pathology Collector, Dorevitch;
- Ron Figgins, Courier, Dorevitch;
- Irene Spindler, Human Resources Manager, Health Services Union Victoria No.1 Branch; and
- James Dickson, Senior Manager, Stennards Accountants and Advisors.

[37] No significant issue of the credit of any witness arises for consideration. There were some differences in the evidence concerning the detail of certain events which occurred in the course of bargaining, and also some differences in the expert evidence concerning the proper analysis of Dorevitch's commercial and financial position. However, we consider that on matters of significance to our decision-making process, there was no evidentiary contest of significance which requires resolution. The factual background which we set out below is almost entirely based on matters which were not the subject of evidentiary dispute.

Factual background

Dorevitch and its workforce

[38] Dorevitch's pathology business provides clinical laboratory services to private and public hospitals and directly to patients on referrals from GPs and other medical specialists. Its laboratories and collection centres are located in Melbourne, regional and rural Victoria and some areas of southern New South Wales. It is one of Victoria's largest pathology providers, and is the largest provider to Victorian public hospitals and in regional and rural Victoria. Dorevitch is a wholly-owned subsidiary of Primary Health Care Limited (Primary Health Care), which accounts for approximately 36% of the private pathology market and is the second-largest industry participant.

[39] The principal services provided by Dorevitch consist of the following:

- pathology services to acute inpatients in emergency departments, intensive care units and other patients admitted to public and private hospitals;
- pathology services to residential care patients;
- home visit services to collect specimens from patients' homes where their medical condition or immobility prevents them from easily attending collection centres;
- specimen collection from relevant health care centres or collection centres and transfer to Dorevitch laboratories (courier services);
- various types of pathology testing (to both inpatients and outpatients), including either at an on-site laboratory at a hospital or after transport to an offsite Dorevitch laboratory;
- preparation of reports relating to pathology testing;
- the provision of blood products for transfusion;
- telephone or in person advice regarding pathology testing; and
- pathology equipment calibration.

[40] Dorevitch operates 31 laboratories in Victoria and 2 in New South Wales, of which 20 are co-located with public hospitals, 10 are co-located with private hospitals and 3 are stand-alone facilities. For each of the 20 laboratories co-located in public hospitals, Dorevitch has a long term contract with the Victorian Government for the provision of on-site services. These contracts were obtained through competitive tender, involve prices that are on average lower than for the provision of services to the private sector, and with limited exceptions do not provide for inflationary increases in fees. Twenty of these laboratories are located in regional and rural Victoria. Dorevitch's greater presence in non-metropolitan areas distinguishes it from its major competitors. Dorevitch also operates a total of 638 pathology collection centres.

[41] Apart from the contracts with Victorian public hospitals, Dorevitch's revenue for the provision of pathology services are primarily paid by the Federal Government through the Medicare Benefits Schedule (MBS). Dorevitch is usually paid 85% of the scheduled fee because of bulk billing, which leaves no capacity to charge the patient a co-payment.

[42] Over 90% of Dorevitch's cost structure consists of three components: labour (the largest), real estate/rent and consumables. It has approximately 2,465 employees, of whom approximately 1,789 will fall within the agreed scope of coverage of the workplace determination we will make. Those to be covered may be categorised as follows:

(a) *Pathology collectors*: approximately 1101 employees, who perform work at 600 pathology collection centres across Victoria and Albury in New South Wales.

(b) *Pathology collection registered nurses*: 3 employees performing work at Gippsland pathology, who maintain their registration as a registered nurse.

(c) *Laboratory assistants*: approximately 221 employees, performing work at 32 laboratories located across Victoria, and Albury in New South Wales.

(d) *Couriers*: approximately 228 employees.

(e) *Clerks*: approximately 226 employees.

(f) *Storepeople*; approximately 10 employees.

[43] Approximately 60% of Dorevitch's workforce consists of part-time employees.

Business trends in the pathology industry

[44] There are three main trends in the pathology industry which affect Dorevitch's business and its profitability. The first is significant growth in the number of tests funded through the MBS each year which exceeds the growth in population. Over the last decade the compound annual growth rate in MBS pathology services has been 4% per year. The second is a virtual freeze in MBS pricing for pathology services, with no net per item increase having occurred over the last decade. The introduction of "grand coning" rules, which operate so that where more than three tests are requested for a single patient at one time, only the three most expensive tests are paid for, has contributed significantly to the stagnation in MBS pricing. This has occurred against a background of significant productivity and efficiency gains due to industry consolidation, which has given rise to economies of scale, and technological advances. The third is deregulation in relation to the number and location of pathology collection centres. This has caused the number of collection centres in the industry to quadruple since 2010 as industry participants competed with each other to expand their coverage of metropolitan and regional centres. This has caused cost pressures in the form of increased rents to pay for the premises and increased labour to staff them. However in the 2017 budget the Federal Government announced that it would review rents being paid for co-located collection centres in order to cap rental costs.

[45] Profit margins in the pathology industry are generally at around 11.5%, measured as a ratio of earnings before interest and tax (EBIT) to revenue. They are not predicted to increase materially in the future.

Commercial position of Dorevitch

[46] The performance of Dorevitch as a stand-alone business within Primary Health Care's group of businesses is not separately reported publicly. Primary Health Care's annual reports since 2011 disclose the following in respect of the Primary Health Care group of businesses:

- it has enjoyed about 25% in revenue growth since 2011, with about 40% growth in the pathology businesses (which include Dorevitch);

- EBIT has been deteriorating since 2014, but this has been caused mainly by events outside the pathology businesses;

- the group's businesses generated a significant cash surplus from operations for each year from 2011 to 2017, and has paid out dividends in each year; and

- EBIT growth in the pathology segment since 2011 is 20%.

[47] An analysis of the financial position since 2011 does not take into account the reduction in the MBS payments for pathology services which occurred in 2010, so that if a 2010 to 2017 comparison is done, the growth in EBIT for the pathology segment of Primary Health Care was minimal. The differential between revenue and EBIT growth suggests that the profitability of the new revenue obtained through acquisitions is less than that of the existing revenue. A proportion of the revenue growth had been through acquisitions rather than organic growth. Nonetheless the EBIT to revenue ratio for the pathology segment of Primary Health Care is expected to be around 14% in the coming years.

[48] Prior to 1 January 2018, Dorevitch held the Federal Government contract for the assembly, distribution and testing of faecal occult blood test (FOBT) kits. However in 2017 there was a competitive tender for the contract, and it was awarded to Dorevitch's largest pathology industry competitor, Sonic Healthcare Limited. This contract had been worth about $90 million in revenue over three years. Work under the contract will have fully wound down by the end of 2018.

[49] The estimates of the effect of a 3% wage increase on Dorevitch's profit are in the range of a 4.2%-7.5% reduction. However Primary Health Care has not issued a profit warning about the pending workplace determination or otherwise publicly identified it as a potential risk to its business.

The 2004 Agreement

[50] The 2004 Agreement came into effect on 22 December 2004 with a nominal expiry date of 1 July 2007. It contains the following classifications:

- Collector Grade 1 Years 1-4
- Collector Grade 2 Years 1-4
- Collector Reliever Years 1-3
- Collector Grade 3 Years 1-3
- Courier Years 1-5
- Courier Reliever Years 1-3
- Scientist Grade 1 Years 1-7
- Scientist Grade 2 Years 1-4

- Scientist Grade 3 Years 1-4
- Scientist Grade 4 Years 1-5
- Scientist Trainee Years 1-4+
- Cleaner Years 1-3
- Laboratory Assistant Grade 1 Years 1-3
- Laboratory Assistant Grade 2 Years 1-3
- Laboratory Assistant Grade 3 Years 1-3
- Storeperson Years 1-3
- Storeperson working alone Years 1-3
- Storeperson Advanced Years 1-3
- Maintenance/Handy Person Years 1-3
- Maintenance/Handy Person Advanced Years 1-3
- Clerk Grade 1 Years 1-3
- Clerk Grade 2 Years 1-3
- Clerk Grade 3 Years 1-3
- Clerk Grade 4 Years 1-3
- Clerk Grade 5 Years 1-3
- Clerk Grade 6 Years 1-3
- Medical Laboratory Technicians Trainees Years 1-4
- Medical Laboratory Technicians Grade 1 Years 1-8
- Medical Laboratory Technicians Grade 2 Years 1-4

[51] The wage increases provided for in clause 9 of the 2004 Agreement were as follows:

- 3% from 1 July 2004;
- 3% from 1 July 2005;
- 3% from 1 April 2006;
- 1.5% from 1 January 2007; and
- 1.5% from 1 July 2007.

[52] The 2004 Agreement provides for a range of other conditions of employment which it is not necessary to detail, except to say that clause 5 provides that all terms and conditions in the *Health Services Union of Australia (Private Pathology - Victoria) Award 2003* as at the date of the execution of the 2004 Agreement (2003 Award) were to apply "*in total for the duration of this agreement or until it is replaced by another agreement between the parties*" except where there was an inconsistent term in the 2004 Agreement in which case the latter was to prevail. The practical effect of this is that, to a significant degree, provisions of the 2003 Award incorporated into the 2004 Agreement by clause 5 remain part of the terms and conditions of employment currently applying to Dorevitch and its workforce.

[53] Clause 42 of the 2004 Agreement relevantly provides:

> **42. Negotiation of the Next Agreement**
>
> The parties are committed to ensuring that a new EBA commences six months after the expiry of this EBA. Accordingly, an EBA Committee will be formed and commence negotiations no later than the date the EBA expires. Any wage increase in the EBA that follows this one, will apply from the first full pay period that commences

> on or after 31 December 2007. All parties agree that negotiations will be undertaken in good faith as defined by this clause.

History of bargaining since the 2004 Agreement

[54] The evidence did not disclose that there was any bargaining for a new agreement after the nominal expiry date of the 2004 Agreement passed as contemplated by clause 42 of that agreement. However the change in the ownership of the Dorevitch business from Mayne Health to Symbion Health, and the subsequent takeover by Primary Health Care in 2008, undoubtedly served as distractions. In 2009, bargaining commenced between Dorevitch, the HSU and the ANMF. Dorevitch subsequently decided to seek five separate agreements covering collectors, scientists, technicians, couriers and other support staff (including laboratory assistants, clerical staff, storepersons, maintenance staff and cleaners). A proposed agreement applying to collectors, which provided for a 2-year enterprise agreement with 1.5% wage increases per year, was put to a vote and rejected. In August 2010 another proposed agreement covering collectors was put to a vote and rejected. The HSU campaigned against the approval of these proposed agreements. It appears that Dorevitch issued a notice of employee representational rights pursuant to the FW Act in 2012, but bargaining ended after one meeting with the HSU and the ANMF.

[55] In February 2016 and again in April 2016, the HSU requested in writing that Dorevitch recommence bargaining for a new enterprise agreement. There was initially no response from Dorevitch, which led the HSU to commence preparation of an application for a majority support determination pursuant to s 236 of the FW Act. However on 21 April 2016 the HSU was successful in arranging a meeting with Dorevitch at which Dorevitch's then CEO, Neville Moller, was in attendance. Other participants at the meeting were David Eden, the Assistant Secretary of the HSU's Victoria No.1 Branch (Branch), Ray Collins, an HSU Organiser, Scott Crawford, the Branch's Industrial Officer, and Dorevitch's Human Resources Manager, Rebecca Sekic. At this meeting, Mr Moller agreed that Dorevitch would engage in bargaining with the HSU. However when the HSU representatives attempted to schedule a program of bargaining meetings and a process for the exchange of logs of claim, the meeting became heated and ended up with Mr Moller walking out. Notwithstanding this Dorevitch subsequently issued notices of employee representational rights to its employees.

[56] On 2 May 2016 the HSU sent a letter to Dorevitch seeking a meeting date and time to progress negotiations, and on 20 June 2016 the HSU sent its log of claims to Dorevitch. There were further exchanges of correspondence, but no meeting was able to be arranged. On 13 July 2016 the HSU lodged an application with the Commission for bargaining orders pursuant to s 230 of the FW Act. This application was the subject of a conference before the Commission on 19 July 2016, at which Dorevitch agreed to a timetable of bargaining meetings with the HSU.

[57] Bargaining meetings then occurred on 4 August, 18 August, 1 September, 13 September, 5 October, 21 October and 1 December 2016. Jennifer Fraumano, an industrial relations consultant with particular expertise in the health industry, was engaged by Dorevitch as its bargaining representative and led the negotiations. There were exchanges of positions about various matters by correspondence in between these meetings. Dorevitch served a log of claims, but it did not contain any proposal with respect to wages. However in late November 2016 Dorevitch informed its employees, but not the HSU or the ANMF, that it intended unilaterally to increase its employees' wages by 2.4% effective from 3 December

2016. Dorevitch did not inform the HSU and the ANMF about this until the meeting on 1 December 2016.

[58] At or before the 1 December 2016 meeting, the parties agreed to use the proposed agreement from the 2010 negotiations as the working document for future negotiations. On 13 February 2017 the HSU sent Dorevitch a marked-up copy of this document which primarily sought to maintain existing entitlements but also added some new claims. There were further meetings on 20 February, 16 March, 11 April, 4 May and 19 May 2017. At none of those meetings did Dorevitch make any offer or proposal with respect to wages, but the parties continued to exchange their positions about other matters during the meetings and by correspondence.

[59] At this point the HSU, frustrated with the state of progress, apparently decided to launch an industrial campaign against Dorevitch in order to expedite a favourable bargaining outcome. On 13 June 2017 the HSU made an application for a protected action ballot order pursuant to s 437 of the FW Act. It also organised a mobile billboard, which said "*Ditch Dorevitch, Fair bloody go, No pay deal since 2010*", to tour metropolitan and regional areas. This aspect of the campaign was launched on 14 June 2017 outside Dorevitch's office at Heidelberg, shortly before a bargaining meeting was scheduled to occur there. When the HSU's representatives arrived at the office for the meeting, they were informed by Ms Fraumano, on instruction from Mr Moller, that the meeting was cancelled because of the mobile billboard. No further meeting was arranged at that time.

[60] On 15 June 2017 the protected action ballot order was made by the Commission. On 20 June 2017 Ms Fraumano wrote to the HSU alleging that Mr Collins had entered a Dorevitch site at Frankston the previous day to hand out leaflets to employees contrary to the right of entry requirements of the FW Act. On 21 June 2017 Dorevitch lodged an application in the Commission for it to deal with this alleged right of entry dispute. It subsequently complained about another entry by an HSU representative to a Dorevitch site at Wantirna South.

[61] On 13 July 2017 the results of the protected action ballot were declared, with employees voting to take protected industrial action. On 30 July 2017 the HSU notified Dorevitch of its intention to take protected industrial action on 7 August 2017 by way of a stoppage of work. On 1 August 2017 the HSU gave a further notification of protected industrial action by way of speaking to patients, their families and the community about its campaign during work hours from 5 August 2017. On 2 and 3 August 2017 the HSU gave further notifications of protected industrial action in the form of identified bans and the display of campaign material during work hours. On 4 August 2017 Dorevitch gave notices to its employees pursuant to s 470 of the FW Act of its intention to make deductions from their pay during certain periods of protected industrial action. On 6 August 2017 the HSU gave a further notification of protected industrial action by way of a stoppage of work on 14 August 2017. On the same day it also applied to the Commission for an order under s 472 of the FW Act to vary the proportion of the reduction to payments to employees in respect of the partial work bans.

[62] Dorevitch employees who were members of the HSU commenced taking protected industrial action in accordance with the notices given by the HSU during August 2017. On 7 and 8 August 2017 Dorevitch took employer response action by locking out named

employees. On the evening of 7 August 2017, the HSU sent a text message to its members concerning the taking of employee response action in the following terms:

> "TOUCH ONE, TOUCH ALL: Walk out at 8.15am tomorrow! As expected, Dorevitch CEO locks out 66 workers. You know someone on this list. It's our legal right to walk out in response tomorrow at 8.15am. Stand together. Stay strong. More updates to follow."

[63] Later that evening, in an apparent response to this text message, Dorevitch sent an email to its employees stating that should employees take industrial action and not attend work the following day, "*…this would not be protected industrial action as there are requirements to be met by FWC…Please ensure you attend to your rostered shift as rostered or there may be claims for unprotected industrial made against you*". The HSU regarded Dorevitch's email as constituting a knowing or reckless misrepresentation concerning employees' workplace rights in contravention of s 345 of the FW Act, and on 9 August 2017 the HSU lodged an application in the Federal Circuit Court in respect of this alleged contravention.

[64] Also on 9 August 2017 the HSU applied to the Commission for an extension to the 30-day period for taking protected industrial action and for a bargaining order, and notified Dorevitch of its intention to take employee response action by way of a stoppage of work from 10 to 15 August 2017. The same day Dorevitch locked out employees, and then from 10 to 15 August 2017 employees engaged in a stoppage of work. On 11 August 2017 Dorevitch lodged submissions in the Commission objecting to the extension of the period for taking protected industrial action. On 13 August 2017 the HSU notified further protected industrial action by way of a stoppage of work to occur on 21 August 2017.

[65] On 15 August 2017 Dorevitch, the HSU and the ANMF attended a conference in the Commission before Commissioner Cribb concerning the HSU's applications. An order was made for extending the period for the taking of protected industrial action by 30 days, but no bargaining orders were made. By agreement, the Commissioner scheduled a series of conferences to be conducted in the Commission, to be held on 30 August, 8 September, 13 September, 20 September and 25 September 2017.

[66] On 17 and 18 August 2017, the HSU issued three further notifications of protected industrial action in the form of work stoppages and work bans. From 18 to 23 August 2017, employees of Dorevitch participated in employee response action by way of a stoppage of work. On 22 August 2017 the ANMF, having obtained a protected action ballot order and its members having voted to approve the taking of protected industrial action, notified Dorevitch of protected industrial action in the form of stoppages and work bans. The same day Dorevitch withdrew its s 470 notices.

[67] On 23 August 2017 the Victorian Minister for Industrial Relations lodged the application to terminate the industrial action being taken by the HSU, the ANMF and Dorevitch pursuant to s 424 of the FW Act. The same day Dorevitch ceased its lockout of employees and the HSU directed its members to return to work. On 25 August 2017 the Suspension Order was made by the Commission (Commissioner Bissett) as required by s 424(4) on the basis that the Minister's application could not be determined within 5 days in accordance with s 424(3). On 30 August 2017 there was a conference before Commissioner Cribb to discuss the main issues in dispute in the bargaining. Late in that conference, which

was attended by Dorevitch's new CEO, Ian McPhan, Dorevitch made a wage offer of a 3% increase, with annual CPI increases after that. This was the first time that Dorevitch had made a wages proposal. This was rejected by the HSU.

[68] On 4 September 2017 the Minister's application was heard, and the Termination Order was made. The parties consented to the extension of the post-industrial action bargaining period to 42 days. There then were conferences conducted by Commissioner Cribb on 8 September, 13 September and 20 September 2017. At the 20 September 2017 conference Dorevitch made a wages offer in connection with a proposal for a new classification structure. This wages offer was significantly in excess of the 30 August 2017 offer, and was regarded by the HSU as a serious proposal. There was a further conference conducted by Commissioner Cribb on 25 September 2017. At this conference the HSU gave a preliminary response to Dorevitch's wages offer, and without actually rejecting Dorevitch's proposal indicated that it intended to move from the initial position on wages stated in its log of claims and put a revised wages proposal to Dorevitch in the near future. However Mr McPhan on behalf of Dorevitch stated that he intended to put Dorevitch's offer to a vote of employees, and Commissioner Cribb then adjourned the conference.

[69] On 28 September 2017 Dorevitch sent the HSU and the ANMF a copy of the enterprise agreement it intended to provide to employees. The proposed agreement included terms which Dorevitch understood had been agreed in the negotiations to date. The average wage increase for employees under the proposed agreement (including due to reclassification) was 6.5%. The proposed agreement and a notice of the time, place and method of the vote were sent to employees on 29 September 2017. The further conference in the Commission scheduled for 3 October 2017 did not proceed as a result of Dorevitch's decision to proceed to a ballot. On 4 October 2017 the HSU applied to the Federal Court for an interlocutory injunction to restrain the conduct of the vote upon Dorevitch's proposed enterprise agreement, but this application was refused by the Court on 5 October 2017. The vote took place in the period 7-10 October 2017, and employees voted to reject the proposed agreement by a margin of 78.9% to 21.03%. There were then further conferences conducted in the Commission before Deputy President Gooley until the 42-day post-industrial action period ended.

Wage increases, inflation and wage growth since the expiry of the 2004 Agreement

[70] Since the nominal expiry date of the 2004 Agreement, Dorevitch has paid its employees the following wage increases:

- 1 January 2008 - 1.5%.
- 27 November 2010 - 1.5%.
- 6 July 2013 - increase to modern award rate for Couriers Yr 1, 2 and 3 and Courier Reliever Yr 1 only.
- 23 November 2013 - 1.5% for Collectors, Couriers Yrs 3-5, Courier Relievers and Clerks only, but absorbing 6 July 2013 increases where applicable.
- 21 June 2014 - 2.5% for staff who did not receive the 23 November 2013 increase and 1% for those who did.

- 5 July 2014 - increase to the modern award rate for Couriers Yrs 1-3, Collector Reliever Yr 1, Cleaners Yr 1 and 2, Laboratory Assistants Grade 1 Yr 1 and 2 and Storepersons.

- 5 July 2015 - increase to the modern award rate for Couriers, Courier Relievers Yr 1 and 2, Cleaners, Laboratory Assistants Grade 1, Storepersons and Storepersons (alone).

- 31 August 2015 - 2% increase for Storepersons (Advanced) Yr 1, 2 and 3

- 1 July 2016 - increase to modern award rate for Collector Grade 1 Yr 1, 2 and 3, Courier Yrs 1-5, Courier Reliever Yr 1 and 2, Cleaner Yrs 1-3, Laboratory Assistant Grade 1 Yrs 1-3, Laboratory Assistant Grade 2 Yr 1, Laboratory Assistant Grade 3 Yr 1 and 2, Storeperson Yrs 1-3, Storeperson (alone) Yrs 1-3, Clerk Grade 3 Yr 2, Clerk Grade 4 Yrs 1-3, Clerk Grade 5 Yrs 1-3 and Clerk Grade 6 Yrs 1-3.

- 3 December 2016 - 2.4% increase.

- 1 July 2017 - increase to modern award rate for Collector Grade 1 Yrs 1-4, Collector Grade 2 Yrs 1-3, Courier Yrs 1-5, Courier Reliever Yr 1 and 2, Cleaner Yrs 1-3, Laboratory Assistant Grade 1 Yrs 1-3, Laboratory Assistant Grade 2 Yrs 1-3, Laboratory Assistant Grade 3 Yr 1 and 2, Storeperson Yrs 1-3, Storeperson (alone) Yrs 1-3, Maintenance/Handyperson (advanced) Yrs 1-3, Clerk Grade 1 Yrs 1-3, Clerk Grade 2 Yrs 1-3, Clerk Grade 3 Yr 2 and 3, Clerk Grade 4 Yrs 1-3, and Clerk Grade 5 Yrs 1-3

- 1 July 2018 - 3.5% increase.

[71] The total increase over the period from the nominal expiry date of the 2004 Agreement to the date of this decision may be illustrated with respect to the following classifications:

Classification	**1 July 2007 $ per hour**	**1 July 2018 rate $ per hour**	**Total percentage increase**
Collector Gr 1 Yr 1	19.09	22.04	15.5
Collector Gr 3 Yr 1	20.82	22.78	9.4
Courier Yr 1	16.89	20.96	24.1
Courier Yr 5	18.22	20.96	15.0
Cleaner Yr 1	16.67	20.12	20.7
Lab Assistant Gr 1 Yr 1	16.67	20.12	20.7
Lab Assistant Gr 3 Yr 1	18.17	20.96	15.4
Storeperson Yr 1	17.32	20.96	21.0
Storeperson (Adv) Yr 1	19.09	21.06	10.3
Clerk Gr 1 Yr 1	17.97	20.12	12.0
Clerk Gr 4 Yr 1	19.49	22.78	16.9

[72] Over the same or similar period the total percentage increases in the Melbourne CPI, the National Minimum Wage and average wages growth were as follows:

Melbourne CPI:	29.5%[4]
National Minimum Wage:	40.5%
Average Wages Growth:	38.8%[5]

Section 275 matters - general conclusions

[73] As earlier set out, s 275 requires us to take into account eight identified matters in deciding which terms to include in the workplace determination we are required to make. Some of these matters will necessarily apply themselves differently to the specific issues in dispute, but nonetheless we are able to express some broad conclusions of general application about these matters.

The merits of the case

[74] It will be necessary to deal with the merits of each of the disputed matters in turn. Having regard to the history of bargaining and the weight of the evidence and submissions before us, it is clear that the issue of wages (and the associated issue of the classification structure) is the major issue which requires resolution. In respect of the other issues, although there was a degree of evidence concerning the competing positions, there was little or no evidence that the existing provisions in the 2004 Agreement were operating unsatisfactorily for either Dorevitch or the employees to be covered by the workplace determination to be made. Although it is not necessary for a party advocating some alteration to the status quo to discharge an onus of demonstrating a positive "case for change",[6] the lack of any significant difficulty with the status quo position will be a matter relevant to the merits of the case.

The interests of the employer and employees who will be covered by the determination

[75] In relation to the major issue of wages, the primary interest of Dorevitch is to minimise its business costs and maximise its profits. This is suggestive of a lower rather than higher wage increase, although it is not suggestive of there being *no* wage increase, since there are offsetting issues of employee morale, retention and turnover which may indirectly affect its costs and profitability. The employees' primary interest is to maintain and improve their living standards, and this is suggestive of a higher rather than lower wage increase. However this is tempered by a need not to increase wages excessively so that Dorevitch's business viability is not adversely affected to the degree that employees' job security, which is also an important interest, is endangered. Consideration of the s 275(c) matter calls for an appropriate balance to be struck between these legitimate interests.[7]

The public interest

[76] The public interest consideration in s 275(d) was discussed in *Application by Parks Victoria*[8] in the following terms (footnotes omitted):

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[4] Calculated by reference to the June quarter for each corresponding year

[5] May 2007 to November 2017

[6] *Essential Energy Workplace Determination* [2016] FWCFB 7641 at [77]

[7] *AMWU v Curragh Queensland Mining Limited* Print Q4464 (11 August 1998)

[8] [2013] FWCFB 950

> "[49] Section 275(d) provides that the Commission must take the 'public interest' into account. The public interest imports a discretionary value judgment confined only by the subject matter, scope and purpose of the FW Act.
>
> [50] The public interest refers to matters that may affect the public as a whole such as the achievement or otherwise of the objects of the FW Act, employment levels, inflation and the maintenance of appropriate industrial standards.
>
> [51] The statutory distinction between the interests of the employer and employees on the one hand (s.275(c)) and the public interest on the other (s.275(d)) leads us to conclude that the public interest is distinct from the interests of the parties, though the considerations may overlap. For example, matters which may be in the public interest may also be in the interests of one or more of the parties."

[77] The critical public interest considerations are those identified by Commissioner Bissett in the decision to terminate protected industrial action, namely that "…pathology services are a critical component of the delivery of health care services to the population" and "… disruption to pathology services may have an adverse impact on the general provision of health care services".[9] The evidence before us disclosed that Dorevitch is one of the largest suppliers of pathology services in the State of Victoria (as well as in southern New South Wales). Therefore an outcome which significantly prejudices the capacity of Dorevitch to provide pathology services would be likely to be contrary to the public interest. However there was no evidence that any outcome within the ambit of the competing positions of the parties would result in any such prejudice.

How productivity might be improved in the enterprise or enterprises concerned

[78] The meaning of the word "*productivity*" as used in s 275(e) was discussed in *Schweppes Australia Pty Ltd*[10] as follows (footnotes omitted):

> "[42] We accept that the conventional economic meaning of the word productivity is the number of units of output per units of inputs. Productivity is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. Schweppes incorrectly equates productivity with the average cost of labour per unit, which, properly understood, is a measure of nominal unit labour costs.
>
> [43] In our view productivity, as used in the Act, refers to the conventional economic meaning of the quantity of output relative to the quantity of inputs. It is quite different in concept to the price of output and price of inputs, including the price of labour.
>
> [44] The legislative context is also important. Context may require a word to be read more narrowly than if was considered in isolation. In this regard we note that the 'modern awards objective' (s.134) requires consideration of the likely impact of any

[9] [2017] FWC 4610 at [26]

[10] [2012] FWAFB 7858

> exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden. The distinction between productivity and employment costs recognises that whilst employment costs will be affected by productivity in relation to the quantity of labour input required, the price of labour constitutes a separate and distinct consideration. A similar distinction is made between productivity and business competitiveness and viability in the 'minimum wages objective'. It may be presumed that Parliament intended the word productivity to have the same meaning throughout the Act.
>
> [45] Accordingly, we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed to the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs."

[79] We do not consider that any of the matters in dispute here raise any question of significance concerning the improvement of productivity in the sense discussed above. Dorevitch suggested in its submissions that its proposed classification structure would promote and enhance skill development in a way which is relevant to the actual requirements of employees' positions, and that this would improve productivity. It also submitted that provisions concerning rostering arrangements proposed in clause 32.4, 32.5 and 32.7 of the HSU/ANMF draft determination would be detrimental to productivity. In both cases, we consider the connection between these issues and productivity improvement to be remote, and accordingly the s 275(e) consideration will not be significant in the determination of the terms and conditions of the workplace determination to be made.

The extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement

[80] Much time was devoted at the hearing of this matter to the HSU's contention that Dorevitch's conduct during the 2016-17 bargaining was not reasonable. Specifically, the HSU contended that Dorevitch conducted itself unreasonably in the following respects:

- the s 471 notification of deduction from pay for partial work bans sent by Dorevitch to its employees on 4 August 2017, which disproportionately quantified the amount of the deductions to be made, deliberately or recklessly and unreasonably misapplied the tests in reg 3.21 of the *Fair Work Regulations 2009* for such deductions;

- Dorevitch initially opposed unreasonably the HSU's application for an extension of the period for taking protected industrial action, only to drop its opposition after the matter application was listed for hearing;

- Dorevitch initially opposed unreasonably the HSU's s 472 application to vary the payment reductions for the partial work bans, only ultimately to withdraw its s 471 notices altogether;

- it engaged in employer response action by way of lockouts on 7, 8 and 9 August 2017 in circumstances where it was not genuinely trying to reach agreement contrary to the common requirement for the taking of protected industrial action in s 413(3)(a) in that

it had failed to attend meetings, was engaging in surface bargaining, and was unilaterally increasing wages;

- in its email of the evening of 7 August 2017, it had misrepresented the workplace rights of HSU members to take employee response action, and then failed to retract the email after notification of the employee response action under s 414(4) was received;

- during bargaining, Dorevitch refused to amend discriminatory proposals which prevented same-sex couples from accessing parental leave;

- Dorevitch unilaterally decided to put its proposed enterprise agreement to a vote of employees during the post-industrial action negotiation period, a course of conduct which was contrary to s 266 of the FW Act and which led to it not participating in a scheduled conference in the Commission on 3 October 2017;

- Dorevitch failed to incorporate terms which had been agreed in the draft determination it prepared for the purpose of the workplace determination arbitration; and

- Dorevitch did not comply with the good faith bargaining obligations in clause 42 of the 2004 Agreement.

[81] Except in one respect which we will explain shortly, we do not consider that Dorevitch (or for that matter the HSU or the ANMF) conducted itself other than reasonably during the bargaining process. The scheme of enterprise bargaining in the FW Act has, relevantly, two fundamental features: first, parties are not required to reach an agreement and, secondly, parties may within strictly defined limits use industrial action to coerce each other to reach agreement. In that context, a continued resistance to any departure from a party's starting point position, the use of industrial action including response industrial action and the use of legal means to limit the damage caused by industrial action undertaken by the other side is not by itself necessarily indicative of unreasonable bargaining conduct. Most of the conduct complained about by the HSU occurred in the context of Dorevitch's response to an industrial campaign launched by the HSU after the bargaining process derailed in about June 2017. To say that is not to imply any criticism of the HSU, but merely to observe that Dorevitch's conduct largely occurred in circumstances where the parties were "at war" with each other.

[82] In response to the specific matters raised by the HSU:

(1) The evidence is not such as to enable us to conclude that the reductions in payments to employees proposed in the s 471 notices issued by Dorevitch were unreasonable or incapable of being characterised as being in conformity with reg 3.21 of the FW Regulations. Dorevitch was entitled under s 471 to seek to reduce payments to employees in the face of the partial work bans imposed by the HSU and its members. In any event, the significance of this matter in the context of the bargaining process is diminished by the fact that Dorevitch did not ultimately reduce payments to its employees in relation to the partial work bans at all.

(2) We do not consider that Dorevitch's initial opposition to the HSU's application for an extension of the period for taking protected industrial action or its s 472 application to vary the payment reductions for the partial work bans was

unreasonable in the context of an fast-moving industrial dispute in which both parties were taking measures and counter-measures to advance their bargaining interests. In any event the significance of these matters is diminished by the fact that Dorevitch ultimately did not oppose the extension of the period for taking protected industrial action and withdrew its s 471 notices.

(3) We do not consider that Dorevitch acted unreasonably in locking out employees in response to the industrial campaign undertaken by the HSU. Nor do we consider that Dorevitch was not genuinely trying to reach agreement on the basis of the matters identified by the HSU. It is clear that, notwithstanding its failure to attend some meetings, it had nonetheless participated in a significant number of meetings with the HSU and the ANMF over the period August 2016 to May 2017. We do not consider that Dorevitch was engaged in "surface bargaining" to the extent that that expression refers to merely nominal participation in the bargaining process with no real intention to reach an agreement. There is no doubt that Dorevitch was engaged in very hard bargaining and was reluctant to make the concessions desired by the HSU, but that is not the same thing as saying it was merely surface bargaining. Nor do we consider that "unilateral" increases to employees' wages can be considered unreasonable, particularly in circumstances where Dorevitch had to ensure that base rates of pay were equal to or exceeded the modern award rates of pay as required by s 206 of the FW Act.

(4) The evidence does not permit us to conclude that Dorevitch's email on the evening of 7 August 2017 involved a knowing or reckless, as distinct from mistaken or accidental, misrepresentation about employees' workplace rights. It probably should have subsequently retracted the email, but that it failed to do so in the course of the fast-moving industrial dispute does not, we consider, render its bargaining conduct unreasonable.

(5) The evidence does not give sufficient detail to permit findings as to whether Dorevitch unreasonably intended that same-sex couples not have access parental leave or that it unreasonably refused to amend its proposed parental leave provision in this respect. Certainly the evidence does not support the proposition that any disagreement about this issue was a major impediment to the parties reaching an agreement.

(6) Assuming, without deciding, that conduct after the termination of protected industrial action is relevant to the s 275(f) consideration, we do not consider it to be clear that Dorevitch's abrupt decision on 25 September 2017 to put its wage offer to a vote of employees was contrary to s 266. Although s 266 is far from pellucid on the issue, the fact that s 266(1) requires the making of a workplace determination only where "*the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement*" by the end of the post-industrial action negotiating period implies that if all such matters *are* settled, then an enterprise agreement rather than a workplace determination will follow. Arguably, where employees vote to approve an enterprise agreement during the post-industrial action negotiating period, all such matters are settled. Further, the evidence did not clearly establish that it was Dorevitch's decision to put its proposed

agreement to a vote of employees that caused the 3 October 2017 conference not to proceed.

(7) We do not consider that the terms included in Dorevitch's proposed workplace determination prepared for the purpose of the arbitration has any relevance to the bargaining process.

(8) We do not consider that Dorevitch failed to comply with clause 42 of the 2004 Agreement. Clause 42 was intended to apply to negotiations that were to occur in 2007 so that there would be a new agreement in place by 31 December of that year. There is no evidence that either Dorevitch or the HSU took any step to achieve that outcome. We do not consider that the provision has any relevance to a bargaining process occurring a decade later.

[83] We do consider however that Dorevitch did act unreasonably in failing to make any wages proposal or offer to the HSU or the ANMF during the bargaining process until 30 August 2017, and even then making an offer that was more tokenistic than real having regard to the far more substantive wages proposal which Dorevitch advanced after the termination of protected industrial action. Once Dorevitch agreed to bargain, it was perfectly apparent that wage rates would be the major issue in the bargaining process having regard to the fact that many years had passed since the nominal expiry date of the 2004 Agreement without Dorevitch increasing wages other than by small amounts and on an ad hoc basis. The HSU had provided Dorevitch with a log of claims which included a claim for a large "catch-up" increase on 20 June 2016. In the period until June 2017, when the negotiations effectively broke down and the industrial dispute began, the parties had a total of 12 meetings and between those meetings engaged in extensive correspondence in which they exchanged their positions on a range of issues. Yet at no stage during this process did Dorevitch address the major issue in dispute. Remarkably, its own log of claims said nothing about wages.

[84] There was disputed evidence about the precise position concerning wage rates which Dorevitch advanced in the bargaining meetings in the period to June 2017. Mr Collins' evidence was that he would open every meeting by asking whether Dorevitch had a wage offer yet, and that Ms Fraumano replied by stating words to the effect of: "*You have our wage offer, it's zero*". Both Mr Collins and Mr Crawford gave evidence that Ms Fraumano communicated that any wage offer would be dependent on "*the whole package*". Ms Fraumano denied making the first statement, but accepted that the second reflected the position that was communicated and that "*Dorevitch was looking to obtain productivity increases in exchange for the wage offer that it would make*". It would not be unreasonable, we consider, for an employer's bargaining position on wages to be contingent on "trade-offs", that is, agreement to other changes to conditions sought by the employer. However, in circumstances where wage rates was the major issue for the reason earlier stated, it was simply not reasonable for Dorevitch not to advance any position at all on wage rates in 12 months of negotiations. Even where it sought trade-offs, Dorevitch should have given some indication of what wage increase would be available if the trade-offs were agreed to. It never did this.

[85] It was the failure of Dorevitch to advance any proposal concerning wage rates which could then become the subject of bargaining which, we consider, caused the negotiations to break down in June 2017, resulting in the HSU's campaign of industrial action and Dorevitch's response action. The offer of a 3% increase that was eventually made on 30

August 2017 does not appear to have been a considered or realistic position, since Dorevitch was able to advance a more substantive, detailed and generous proposal shortly afterwards, on 20 September 2017, after the termination of protected industrial action. The 3% offer was also, notably, not linked to any trade-offs or "package" outcome, contrary to the bargaining approach which Dorevitch had ostensibly taken since June 2016.

[86] We consider that it is likely that had Dorevitch advanced its 20 September 2017 proposal during a much earlier stage of the bargaining process, an agreement would have been reached in mid-2017 without the need for an industrial dispute involving the taking of protected action. Although the HSU and the ANMF did not agree to the 20 September 2017 proposal when it was advanced, the evidence demonstrates that nonetheless they recognised it as a serious proposal and it prompted them to modify their positions and develop a new counter-proposal. Indeed, had Dorevitch not abruptly decided to go to a vote of its employees, it may well have led to agreement during the post-industrial action negotiating period. This is demonstrative of the unreasonableness of Dorevitch's approach to the wages issue during bargaining. We will treat this as a particularly relevant matter when we consider the issue of what date the wage increase we propose to award should be payable from.

The extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements

[87] We consider that Dorevitch, in respect of the failure to make a wages offer or proposal in bargaining prior to 30 August 2017 which we have just described, failed to comply with the good faith bargaining requirement in s 228(1)(c) and (d), namely "*responding to proposals made by other bargaining representatives for the agreement in a timely manner*" and "*giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals*". As earlier stated, the HSU had made a wages proposal in its initial log of claims, but the evidence does not indicate that this was ever given serious consideration by Dorevitch, and certainly no substantive response was given over the course of a year of bargaining. Again, we consider this conclusion to be relevant to the date upon which the wage increase we will award should be payable.

[88] The HSU contended that Dorevitch failed to comply with the good faith bargaining requirements in the following respects:

- contrary to s 228(1)(a), Dorevitch failed to attend and participate in meetings at reasonable times, including between April and July 2016, on 14 June 2017, and between 14 June and 15 August 2017, and on 3 October 2017;

- contrary to s 228(1)(b), Dorevitch failed to disclose relevant information in a timely manner, in that it failed to disclose its intention to make a unilateral wage increase in advance of the announcement to employees, failed to disclose prior to June 2017 that it had budgeted for wage increases in the 2017-18 year, failed to disclose its intention to request employees to vote upon a proposed agreement during the post-industrial action negotiating period, and failed to provide a copy of that proposed agreement to the HSU in a timely manner and to disclose changes in the proposed agreement to items which had previously been agreed in bargaining;

- contrary to s 228(1)(d), failed to consider the wage claim foreshadowed by the HSU on 25 September 2017, but instead proceeded to a vote of employees;

- contrary to s 228(1)(e), failed to refrain from capricious or unfair conduct which undermined freedom of association or collective bargaining, in that made unilateral wage increases, failed to retract the email of the evening of 7 August 2017, and put its proposed agreement to a vote of employees without the consent of the bargaining representatives in terms which were different to those previously agreed.

[89] We are not satisfied that any of these matters constitutes a failure to comply with the good faith bargaining requirements. Specifically we conclude as follows:

(1) Although occasions may be identified at which Dorevitch failed to meet with the HSU and the ANMF, taken over the entirety of the period during which bargaining occurred, we do not consider that there was a failure by Dorevitch to attend and participate in meetings at reasonable times. In relation to the period April to July 2016, Dorevitch was not sent the HSU's log of claims until 20 June 2016, and by 19 July 2016 Dorevitch had agreed to a timetable of meetings with the HSU which it subsequently adhered to. We have earlier described the events of 14 June 2017; we consider that the HSU engaged in provocative conduct in driving its mobile billboard in the immediate vicinity of Dorevitch's office at Heidelberg shortly before the scheduled bargaining meeting was due to commence, and it should not have been surprised in the circumstances that it succeeded in provoking Mr Moller into cancelling the meeting. The evidence did not establish that the HSU made efforts to arrange meetings in which Dorevitch refused to participate in the period 14 June to 15 August 2017, nor did it clearly establish that Dorevitch refused to attend a conference on 3 October 2017.

(2) We do not consider that s 228(1)(b) required Dorevitch to inform the HSU and the ANMF of its intention to increase wages in December 2016 before it told its employees directly. We note that Dorevitch did inform the bargaining representatives of the wage increase at the meeting held on 1 December 2016, which was the first meeting which occurred after it informed its employees. There was no evidence that, insofar as Dorevitch budgeted for wage increases in the 2017-18 year, the HSU made a request for information about this prior to June 2017 with which Dorevitch refused to comply. In relation to its decision to put its proposed enterprise agreement to a vote of employees, Dorevitch did disclose to the HSU and the ANMF on 25 September 2017 that it had decided to take this course of action before it informed its employees of this. Dorevitch also sent the HSU and the ANMF a copy of the proposed agreement before it provided it to employees. It was not conceded by Dorevitch that the proposed agreement, in the form eventually sent to employees, did not fail to include items which had previously been agreed.

(3) Dorevitch could not fail to consider a wages proposal which had only been foreshadowed but not actually communicated to it.

(4) We do not consider that Dorevitch's unilateral wage increase in December 2016 could be considered to be capricious or unfair for the same reason that we

> did not consider it to constitute unreasonable conduct during bargaining. In any event, it did not undermine collective bargaining as demonstrated by the fact that collective bargaining continued after the wage increase had been paid. We likewise do not consider that the failure to retract the email sent on the evening of 7 August 2017 was capricious or unfair conduct for the same reason as we did not consider it to constitute unreasonable conduct during bargaining, nor is there any evidence that this undermined collective bargaining. The proposition that fairness required Dorevitch to obtain the consent of the HSU and the ANMF to request employees to vote upon a proposed agreement in certain terms is contrary to authority and not accepted.

Incentives to continue to bargain at a later time

[90] In the circumstances of this matter, we consider that there will be little incentive for Dorevitch, the HSU and the ANMF to continue to bargain at a later time if the workplace determination we are required to make resolves, in a highly prescriptive way and for a long period of time, every issue that remains in dispute between the parties. In order for there to be an incentive to bargain in the future, there must remain subject matters to bargain about. It is clear that the core issue which caused the 2016-17 bargaining between the parties to fail was the issue of wage rates which, given the length of the period during which there had been nothing but small and ad hoc increases, meant that this became a very difficult issue about which to reach agreement because of the potential quantum of the wage increases involved. It will obviously be necessary for this core issue to be resolved in the workplace determination that we will make. But in relation to the other matters in dispute, the issue of incentives to continue to bargain at a later date will weigh heavily in our determination as to whether we should attempt a full and long term resolution of those matters or simply continue the status quo and leave it to the parties to resolve them in future bargaining.

Consideration – issues in dispute

Nominal expiry date

[91] The HSU and the ANMF have proposed a nominal expiry date of 1 July 2021, while Dorevitch has proposed 1 November 2021. We reject both positions. We consider that a nominal term of either duration is too long because it would act as a disincentive to the resumption of bargaining and would require us to set wages for some years in the future in circumstances where relevant factors such as inflation, general wages growth, general economic conditions and business conditions in the pathology industry cannot be reliably predicted over such a period. The general approach we prefer is to resolve the issue of wages, which has become intractable because of the amount of time which has passed since the last successful bargaining round, and put in place a relatively short-term workplace determination which will encourage an early return to bargaining to deal with other outstanding issues. Accordingly the workplace determination will have a nominal expiry date of 31 December 2019.

Classification structure, wages, allowances and shift penalties

[92] The proposals advanced by the parties with respect to wages were interlinked with their differing proposals for a modified classification structure. The differences, and areas of agreement, between the parties may be summarised as follows.

(1) *Pathology Collectors*: Dorevitch proposes the following classifications with accompanying definitions: Pathology Collector Grade 1 (with 3 levels), Pathology Collector Grade 2, Pathology Collector Grade 3, Pathology Collector Grade 4, Pathology Reliever Grade 1 (with 3 levels), Pathology Reliever Grade 2, and Pathology Reliever Grade 3. The definition of the Pathology Collector Grade 4 classification was the subject of agreement after 16 October 2017. There is also a classification for Registered Nurse who performs the duties of a Pathology Collector Grade 4 which is a matter that was agreed as at 16 October 2017 and accordingly must be included in the workplace determination we make. The HSU proposes the following classifications, with definitions: Collector Grade 1, Collector Grade 2 (with 4 yearly incremental steps), Collector Grade 3 (with 4 yearly incremental steps), Collector Grade 4 (with 4 yearly incremental steps), Collector Grade RN (with 3 yearly incremental steps), Collector Reliever Grade 1, Collector Reliever Grade 2 (with 3 yearly incremental steps), Collector Reliever Grade 3 (with 3 yearly incremental steps), and Collector Reliever Grade RN (with 3 yearly incremental steps). The HSU's proposed determination contains the agreed classification definition for Registered Nurse, but it is not quite clear what this is intended to correspond to – presumably, it relates to the proposed classifications of Collector Grade RN and Collector Reliever Grade RN.

(2) *Couriers*: There is agreement (post-16 October 2017) upon a definition of the classification of Pathology Courier. Dorevitch proposes a single classification for Pathology Courier with 3 levels. The HSU proposes a single classification of Courier with 5 yearly increments.

(3) *Cleaners*: The parties were agreed as at 16 October 2017 as to classification definitions for Cleaner Grade 1 and Cleaner Grade 2 and accordingly they must be included in the workplace determination we make. Dorevitch's classification structure contains these 2 classifications, as does the HSU's, but the HSU provides for 3 yearly increments for Cleaner Grade 2.

(4) *Laboratory Assistants*: Definitions for the classifications of Laboratory Assistant Grade 1, Laboratory Assistant Grade 2 and Laboratory Assistant Grade 3 were agreed as at 16 October 2017 and must be included in the workplace determination we make. Dorevitch's classification structure provides for these classifications as does the HSU's, but the HSU proposes 3 yearly increments for the classifications of Laboratory Assistant Grade 2 and Laboratory Assistant Grade 3.

(5) *Clerks*: Definitions for the classifications of Clerk Grade 1, Clerk Grade 2, Clerk Grade 3 and Clerk Grade 4 were agreed as at 16 October 2017 and must be included in the workplace determination we make. Dorevitch's proposed classification structure provides for these classifications, with Clerk Grade 2 having 3 incremental levels. The HSU proposes that there be 3 yearly increments for the classification of Clerk Grade 2, Clerk Grade 3 and Clerk Grade 4.

(6) *Storepersons*: There was agreement as at 16 October 2017 upon definitions for the classifications of Storeperson Grade 1 and Storeperson Grade 2, and they must be included in the determination we make. Dorevitch included these two classifications in its proposed determination, but the HSU proposed that each classification have 3 yearly increments.

(7) *Maintenance Handyperson*: The parties had agreed as at 16 October 2017 to classification definitions of Maintenance Handyperson Grade 1 (unqualified) and Maintenance Handyperson Trade. Accordingly these definitions must be included in the determination we make. Dorevitch's proposed classification structure divides the Maintenance Handyperson Grade 1 (unqualified) classification into 2 levels: the first is for Year 1 and 2, and the second is Year 3. The HSU proposes that the Maintenance Handyperson Grade 1 (unqualified) and Maintenance Handyperson Trade classifications each contain 3 yearly increments. It also has a classification for Maintenance Handyperson Advanced, with 3 yearly increments. It does not propose a definition for this classification.

[93] The rates of pay proposed for the respective proposed classifications structures, and the associated wage increases, are not capable of simple description. During the hearing the parties provided wage comparison tables which identified the wage increases which would apply on top of the actual pay rates as they were as at 1 July 2017. Because the adjustments to pay rates made by Dorevitch since the nominal expiry date of the 2004 Agreement until 1 July 2017 have not been standard across the workforce but have differed as between classifications and also as between incremental levels within classifications (resulting from the need to ensure that rates for the lower-paid classifications kept up with award rates), there is no standard increase involved for the workforce. Dorevitch's proposal would, from 1 October 2017, increase pay rates for lower paid classifications in its structure (such as Collector Grade 1, Courier Yr 1 and Cleaner) by about 3-4%, and about 12-13% for higher paid classifications. It then proposes that there be a 3% increase from the commencement of operation of the workplace determination, and increases in line with the CPI (Melbourne, September quarter) every 12 months after that for 3 years. The HSU proposes increases ranging from 11% to 27% payable from 1 July 2017, and then increases of 3.5% effective from 1 July 2018, 1 July 2019 and 1 July 2020.

[94] We have determined that we will not attempt to resolve the differences between the parties in relation to a new classification structure. There was insufficient evidence before us concerning the nature of the work performed, employees' skill development over time and the current make-up of the workforce in terms of classification distribution and years of service to permit us to make the sort of judgments required to establish a new long-term classification structure. The parties' submissions barely addressed some of the major differences between them. Additionally we consider that the creation of a long-term and sustainable classification structure for the parties would best be arrived at through future bargaining. Accordingly, except as modified by agreement, we will largely retain the classification structure contained in the 2004 Agreement as relevant to the agreed coverage of the workplace determination we make. We will adopt classification definitions where they have been agreed in relation to existing classifications. We will also include the two agreed new classifications and their definitions (the pay rates for these classifications are dealt with separately below). Existing classifications which have been retained but for which there is no agreed definition will not be assigned a definition, consistent with the position in the 2004 Agreement. Attachment A sets

out the translation table from the classifications as described in the 2004 Agreement to the classification in the workplace determination we will make.

[95] In relation to the rates of pay to be set, we consider the following propositions to be critical:

- there is no evidence that there has been any diminution in the value of work performed by Dorevitch employees since the nominal expiry date of the 2004 Agreement;

- the wage rates of Dorevitch employees have declined significantly in real terms since the nominal expiry date of the 2004 Agreement, and have fallen well behind when compared to wages growth in the Australian economy generally over that period;

- the wage rates of Dorevitch employees have been kept artificially low over an extended period due to a lack of bargaining power and the failure of bargaining when it has occurred;

- the Dorevitch business is in a sound commercial position, and it is likely to enjoy continued revenue growth over the limited term of the workplace determination we will make; and

- the low wages growth for Dorevitch employees has no rational connection to the viability or profitability of Dorevitch's business or to the state of the pathology industry generally.

[96] We consider that in the circumstances described, the appropriate course is to increase the rates of pay as they were in the 2004 Agreement as at the nominal expiry date of 1 July 2007 by an amount which preserves their real value. Using the Consumer Price Index for Melbourne, this requires, as at the date of this decision, a total increase of 29.5% to those 1 July 2007 rates. That is not of course the actual increase which employees will receive, since pay increases of varying amounts have been paid by Dorevitch since 1 July 2007, and they will be absorbed into the new rates. The actual increases involved will be in the range of approximately 4%-20%. In some cases, the increases will be large in nominal terms, but in the over 14 years since the nominal expiry date of the 2004 Agreement, the total increase will remain significantly below the rate of increase in the National Minimum Wage (40.5%) and average wages growth (38.8%). We reject Dorevitch's submissions that pay increases which maintain the real value of the 2007 rates would have a "*chilling*" effect on bargaining. Dorevitch's employees will not have shared in the real wages growth which the Australian workforce generally has enjoyed since 2007, notwithstanding the increases we propose to award them, and the relative position vis-à-vis the applicable award rates will have declined significantly because award rates have been increased at a higher rate than inflation. If Dorevitch employees seek to improve the real value of their wages, they will have to do so through future bargaining.

[97] Having regard to the history of bargaining which we have earlier set out, and our conclusion that Dorevitch acted unreasonably and did not comply with the good faith bargaining requirements by failing to make any wages offer or proposal until 30 August 2017, well over a year after bargaining had commenced, we consider that a substantial proportion of the total increase should be payable on and from 1 July 2017. Therefore the workplace determination will require Dorevitch to pay employees, upon the commencement of operation

of the determination, an amount representing a 25% increase on the 1 July 2007 rates in the 2004 Agreement. The remainder (4.5%) will be payable on and from the date of commencement of the workplace determination. We have also determined that a further increase of 2.5% should be payable 12 months after the date of the commencement of operation of the determination. We consider this amount to be appropriate having regard to current and expected rates of inflation and wages growth. In summary therefore the wage increases will be as follows:

- from **1 July 2017**, an increase of **25%** to the rates in the 2004 Agreement as at its nominal expiry date;

- from the determination's **date of commencement**, a further increase amounting to **4.5%** upon the rates in the 2002 Agreement as at its nominal expiry date; and

- **12 months after the date of commencement**, a **2.5%** increase to the determination's wage rates.

[98] In reaching this conclusion, we reject Dorevitch's submission that it should not be compelled to maintain the real value of the wage rates it agreed to in the 2004 Agreement, which were substantially above award rates at the time (in the range of 12-27%), because this would have a "*chilling*" effect on bargaining. Merely maintaining the real value of those wages rates means that employees and their bargaining representatives, the HSU and the ANMF, will have the incentive to engage positively in future bargaining in order to improve their real incomes and to make up some of the ground they have lost compared to the general labour market in terms of wages growth.

[99] There are two instances where agreed new classification definitions have been adopted but the classifications and pay structures have not been agreed. Our conclusions concerning these matters are as follows:

(1) *Pathology Collector Grade 4* - This agreed new classification has no equivalent in the 2004 Agreement. As earlier stated, Dorevitch proposed a single new classification, whereas the HSU proposed a new classification with 4 yearly increments. We do not consider that there is any evidence before us which demonstrates that there would be skill development for persons graded within the new classification justifying the establishment of new incremental pay levels based on years of experience. There will therefore be a single pay level for the new classification. In their proposals, both parties had an approximate 5.2% differential between their proposed Pathology Collector Grade 3 and Pathology Collector Grade 4 rates. We will adopt that agreed assessment of relativity. The rate for a Pathology Collector Grade 4 will be set at 5.2% above that for a Pathology Collector Grade 3 Year 3.

(2) *Registered Nurse* - This position has a separate industrial history. It derives from a classification in the *Gippsland Pathology Service and HSUA and ANF Enterprise Agreement 2003* (Gippsland Agreement). Gippsland Pathology was a business acquired by Dorevitch in 2007. The Gippsland Agreement provided that staff employed within the classification of "*Pathology Collector, (Division 1 Nurse) – Grade 2 and who maintain their registration as R.N. (Division 1 Nurse)*" would retain their classification of "*Pathology Collector Division 1*

> *Grade 2*". This was retained as a grandparented arrangement which currently only applies to three employees, who would otherwise be classified as Pathology Collectors Grade 3. Contrary to the position of the ANMF, we do not consider that anything in the evidence establishes that registered nurses performing work as pathology collectors perform work of higher value because of their qualification justifying a higher rate of pay. Accordingly we will simply preserve the position of the three nurses who will fall into the new Registered Nurse classification by maintaining their current relativity with the classification of Pathology Collector Grade 3. Therefore the current position whereby, as at 1 July 2018, Registered Nurses are paid a rate ($27.50 per hour), which is 19.7% above the rate for a Pathology Collector Grade 3 Year 3 ($22.97), will be maintained for the three nurses who are the subject of the grandparented arrangement.

[100] The existing allowances in the 2004 Agreement will be retained and adjusted by the same percentage amounts as the wage rates. There has been agreement reached concerning the introduction of a new "*buddy allowance*", with a quantum of $1.55 per hour. As we understand it, it is also agreed that this allowance will not be payable from any date prior to the date the workplace determination comes into effect. This allowance will be adjusted in line with wage rates and other allowances by 2.5% 12 months after the workplace determination takes effect.

[101] Shift allowances in the 2004 Agreement, and as currently paid, are expressed as flat dollar amounts payable per shift. They will be adjusted in line with wages in order to maintain their relativity with wage rates and the real value of the compensation provided for the disabilities associated with working shifts.

Definition of "shiftworker" and the entitlement to an additional week of annual leave

[102] Clause 3.1.7 of Dorevitch's proposed determination provides that "shiftworker" be defined to mean: "*A shiftworker for the purpose of the additional annual leave in the NES is an employee who works for four (4) or more hours on ten (10) weekends in the year*". Additionally, clause 28.3(a) of its proposed determination provides that an employee "*who works for four (4) or more hours on ten (10) weekends in a year is entitled to an additional week's annual leave on the same terms and conditions*". Clause 28.3(b) then provides that "*Employees who meet the requirements of (a) will be considered shift workers for the purpose of the additional annual leave provided for in the NES*".

[103] The HSU proposes, in clause 3.6 of its draft determination, that shiftworker mean "*…an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of a day worker as defined in clause 30*". Clause 30 provides that the ordinary hours of work for a day worker are to be worked between 6.00am and 7.00pm Monday to Friday unless stated otherwise. This latter provision is agreed to by Dorevitch. Clauses 36.3-36.8 of the HSU's proposed determination contain provisions concerning the additional week's annual leave. Clause 36.6 sets out two categories for employees who are eligible for this entitlement: the first (in clause 36.6.1) is the same in substance as Dorevitch's clause 28.3(a), and the second (in clause 36.6.2) consists of any employee who "*Works for three (3) or more ordinary hours on twenty six (26) or more occasions falling on a weekend in a year*". Clause 36.7 of the HSU's proposed determination provides that employees in the two categories will

be considered to be shiftworkers for the purpose of the additional annual leave provided for in the NES.

[104] Section 87(1)(b)(i) of the FW Act provides that an employee is entitled to 5 weeks of paid annual leave if "*a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards*", and s 87(1)(b)(ii) affords the same entitlement if "*an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards*". In relation to the approval of enterprise agreements which cover employees who are defined or described as a shiftworker for the purpose of the NES in a modern award which covers them, s 196(2) provides that "*The FWC must be satisfied that the agreement defines or describes the employee as a shiftworker for the purposes of the National Employment Standards*". Section 272(5)(b), to which we have earlier referred, provides that a workplace determination must not include a term that, if the determination were an enterprise agreement, would require the agreement not to be approved because of the operation of Subdivision E of Division 4 of Part 2-4, which includes s 196.

[105] There appears to be no dispute that the workplace determination we are required to make will cover employees who are covered by the *Health Professionals and Support Services Award 2010* (Health Award) and are defined as shiftworkers for the purpose of the NES. Clause 31.1(b) of that award provides: "*For the purpose of the NES a shiftworker is an employee who is regularly rostered to work Sundays and public holidays*". We also note that clause 31.1(b) of the *Nurses Award 2010* provides that, for the purpose of the additional annual leave provided by the NES, a shiftworker is defined as an employee who is regularly rostered over seven days of the week and regularly works on weekends.

[106] Accordingly the workplace determination we make, in order to satisfy the s 272(5)(b) requirement, must at least include a provision defining a shiftworker for the purpose of the NES as being an employee who is regularly rostered to work Sundays and Public Holidays, and perhaps also an employee who is regularly rostered over seven days of the week and regularly rostered to work Sundays and public holidays. Dorevitch submits, and the HSU does not dispute, that the definition of shiftworker as an employee who works for four (4) or more hours on ten (10) weekends in the year is sufficient to achieve compliance with s 272(5)(b). It also appears to be agreed that this definition reflects the status quo.

[107] The HSU submits that its claim to have an additional category of employees defined as shiftworkers is "*meritorious*", would provide for "*just compensation for the anti-social nature of weekend work*", and is "*fair and equitable*" for employees who are "*regularly and routinely rostered for short weekend shifts*". We are not persuaded that this claim should be granted. The status quo position not only meets the requirement in s 272(5)(b), but goes well beyond it and may be characterised as reasonably generous in its conferral of the five weeks' annual leave entitlement. The evidentiary basis for a further extension of this entitlement was not established. It is a claim which the HSU will have the incentive to pursue in future enterprise bargaining. Accordingly the annual leave provision in the workplace determination will reflect clause 28.3 of Dorevitch's proposed determination.

[108] The definition of shiftworker in clause 3.1.7 of Dorevitch's proposed determination is unnecessary because it is merely repetitive of clause 28.3(a). The definition of shiftworker in clause 3.6 of the HSU's determination is also unnecessary because clause 30, which is in agreed terms, adequately explains the circumstances in which it applies.

Union definition

[109] The HSU's proposed determination contains, at clause 3.7, the following definition: "*Union or unions includes the Health Services Union ("HSU") Victoria No. 1 Branch trading as the "Health Workers Union" ("HWU") and the Australian Nursing and Midwifery Federation ("ANMF")*". Dorevitch's proposed determination does not contain such a definition.

[110] We consider that the inclusion of a definition of "*union*" has merit because the term is used at various places in both parties' proposed determinations, including in agreed terms that will be included in the workplace determination which we will make. However the definition cannot render obligations under the determination referable to a branch of a union, because it has no separate legal identity.[11] The definition will therefore simply refer to the name of the registered organisations, being the Health Services Union and the Australian Nursing and Midwifery Federation. The coverage provision of the determination, insofar as it refers to the employee organisations which were bargaining representatives for employee as required by s 267(4)(c), will reflect the definition in this respect in accordance with s 267(4)(c).

Dispute resolution

[111] There remain two issues concerning the content of the dispute resolution provision in determination to be made. The first concerns whether the procedure is to apply to disputes concerning individual flexibility arrangements. In this respect, clause 9.1.2 of the HSU's proposed determination provides that the procedure will apply to disputes relating to "*the National Employment Standards (including all matters relating to requests for extended parental leave and requests for flexible working arrangements)*". The equivalent provision in Dorevitch's proposed determination refers simply to disputes relating to the NES.

[112] The second issue concerns a claim by the HSU that the disputes resolution procedure contain the following provision (clause 9.11 of the HSU's draft determination): "*An employee who is part of the dispute will be released by the employer from normal duties as is reasonably necessary to enable them to participate in this dispute settling procedure so long as it does not unduly affect the operations of the employer*". No such provision is included in Dorevitch's proposed determination.

[113] In respect of the first issue, we will simply adopt Dorevitch's formulation, which reflects the expression of the requirement for a dispute settling procedure in s 273(2). We note that there is some doubt whether a dispute resolution in a workplace determination can empower the Commission to deal with a dispute concerning whether an employer had reasonable business grounds to refuse a request for flexible working arrangements under s 65(5) or extended parental leave under s 76(4), having regard to the terms of s 739(2)(a), but we do not need to express a final view concerning this question.

[114] In relation to the second issue, the current dispute procedure in the 2004 Agreement does not contain any provision of the type proposed by the HSU, and there is insufficient evidence to persuade us that there is any need to depart from the status quo in this respect.

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[11] *Williams v Hursey* [1959] HCA 51; (1959) 103 CLR 30

This is, again, an issue which the HSU may pursue in future enterprise bargaining. If there arises any difficulty under the workplace determination concerning an unreasonable refusal by Dorevitch to release an employee from duty in order to attend dispute resolution proceedings conducted by the Commission pursuant to the dispute resolution procedure, it would be open for the HSU to apply for an order under s 590(2)(a) compelling the employee's attendance. Further, any dispute about non-payment of an employee for participation in the dispute resolution process could itself become the subject of a dispute and ultimately be arbitrated by the Commission pursuant to the procedure.

Termination of employment – serious misconduct

[115] We have earlier, in paragraph [20], set out the provision sought by Dorevitch, which is opposed by the HSU. We consider that it is unexceptional to have a provision permitting the termination of an employee without notice for serious misconduct. A provision of this nature in clause 14 of the *Health Services Union of Australia (Private Pathology - Victoria) Award 2003* (*2003 Award*) was incorporated into the 2004 Agreement by clause 5 of that agreement, and thus forms part of the status quo. The provision sought by Dorevitch, in a slightly redrafted form, will be included in the workplace determination we will make.

Redundancy – suitable redeployment

[116] Clause 13.5 of Dorevitch's proposed determination and clause 19.4 of the HSU's proposed determination set out the criteria for suitable redeployment of employees whose positions have become redundant. The only difference between the proposed provisions is that the HSU proposed, in clause 19.4.2, a criterion not included in Dorevitch's proposed provision, namely: "*…is a position that the employee is qualified to perform, or otherwise could undertake with reasonable training*". Dorevitch's concern is that "*reasonable training*" might be taken to include external training at its expense in order that the employee could perform work they had never been qualified to perform before. We consider that this concern is a reasonable one, which would be ameliorated if the potential training was confined to training that Dorevitch was able to provide internally. Therefore the criterion will be included in the following form: "*...is a position that the employee is qualified to perform, or otherwise could undertake with reasonable training capable of being internally provided by the employer*".

Payment of wages – frequency and method

[117] We have earlier set out, in paragraph [26] above, the payment of wages provisions sought in the HSU's proposed determination. Those provisions were opposed by Dorevitch. We do not consider that the provisions should be included in the workplace determination we will make. The requirement in the HSU's proposed clause 22.1.3 that wages be paid on a Thursday is redolent of the era of cash payment of wages, and is unnecessary given that wages will have to be paid at weekly, fortnightly or, by agreement, monthly intervals. The requirement concerning the correction of underpayment of wages was not contained in or incorporated into the 2004 Agreement, and thus is not part of the status quo. The evidence did not support the proposition that underpayments due to the erroneous calculation of wages were a problem of sufficient significance such as to require a specific provision to address it. In any event, it undercuts the rigour of the provisions concerning the underpayment of wages which are agreed: if Dorevitch fails to pay in full wages that are owing by the end of the

applicable payment interval, it will already be in breach of the determination and will not have the benefit of an allowance of time to correct this.

Certificates of service

[118] Clause 20 of the HSU's proposed determination would provide as follows:

> "**20. Certificate of service**
>
> Upon request from an employee, the employer will provide a certificate of service outlining the following:
>
> 20.1 Name of employer;
>
> 20.2 Employee's classification (e.g. Collector Grade 2 Year 4), rate of pay and regular allowances;
>
> 20.3 Date of commencement and termination;
>
> 20.4 The workplace/campus/location where the person was situated;
>
> 20.5 Their mode of employment i.e. full-time, part-time;
>
> 20.6 Fortnightly hours on commencement and on termination;
>
> 20.7 Summary of training (both external and in-service) undertaken during employment, including training nominal hours and indication of successful completion so far as such information is reasonably accessible to the employer."

[119] This provision is opposed by Dorevitch.

[120] We do not consider that this provision should be included in the workplace determination to be made. It does not form part of the status quo. There was no evidence indicating that there was an existing problem requiring remediation by a provision of this nature. The HSU will have the opportunity to pursue its claim for such a provision in future enterprise bargaining, and this will constitute an incentive to bargain at a later time.

Rostering arrangements

[121] The provisions applying to rostering arrangements are agreed except in the following respects. First, the HSU proposes the following provisions in clauses 32.4 and 32.5 of its proposed determination, which are opposed by Dorevitch:

> "31.4 In lieu of the ordinary rostering arrangements, by agreement, an employee may fix their roster.
>
> 31.5 An employee may cancel their fixed roster at any time, by giving written notice to the employer. In such cases, the employee's roster will revert to the ordinary rostering arrangements from the commencement of the next full roster period,

being not less than five clear days after their cancellation is received by the employer."

[122] The HSU submits that these provisions form part of the status quo, in that they are provisions to be found in the 2003 Award which were incorporated into the 2004 Agreement by clause 5 of that agreement. That submission appears to be founded on clause 17.1.5-17.1.7 of the 2003 Award, which provided:

> "**17.1.5** An employee, by making a request in writing to the employer, may have their roster fixed by the provisions of 17.1.6, in lieu of 17.1.1 to 17.1.3.
>
> **17.1.6** Rosters shall be fixed by mutual agreement, subject to the provisions of this award.
>
> **17.1.7** An employee may repudiate the request referred to in 17.1.5 at any time, by giving written notice to the employer. In such a case the roster for the employee shall be fixed according to the provisions of 17.1.1 to 17.1.3 of this clause, from the commencement of the next full roster period being not less than five clear days after such repudiation is received in writing by the employer."

[123] It is not apparent to us that the provisions proposed by the HSU accurately reflect the above 2003 Award provisions. Clauses 17.1.5 and 17.1.6 constitute a facilitative mechanism for the fixation of rosters by mutual agreement. That is not the same thing as the HSU's proposal that "*an employer may fix their roster*", albeit by agreement. The meaning of clause 17.1.7 is not altogether clear, but read literally it appears to mean that an employee's request for an alternative roster to be fixed by agreement may be withdrawn – not that an alternative roster, once agreed, can unilaterally be abandoned by the employee on five days' notice. We do not consider therefore that the HSU's proposed provisions can be justified on the basis that they represent a mere continuation of the status quo.

[124] It is desirable, we consider, that the rostering provisions permit non-standard work rosters to be implemented by mutual agreement between Dorevitch and individual employees to facilitate an appropriate balance between work and family commitments. There are a number of agreed provisions which permit specific types of non-standard rosters. We consider it is sufficient in addition to including in the determination to be made a provision permitting non-standard rostering arrangements to be reached by agreement between Dorevitch and individual employees, provided any such agreement is recorded in writing and is terminable by Dorevitch or the employee on reasonable notice.

Recall to work overtime and other overtime issues

[125] As earlier discussed, we regard the "*Recall to work overtime*" provision as having been agreed, and accordingly it is not necessary to resolve this issue.

[126] In relation to the issue of time off instead of payment for overtime, there appears to be only one substantive difference between the parties, namely the quantification of the time to be taken off in lieu of payment for overtime worked. Dorevitch proposes that the time to be taken off in lieu be equal to the period of overtime worked. The HSU proposes that the time to be taken off be calculated by reference to the number of hours of pay that the overtime worked would have attracted so that, for example, if an employee worked two hours which,

because of a penalty rate of time and a half, would attract three hours' pay, the time off in lieu would be three hours.

[127] The status quo position is contained in clause 25.1.4(a) of the 2003 Award and in clause 23 of the 2004 Agreement. The former provision is as follows (emphasis added):

> **25.1.4(a)** In lieu of receiving payment for overtime, employees, may with the consent of the employer, take time-off for a period of time equivalent to the period worked in excess of ordinary rostered hours of duty, *plus a period of time equivalent to the overtime penalty incurred*. Time in lieu shall be taken at a time agreed to between employer and employee within 28 days of the overtime being worked.

[128] Clause 23 of the 2004 Agreement provides:

> **23. Local Time Off in Lieu Arrangements**
>
> Staff and their local managers may agree to arrangements that allow employees to work additional hours, which can be stored and taken at a future time as leave, where the workload allows. Local arrangements will include the following:
>
> • Individual staff may accrue up to 5 days by agreement;
>
> • Accrued leave has to be taken within 28 days of its accrual. If this is not possible, the employee may elect to either take it at an alternate agreed time or be paid out; and
>
> • Hours will be taken as leave or paid out at the applicable Award I EBA rate for the time when the additional work was performed.

[129] The 2003 Award provision is clearly consistent with the HSU's position. The 2004 Agreement provision above appears to be silent as to the quantification of the time off in lieu in which case, consistent with clause 5 of the 2004 Agreement, the 2003 Award provision would apply. The status quo appears therefore to be consistent with the HSU's position. We are not satisfied there is any demonstrated reason to change this. Accordingly the time off instead of overtime provision will incorporate the HSU's position. If Dorevitch wishes to pursue change in this area, it can do so in future enterprise bargaining.

[130] We have earlier set out, in paragraphs [30]-[31] above, the issue concerning the reasonable overtime protection provision. The HSU's proposed provision contains 8 of the 10 matters required by s 62(3) to be taken into account in determining whether additional hours requested to be worked are reasonable or unreasonable, and we have found that a ninth matter was agreed to be included as at 16 October 2017. In circumstances where both parties have agreed that the reasonable overtime protection provision is to operate by reference to matters listed in s 62(3), we see no good reason why all those matters should not be included. Dorevitch's proposed clause 25.4.1(g) (as well as the agreed clause 25.4.1(f)) will be included in the provision which will appear in the determination we will make.

Public holiday issues

[131] There are a number of issues relating to the public holiday provisions in the parties' respective proposed determination. First, clause 31.1 of Dorevitch's proposed determination

seeks to confine the entitlement to public holidays to full-time employees. Clause 37.2 of the HSU's proposed determination is not so confined.

[132] Second, clause 37.3 of the HSU's proposed determination would provide that full-time Monday to Friday employees, and part-time employees who work in services, facilities or centres that operate only on a Monday to Friday basis, would receive substitute holidays where Christmas Day, Boxing Day, New Year's Day or Australia Day falls on a Saturday or Sunday. Clause 31.2 of Dorevitch's proposed determination simply provides for holidays in lieu when Christmas Day, Boxing Day, New Year's Day or Australia Day fall on a Saturday or Sunday. The difference between the parties appears about this issue appears to arise from clause 31.1 of Dorevitch's proposed determination, so that the public holidays in lieu provisions it proposes would presumably operate only by reference to full-time employees.

[133] Third, clause 37.5 of the HSU's draft determination provides that where an employee works on a public holiday falling on a Saturday or Sunday for which there is a substitute holiday, the employee will received public holiday penalty rates for working on the actual holiday and ordinary rates for the substitute holiday, except in the case of a full-time Monday-Friday employee or a part-time employee who works in an area that operates on a Monday-Friday basis, who will instead receive public holiday penalty rates for working on the substitute holiday. Dorevitch's proposed determination contains no such provision. The parties are also in disagreement concerning the formulation of the entitlement to public holiday penalty rates.

[134] Fourth, clauses 37.8 and 37.9 of the HSU's proposed determination provide that part-time employees will not be entitled to a public holiday unless they are required to work on the day, but in the case of part-time employees who work a rotating roster, where the employee has worked the day of the week on which the public holiday falls on 50% or more occasions over the previous six months, the employee will be entitled to receive the rostered off benefit for that holiday. The equivalent provision in Dorevitch's draft determination simply provides that "*Part time employees who are rostered to work and work on a public holiday will be paid for the time worked on the public holiday at the rate of double time and a half*".

[135] The status quo with respect to these contested issues is as provided for in clause 34.1 of the 2003 Award, as incorporated into the 2004 Agreement by clause 5 of that agreement. The parties have, in their respective proposed determinations, "cherry-picked" from clause 34.1. No evidence was adduced by any party that satisfies us that there is any difficulty with the status quo. Accordingly all the contested public holiday issues will be resolved by retaining the relevant provisions of clause 34 of the 2003 Award. The public holidays clause in its entirety, incorporating the agreed matters, will be as follows:

X. PUBLIC HOLIDAYS

X.1 Public holidays are provided for in the NES. This clause contains additional provisions.

Entitlement

X.2 An employee shall be entitled to holidays on the following days:

X.2.1 New Year's Day, Good Friday, Easter Saturday, Easter Monday, Christmas Day and Boxing Day; and

X.2.2 the following days as prescribed in the relevant States, Territories and localities: Australia Day, Anzac Day, Queen's Birthday and Eight Hours' Day or Labour Day; and

X.2.3 Melbourne Cup Day or in lieu of Melbourne Cup Day, some other day as determined in a particular locality

Public holidays in lieu

X.3 When Christmas Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 27 December.

X.4 When Boxing Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 28 December.

X.5 When New Year's Day or Australia Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on the next Monday.

Public holiday penalty rate

X.6 If an employee works on a public holiday they shall be paid double time and a half for the time worked.

Public holiday falling on a rostered day off

X.7 If the public holiday falls on the employee's rostered day off, he or she will be entitled to one and a half ordinary day's pay or, if the employee and employer so agree:

X.7.1 the employee may take one day off within four weeks of the public holiday; or

X.7.2 have one day added to his or her annual leave.

Public Holidays and Part Time Employees

X.8 A part-time employee who is ordinarily not required to work on the day of the week on which a particular holiday is observed shall not be entitled to any benefit for any such public holiday unless they are required to work on the public holiday.

Easter Saturday

X.9 An employee who works on Easter Saturday will be paid double time and a half for the time worked. An employee who does not work on Easter Saturday will not be entitled to receive payment for that day.

Substitution

X.10 The employer and an employee may, by agreement, substitute another day for a public holiday.

Cross Border Issues

X.11 In recognition of the special cross border circumstances relating to the Albury Laboratory on the NSW Labour Day holiday, staff will be paid double time and a half for the hours worked (at the appropriate rate).

Personal/carer's leave issues

[136] There are two issues in respect of personal carer's leave. The first concerns the provision of evidence in relation to single-day absences. The HSU proposes, in clauses 38.4 and 38.5, that proof of absence generally may be required by Dorevitch on a discretionary basis. The HSU's proposed provision does not specifically address single-day absences. The provision proposed by Dorevitch (clause 3.4 of its determination) is: "*An employee will not be entitled to single days of paid personal leave on more than three (3) occasions in any one year of service unless the employee produces a medical certificate from a registered medical practitioner, dentist, physiotherapist, psychologist or psychiatrist*".

[137] It appears that the current position is governed by clauses 31.3.3 and 31.3.4 of the 2003 Award (as incorporated into the 2004 Agreement by clause 5) operating in tandem with clause 14.1 of the 2004 Agreement and clause 31.3.4 of the 2003 Award, as incorporated by clause 5 of the 2004 Agreement. Clauses 31.3.3 and 31.3.4 of the 2003 Award provide:

31.3.3 The provisions of sub clauses 31.3.1 and 31.3.2 are subject to the provision that such illness is certified by a legally qualified medical practitioner (or a statutory declaration signed by an employee shall be deemed to be satisfactory evidence of sickness) and evidence thereof, if required by the employer is produced within three days of such a request.

31.3.4 An employee may be absent through sickness for one day without furnishing evidence of such sickness on not more than three occasions in any one year of service, provided that where an employee is rostered to work on a public holiday and fails to do so through sickness, they shall not be entitled to sick leave under this clause unless they furnish evidence of such sickness within three days of their return to work.

[138] Clause 14.1 of the 2004 Agreement provides:

14.1 Extension of Sick leave Certification

For the purpose of certifying leave through illness the employer will accept certificates from the following practitioners where they are registered to practice by the relevant state authorities: medical practitioners, clinical psychologists and dentists.

[139] It seems to us that clause 14.1 of the 2004 Agreement operates to identify the type of medical practitioners who may provide certification pursuant to clause 31.3.3 of the 2003 Award.

[140] We are not satisfied that there is any difficulty with the operation of the status quo. Accordingly the currently applicable provisions will be placed in the workplace determination we will make.

[141] The second issue concerns the quantum of the entitlement to leave. Clause 32.8 of Dorevitch's proposed determination provides for an entitlement to 12 days' leave in the first year of service and 14 days in the second and following years of service (with a pro rata entitlement for part-time employees). Clause 38.9 of the HSU's proposed determination provides for 12 days in the first year of service, 14 days in the second to fourth years inclusive, and 21 days in the fifth and following years.

[142] The current position with respect to the sick leave entitlement is as provided for in clause 31.1.3 of the 2003 Agreement, as incorporated into the 2004 Agreement by clause 5 of that agreement. It provided:

> **31.3.1** An employee is entitled to use up to 7 hours and 36 minutes for each month of service of the current year's personal leave entitlement as sick leave in the first year of service, 106 hours and 24 minutes in the second, third and fourth years of service and 159 hours and 36 minutes in the fifth and following years of service.

[143] It should be noted that clause 31.1.2 of the 2003 Award provided for a greater overall entitlement than clause 13.3.1 for personal leave, which under clause 31.1.1 was defined as a leave entitlement applicable to absence due to personal illness or injury (i.e. sick leave), caring for a family or household member (carer's leave), or bereavement. However all parties are agreed as to a separate entitlement to bereavement leave of four days per year, so this can be disregarded. We are not satisfied that there is any difficulty with the current entitlement, expressed as applicable to personal/carer's leave. In particular, we are not satisfied that there is any pressing need to significantly reduce the entitlement for longer-serving employees, as proposed by Dorevitch. If it wishes to seek a personal/carer's leave entitlement which is closer to the NES level, that is a matter which it will have the opportunity and incentive to pursue in future enterprise bargaining.

[144] The HSU's proposal seeks to convert the current entitlement, which is expressed in hours and minutes, to days, but this may alter the quantum of the entitlement for employees who work other than standard-length days. We do not consider that retaining the entitlement in its current form would run any risk that the NES entitlement in s 96 of the FW Act, which is expressed in days, might be excluded in contravention of s 55(1)[12] (as rendered applicable by s 186(2)(c) and s 272(5)(a)) because of the generous quantum of the current entitlement. Accordingly clause 31.3.1 of the 2003 Award will be incorporated into the determination we will make, although the form in which it is drafted will be modified for the sake of clarity. The new provision will be:

> X.X Personal leave is accrued based on length of service as follows:
>
> X.X.1 91 hours and 12 minutes for full time employees and pro-rata for part time employees in the first year of service;

---

[12] See *RACV Road Services Pty Ltd v ASU* [2015] FWCFB 2881; 249 IR 150

X.X.2 106 hours and 24 minutes for full time employees and pro-rata for part time employees in the second to fourth year of service (inclusive);

X.X.3 159 hours and 36 minutes for full time employees and pro-rata for part time employees in the fifth and following years of service.

Union matters

[145] In its proposed determination, the HSU seeks a number of provisions grouped together under the heading "*Union matters*". They deal with a requirement for Dorevitch to make available a noticeboard at each workplace for the purpose of the provision of union information, to give unpaid leave to employees who serve on the HSU's Branch Committee of Management or National Council, to provide union delegates with reasonable paid time and access to equipment to perform their representative roles, and to make available information to new employees provided by the unions. The HSU submits that these provisions are justified because:

- the remoteness and isolation of many employees and the environments in which they work prevents the HSU from meaningfully exercising rights of entry under s 484;

- the proposed requirements in relation to notice boards and circulation of material are fair and just and not unduly onerous on Dorevitch;

- the provision concerning union delegates is consistent with the agreed term for professional training and development and would assist efficiency by reducing delays in obtaining union representation; and

- the proposed provisions create little if any inconvenience or cost for Dorevitch and recognise the important duties and obligations of employees performing roles within registered organisations.

[146] We are not satisfied that there is a proper merit basis for the provisions proposed by the HSU to be included in the workplace determination we will make. They do not form part of the status quo. We do not accept that the HSU (or the ANMF) have faced any particular inhibition in their capacity to effectively recruit and represent members amongst the Dorevitch workforce. Indeed the extensive evidence we have received concerning the bargaining process strongly suggests that the HSU has been highly effective in recruiting, organising, communicating with and representing members in Dorevitch. The HSU will have the opportunity and incentive to pursue its "*Union matters*" claim in future enterprise bargaining.

Accident make-up pay

[147] Dorevitch's and the HSU's draft determinations both contain extensive provisions concerning accident make-up pay. The proposed provisions are the same except in one respect: Dorevitch (in clause 49.6) proposes that the maximum period or aggregate periods of accident pay be 26 weeks for any one injury, whereas the HSU (in clause 52.9) proposes 39 weeks.

[148] Dorevitch employees currently have accident make-up pay entitlements derived from clause 22 of the 2003 Award, as incorporated into the 2004 Agreement by clause 5. Clause 22.1.13 of the 2003 Award provides that the maximum period or aggregate of periods of accident pay is 39 weeks where the entitlement arises on or after 1 January 1981. The HSU's proposal therefore represents a continuation of the status quo (contrary to the submissions of Dorevitch, which suggest that the entitlement lapsed when the 2003 Award was revoked). We are not satisfied on the evidence that there is any particular need to alter the currently applicable maximum period of payment of 39 weeks. Accordingly the HSU's proposed provision will be adopted. Dorevitch will have the opportunity and incentive to pursue alterations to the accident make-up pay scheme in future enterprise bargaining.

Requirements of sections 267, 268, 272, and 273

[149] A workplace determination made in accordance with the conclusions we have earlier expressed would, we consider:

- contain all the agreed terms as required by s 267(1)(a) and (2);
- deal with all the matters that were still at issue at the end of the post-industrial action negotiating period as required by s 276(1)(a) and (3);
- express its coverage in the form required by s 267(4);
- contain the mandatory terms as required by s 267(1)(c), namely a procedure for settling disputes in accordance with s 273(2), a flexibility term in accordance with s 273(4) and a consultation term in accordance with s 273(5);
- specify a nominal expiry date as required by s 267(1)(b) and s 272(2);
- not include terms about non-permitted matters, unlawful terms or designated outworker terms in accordance with s 267(1)(b);
- not include a term that would prevent the approval of the determination if it were an enterprise agreement because the term would contravene s 55 or because of the operation of Subdivision E of Division 4 of Part 2-4, in accordance with s 267(1)(b) and s 272(5); and
- does not contain any terms other than those required by s 267(1).

[150] There remains the requirement in s 272(4) that the determination must include terms such that it would, if it were an enterprise agreement, pass the better off overall test (BOOT) under s 193. The application of the BOOT to an enterprise agreement requires that every existing and prospective employee covered by a modern award to be better off overall under the agreement for which approval is sought than under the relevant modern award. It will involve the making of an overall assessment as to whether an employee would be better off under the agreement, which necessitates identification of the terms in the agreements

which are more and less beneficial to the employee than under the relevant award.[13] In respect of all employees apart from part-time employees, the application of the BOOT causes no difficulty because the rates in the determination we will make are significantly higher than the rates of pay in the relevant award, being the *Health Award*, and the other terms and conditions in the determination are either more beneficial or at least as beneficial as the award terms and conditions. To the extent that the *Nurses Award 2010* may arguably cover the three Gippsland pathology nurses, we consider that the same conclusion applies. The BOOT is therefore easily passed with respect to full-time and casual employees.

[151] In respect of part-time employees, the parties had agreed as at 16 October 2017 to two provisions with respect to the working of additional hours. The first was:

> "Part time employees who are directed to work in excess of their contracted hours (not including where an employee requests to work additional shifts) will be paid overtime rates as defined above. However, where a part-time employee works additional hours that are adjoining rostered ordinary hours (for example, completing required procedures after the conclusion of the rostered shift) this will not incur overtime rates and will be paid at ordinary time rates in fifteen minute intervals or part thereof up to thirty minutes, after which overtime rates will apply."

[152] The second was (in the drafting format used in the HSU's proposed determination):

> "Part time employees may at their discretion undertake work that is in addition to their normal rostered shifts at times when they are not rostered for their normal duties. These 'additional hours' will be undertaken in accordance with the following conditions and arrangements:
>
> (i) An employee must not work more than seventy six (76) ordinary hours per fortnight and one hundred and fifty two (152) ordinary hours per four week period;
>
> (ii) An employee must not work more than 7.6 ordinary hours in one shift. However, an employee may work up to ten ordinary hours in one shift by agreement;
>
> (iii) An employee will indicate their desire to work 'additional hours' by recording their name on a list of staff available to work 'additional duties' in the next roster period."

[153] Because these are agreed terms, they must be included in the determination we will make. However for the purpose of the application of the BOOT, they need to be compared to the equivalent provision, clause 28.1(d), in the *Health Award*, which is as follows:

> **(d) Part-time employees**

[13] *Loaded Rates Agreements* [2018] FWCFB 3610 at [115]

> Where agreement has been reached in accordance with clauses 10.3(b) or (c), a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause.

[154] The agreement referred to in the above provision is an agreement reached under clause 10.3(b) between an employer and a part-time employee before commencing employment on "*a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day*". Under clause 10.3(c), such an agreement "*may be varied by agreement and recorded in writing*".

[155] Under the first of the agreed part-time provisions agreed to by the parties, part-time employees may apparently be required to work on past their contracted hours for up to half an hour each day without overtime penalty rates. Conceivably, this might occur across five working days a week. That would amount to two and a half hours per week where under, agreed provision, no overtime penalty rates would be payable, compared to the *Health Award* under which a penalty rate of time and a half would be payable. However, the rates of pay in the determination we propose to make are sufficiently higher than the rates in the *Health Award* to ensure that part-time employees would always be better off overall.

[156] Under the second agreed provision, part-time employees may on request work additional hours, up to a total of 7.6 a day, 76 per fortnight or 152 per four week period, without the payment of overtime. The request having been made, it would of course require the employer's agreement then to allow such additional hours to be worked. The method of recording the request is by the employee writing their name on a list prepared for the purpose. The employer will then prepare a roster consistent with the request if there are available hours to be worked.

[157] We do not consider that this is, in substance, detrimental to part-time employees compared to the relevant provisions of the *Health Award.* Under the award, an employee may request, and an employee may agree to, the employee working additional hours without the payment of overtime. This may be achieved, either for a particular roster or other fixed period or on an ongoing basis by a written variation to the existing agreement concerning the pattern of hours pursuant to clause 10.3(c). If an agreement is made pursuant to clause 10.3(c) to expand the number of hours worked by the part-time employee, the overtime obligation in clause 28.1(d) is no longer applicable to those additional hours. The manner and form of a written variation to a part-time hours agreement under clause 10.3(c) is not prescribed and need not be attended by any particular formality. That the agreed provision achieves the same result by a slightly different administrative mechanism does not, we consider, constitute a detriment to part-time employees relevant to the BOOT. In any event, we note that clause 28.1(d) of the *Health Award* only confers an entitlement to overtime penalty rates where the employer *requires* the employee to work additional hours, which would not appear to be applicable to a situation where an employer accedes to an employee's request to work additional hours. The higher pay rates and other superior benefits in the determination that will be made will ensure that part-time employees are always better off overall than under the *Health Award*.

[158] We are therefore satisfied that a workplace determination made in accordance with the conclusions we have reached in this decision would satisfy the requirement in s 272(4) and hence that in s 267(1)(b).

Next steps

[159] A draft workplace determination to give effect to our decision will be provided to the parties together with a copy of this decision. Dorevitch, the HSU and the ANMF are directed to confer in relation to the draft document, and to file any submissions (jointly or separately) identifying any errors, omissions or other difficulties in the draft determination on or before 24 September 2018. We intend to make the final determination shortly thereafter. If all the parties agree on any further modifications to the draft determination, we will consider such modifications.

VICE PRESIDENT

Appearances:
B.Avallone of Counsel on behalf of Specialist Diagnostic Services Pty Ltd t/a Dorevitch Pathology
S.Crawford on behalf of the Health Services Union
R.Tawil on behalf of the Australian Nursing and Midwifery Federation

Hearing details:
Melbourne.
2018:
13-16 February and 27-29 February.

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ATTACHMENT A – TRANSLATION TABLE

2004 Agreement Classification	Workplace Determination Classification
Collector Grade 1 Year 1	Pathology Collector Grade 1 Year 1
Collector Grade 1 Year 2	Pathology Collector Grade 1 Year 2
Collector Grade 1 Year 3	Pathology Collector Grade 1 Year 3
Collector Grade 1 Year 4	Pathology Collector Grade 1 Year 4
Collector Grade 2 Year 1	Pathology Collector Grade 2 Year 1
Collector Grade 2 Year 2	Pathology Collector Grade 2 Year 2
Collector Grade 2 Year 3	Pathology Collector Grade 2 Year 3
Collector Grade 2 Year 4	Pathology Collector Grade 2 Year 4
Collector Reliever Year 1	Pathology Collector Reliever Year 1
Collector Reliever Year 2	Pathology Collector Reliever Year 2
Collector Reliever Year 3	Pathology Collector Reliever Year 3
Collector Grade 3 Year 1	Pathology Collector Grade 3 Year 1
Collector Grade 3 Year 2	Pathology Collector Grade 3 Year 2
Collector Grade 3 Year 3	Pathology Collector Grade 3 Year 3
-	Pathology Collector Grade 4
-	Registered Nurse
Courier Year 1	Courier Year 1
Courier Year 2	Courier Year 2
Courier Year 3	Courier Year 3
Courier Year 4	Courier Year 4
Courier Year 5	Courier Year 5
Courier Reliever Year 1	Courier Reliever Year 1
Courier Reliever Year 2	Courier Reliever Year 2
Cleaner Year 1	Cleaner Grade 1
Cleaner Year 2	Cleaner Grade 2 Year 1
Cleaner Year 3	Cleaner Grade 2 Year 2
Laboratory Assistant Grade 1 Year 1	Laboratory Assistant Grade 1 Year 1
Laboratory Assistant Grade 1 Year 2	Laboratory Assistant Grade 1 Year 2
Laboratory Assistant Grade 1 Year 3	Laboratory Assistant Grade 1 Year 3
Laboratory Assistant Grade 2 Years 1	Laboratory Assistant Grade 2 Year 1
Laboratory Assistant Grade 2 Year 2	Laboratory Assistant Grade 2 Year 2
Laboratory Assistant Grade 2 Year 3	Laboratory Assistant Grade 2 Year 3
Laboratory Assistant Grade 3 Year 1	Laboratory Assistant Grade 3 Years 1
Laboratory Assistant Grade 3 Year 2	Laboratory Assistant Grade 3 Year 2
Laboratory Assistant Grade 3 Year 3	Laboratory Assistant Grade 3 Year 3
Storeperson Year 1	Storeperson Grade 1 Year 1
Storeperson Year 2	Storeperson Grade 1 Year 2
Storeperson Year 3	Storeperson Grade 1 Year 3
Storeperson Advanced Year 1	Storeperson Grade 2 Year 1
Storeperson Advanced Year 2	Storeperson Grade 2 Year 2
Storeperson Advanced Year 3	Storeperson Grade 2 Year 3
Maintenance/Handyperson Year 1	Maintenance/Handy Person Year 1
Maintenance/Handyperson Year 2	Maintenance/Handy Person Year 2
Maintenance/Handyperson Year 3	Maintenance/Handy Person Year 3
Maintenance/Handyperson Advanced Yr 1	Maintenance/Handy Person Trade Year 1
Maintenance/Handyperson Advanced Yr 2	Maintenance/Handy Person Trade Year 2
Maintenance/Handyperson Advanced Yr 3	Maintenance/Handy Person Trade Year 3
Clerk Grade 1 Year 1	Clerk Grade 1 Years 1
Clerk Grade 1 Year 2	Clerk Grade 1 Year 2
Clerk Grade 1 Year 3	Clerk Grade 1 Year 3
Clerk Grade 2 Year 1	Clerk Grade 2 Level 1
Clerk Grade 2 Year 2	Clerk Grade 2 Level 2
Clerk Grade 2 Year 3	Clerk Grade 2 Level 3
Clerk Grade 3 Years 1	Clerk Grade 3 Years 1
Clerk Grade 3 Year 2	Clerk Grade 3 Year 2
Clerk Grade 3 Year 3	Clerk Grade 3 Year 3
Clerk Grade 4 Year 1	Clerk Grade 4 Years 1
Clerk Grade 4 Year 2	Clerk Grade 4 Year 2
Clerk Grade 4 Year 3	Clerk Grade 4 Year 3