QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees v State of Queensland (Department of Health)* [2021] QIRC 059
PARTIES:	**Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees** (Notifier) v **State of Queensland (Department of Health)** (Respondent)
CASE NO.:	D/2019/114
PARTIES:	**State of Queensland (Department of Health)** (Applicant) v **Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees** (Respondent)
CASE NO.:	B/2019/70
PROCEEDING:	Application in existing proceedings
DELIVERED ON:	19 February 2021
HEARING DATE:	10 September 2020
MEMBERS:	Merrell DP Pidgeon IC Dwyer IC
HEARD AT:	Brisbane
ORDERS:	**1. The application by the Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees pursuant to s 541(b)(ii) of**

the *Industrial Relations Act 2016*, that the Full Bench dismiss, or refrain from hearing or further hearing Matter No. B/2019/70, is dismissed.

2. Matter No. D/2019/114 and Matter No. B/2019/70 will be mentioned before Deputy President Merrell only on a date to be fixed.

CATCHWORDS: INDUSTRIAL LAW - disputes prevention and settlement - application for declaratory relief by respondent - application in existing proceedings to dismiss application for declaratory relief because further proceedings are not necessary or desirable in the public interest - whether application to dismiss should be granted on grounds of abuse of process or application of the *Anshun* principle - consideration of whether respondent's application for declaratory relief is tantamount to an abuse of process - consideration of competing public interests - consideration of whether facts give rise to an *Anshun* estoppel - balance of the public interest lies in the respondent's application for declaratory relief being heard and determined - application in existing proceedings dismissed

LEGISLATION: *Conciliation and Arbitration Act 1904* (Cth), s 41

Industrial Relations Act 1999, s 331

Industrial Relations Act 2016, s 3, s 4, s 9, s 429, s 447, s 448, s 463, s 464, s 541 and s 564

CASES: *Aldi Foods Pty Limited v Shop, Distributive and Allied Employees Association* [2017] HCA 53; (2017) 262 CLR 593

Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees v State of Queensland (Department of Health) [2020] QIRC 086

Campbell v Queensland [2019] ICQ 18; (2019) 291 IR 171

Commissioner of State Revenue v Mondus [2018] VSCA 185; (2018) 55 VR 643

Department of Education and Training v Nicolaas Hart [2011] QIRC 5

Dr Wayne Shipley & Ors v Metro South Hospital and Health Service [2019] QIRC 071

Johnson v Gore Wood & Co [2000] UKHL 65; AC; [2001] 2 WLR 72

O'Shane v Harbour Radio Pty Ltd [2013] NSWCA 315; (2013) 85 NSWLR 698

O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210

Port of Melbourne Authority v Anshun Pty Ltd [1981] HCA 45; (1981) 147 CLR 589

Queensland Nurses and Midwives' Union of Employees v State of Queensland (Department of Health) [2019] ICQ 12

Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27; (1987) 72 ALR 1

Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees v Minister for Industrial Relations and Retailers' Association of Queensland Limited, Union of Employers [2003] ICQ 33; (2003) 173 QGIG 1342

Spalla v St George Motor Finance Ltd (ACN 007 656 555) (No 6) [2004] FCA 1699

The Electrical Trades Union of Employees of Australia, Queensland Branch v National Electrical and Communications Association of Queensland, Industrial Organisation of Employers [2001] ICQ 38; (2001) 167 QGIG 334

Timbercorp Finance Pty Ltd v Collins [2016] HCA 44; (2016) 259 CLR 212

Tomlinson v Ramsey Food Processing Pty Limited [2015] HCA 28; (2015) 256 CLR 5

UBS AG v Tyne as Trustee of the Argot Trust [2018] HCA 45; (2018) 265 CLR 77

Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378

APPEARANCES:

Ms L. Doust of Counsel instructed by Hall Payne Lawyers for the Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees

Mr A. Herbert of Counsel instructed by McCullough Robertson Lawyers for the State of Queensland (Department of Health)

Reasons for Decision

Introduction

[1] The background to this matter is contained in paragraphs [1] to [7] of *Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees v State of Queensland (Department of Health)*.[1] Those paragraphs should be read with these reasons for decision.

[2] The question that presently requires determination is whether, pursuant to s 541(b)(ii) of the *Industrial Relations Act 2016* ('the Act'), we should exercise our discretion and allow the Union's application to dismiss, or refrain from hearing or further hearing, the Department's application for declaratory relief because further proceedings are not necessary or desirable in the public interest.

[3] The Union's application to dismiss is premised on the contention that the Department's application for declaratory relief is tantamount to an abuse of the process of the Commission, such that it is contrary to the public interest, within the meaning of s 541(b)(ii) of the Act, to entertain the Department's application.[2] The Union also contends that the Department's application for declaratory relief gives rise to the application of the principle in *Port of Melbourne Authority v Anshun Pty Ltd*[3] ('the *Anshun* principle') and that relief under s 541(b)(ii) of the Act should be granted for that alternative reason.[4]

[4] The Department rejects the contention that its application should be dismissed because further proceedings are not necessary or desirable in the public interest on the ground

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[1] [2020] QIRC 086 (Deputy President Merrell, Industrial Commissioner Pidgeon and Industrial Commissioner Dwyer).

[2] The written submissions of the Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees filed on 31 July 2020 ('the Union's submissions'), para. 4.

[3] [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*').

[4] The Union's submissions, paras. 53-59.

that its application is tantamount to an abuse of process[5] or because of the application of the *Anshun* principle.[6]

[5] Whether we should exercise discretion pursuant to s 541(b)(ii) of the Act requires a consideration of:

- the Commission's power pursuant to s 541(b)(ii) of the Act;
- whether the Department's application for declaratory relief:
  - is tantamount to an abuse of process; or
  - gives rise to the application of the *Anshun* principle; and
- whether, if either case is made out, further proceedings by the Commission, of the Department's application for declaratory relief, are not necessary or desirable in the public interest.

[6] For the reasons that follow, we are not persuaded that we should, pursuant to s 541(b)(ii) of the Act, exercise our discretion to dismiss, or refrain from hearing or further hearing, the Department's application for declaratory relief.

The Commission's power pursuant to s 541(b)(ii) of the Act

[7] Section 541(b)(ii) of the Act provides that the Commission may, in an industrial cause, dismiss the cause, or refrain from hearing, further hearing, or deciding the cause if the Commission considers further proceedings by it are not necessary or desirable in the public interest.

Industrial cause

[8] The Commission has discretion, on application, to make a declaration about an industrial matter.[7] At the heart of the Department's application for declaratory relief is the interpretation of sub-cl 4.14.3 of the *Medical Officers' (Queensland Health) Certified Agreement (No. 4) 2015* ('MOCA 4') and of sub-cl 11.24.3.1 of the *Medical Officers' (Queensland Health) Certified Agreement (No. 5) 2018* ('MOCA 5'). The phrase 'industrial cause' is non-exhaustively defined in sch 5 to the Act to include an 'industrial matter and an industrial dispute.' Schedule 1 to the Act defines 'industrial matter' to relevantly include the interpretation of an industrial instrument unless the Act otherwise provides. Given the non-exhaustive definition of 'industrial cause,' we think an application for a declaration about an industrial matter, at the heart of which is the interpretation of an industrial instrument, is an industrial cause.

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[5] The written submissions of the State of Queensland (Department of Health) filed on 2 September 2020 (the Department's submissions), paras. 59-69.
[6] Ibid, paras. 56-58.
[7] *Industrial Relations Act 2016* s 463(1).

Public interest

[9] Both parties referred us to *O'Sullivan v Farrer*[8] as authority for the proposition that the expression 'public interest,' when used in a statute:

> [C]lassically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.'[9]

[10] It may also be the case that the ascertainment, in any particular case, of where the public interest lies will often depend on a balancing of interests, including competing public interests, and will very much be a question of fact and degree.[10]

[11] Section 541(b)(ii) of the Act recognises that in a particular case, the public interest may displace a litigant's normal right to have a case heard and determined.[11]

Onus of proof

[12] We think it clear that the onus lies on an applicant to persuade the Commission to exercise discretion and override the *prima facie* right of a party, who has invoked the Commission's jurisdiction, to refrain from hearing or determining a proceeding.[12]

Is the discretion contained in s 541(b) of the Act exercisable where the Commission considers a proceeding is an abuse of its process?

[13] The inherent jurisdiction of a superior court to stay its proceedings on the grounds of an abuse of process concerns the misuse of the court's procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[13]

[14] While not a superior court with inherent jurisdiction, the Commission is established as a court of record in Queensland.[14] The Commission's functions relevantly include resolving disputes by conciliation of industrial matters and, if necessary, by arbitration or making an order[15] and making declarations about industrial matters.[16] The Commission has jurisdiction to hear and decide all questions:

- arising out of an industrial matter; or

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[8] [1989] HCA 61; (1989) 168 CLR 210.
[9] Ibid 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).
[10] *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* [1987] HCA 27; (1987) 72 ALR 1 ('*QEC*'), 5 (Mason CJ, Wilson and Dawson JJ), in respect of the similar provision in s 41(1)(d)(iii) of the *Conciliation and Arbitration Act 1904* (Cth).
[11] *Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees v Minister for Industrial Relations and Retailers' Association of Queensland Limited, Union of Employers* [2003] ICQ 33; (2003) 173 QGIG 1342, 1343 (President Hall) in respect of the s 331(b)(ii) in the *Industrial Relations Act 1999*.
[12] *QEC* (n 10) 13 (Deane J).
[13] *Walton v Gardiner* [1993] HCA 77; (1993) 177 CLR 378, 392-393 (Mason CJ, Deane and Dawson JJ).
[14] *Industrial Relations Act 2016* s 429.

- involving deciding the rights and duties of a person in relation to an industrial matter; or

- it considers expedient to hear and decide about an industrial matter.[17]

[15] It seems to us, having regard to the above-mentioned functions, jurisdiction and powers of the Commission, and particularly that the public interest is the central consideration to the discretion conferred by s 541(b)(ii) of the Act, such discretion may be enlivened where the Commission considers further proceedings in the industrial cause are an abuse of process. The Industrial Court of Queensland has recognised that the equivalent provision in the *Industrial Relations Act 1999* ('the 1999 Act')[18] conferred power on the Commission to refuse to proceed further in the face of an abuse of process.[19] The Commission itself has, pursuant to s 331(b) of the 1999 Act, refrained from hearing an industrial cause because further proceedings were not necessary or desirable in the public interest on the basis that a relevant application was an abuse of process,[20] including on the basis that particular facts gave rise to an *Anshun* estoppel.[21]

[16] However, we emphasise that, having regard to the Union's application, our task is not to determine if there has been an abuse of process *per se* or that the Department should be estopped from proceeding with its application for declaratory relief because of the application of the *Anshun* principle. The question we have to answer is whether the Department's application for declaratory relief should be dismissed or not further heard because further proceedings are not necessary or desirable in the public interest.

Is the Department's application for declaratory relief tantamount to an abuse of process of the Commission?

The background to the present matter

[17] In or around 2005, the State of Queensland made a decision that medical officers in Queensland Health would be covered by their own industrial instrument. In December 2005, the *Medical Officers' (Queensland Health) Certified Agreement (No.1) 2005* was approved by the Commission.[22] At about the same time, there was a shortage of Senior Medical Officers ('SMOs') who worked in emergency medicine. SMOs, who did specialise in emergency medicine, were increasingly leaving Queensland Health or leaving that speciality and very few junior medical officers were choosing to pursue a career specialising in emergency medicine.[23] As a consequence, on 25 January 2006, the Acting Premier, the Honourable Ms Anna Bligh, agreed in

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[15] *Industrial Relations Act 2016* s 447(1)(i).
[16] *Industrial Relations Act 2016* s 447(1)(o).
[17] *Industrial Relations Act 2016* s 448(1)(b).
[18] *Industrial Relations Act 1999* s 331.
[19] *The Electrical Trades Union of Employees of Australia, Queensland Branch v National Electrical and Communications Association of Queensland, Industrial Organisation of Employers* [2001] ICQ 38; (2001) 167 QGIG 334, 335 (President Hall).
[20] *Department of Education and Training v Nicolaas Hart* [2011] QIRC 5, [44]-[46] (Deputy President Bloomfield).
[21] Ibid [44] and [47]-[48].
[22] Exhibit 7, para. 5.
[23] Exhibit 7, para. 25.

principle to paying an allowance to emergency specialists with the details to be worked through in the coming days.[24]

[18] Ultimately, in February 2006, Queensland Health issued a memorandum entitled 'CIRCULAR ER 24/06' which provided for, amongst other things, recruitment and retention packages for '… Emergency Department Specialists and Senior Medical Officers'. Relevantly, the circular provided:

> **2.2 Emergency Department Specialists and Senior Medical Officers - Recruitment and Retention**
>
> Queensland Health is currently experiencing significant medical workforce shortages in Emergency Departments and anticipates that unless urgent action is taken the Department will continue to face intense pressure to keep Emergency Departments open and to staff expanded services in the future.
>
> An additional 25% will be added to the Option A allowance for Specialists and Senior Medical Officers employed in Emergency Departments and who are working their ordinary hours of work through extended hours arrangements between 7.00am and 10.00pm Monday to Sunday. The defined shift patterns worked by Emergency Department senior medical staff could impact on the ability of these senior medical staff to earn additional remuneration through overtime compared to senior medical staff generally. The criteria for eligibility for this entitlement (e.g. number of extended hours shifts per week) will be agreed between Queensland Health, Queensland Public Sector Union and Australian Salaried Medical Officers Federation Queensland. This will be advised with the instructions for the template contracts and variations.
>
> These new arrangements, including their inclusion in overtime and extended hours payment calculations, will be backdated to 1 January 2006.[25]

[19] There is no dispute that this was the origin of the Emergency Department allowance ('ED allowance') which is at the centre of the present proceedings.[26]

[20] Between May 2006 and 4 August 2014, the ED allowance continued to be offered to SMOs by way of what were referred to as 'Option E contracts' or 'Option A contracts.'[27]

[21] From about 4 August 2014 through to about July 2015, the ED allowance was offered through High Income Guarantee Contracts.[28] It is not disputed that as a consequence of the operation of the *Industrial Relations (Restoring Fairness) and Other Legislation Amendments Act 2015*, assented to on 11 June 2015, collective bargaining returned for SMOs[29] such that their employment would be governed by industrial instruments made under the 1999 Act.

[22] Between May and July 2015, the Department, the Union and Together Queensland, Industrial Union of Employees ('TQ'), negotiated MOCA 4 which contained the ED allowance and which was the first time the ED allowance had been regulated by way of

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[24] Exhibit 7, para. 54.
[25] Exhibit 7, exhibit SL-2, pages 3-4.
[26] Exhibit 7, para. 54.
[27] Exhibit 2, para. 11.
[28] Exhibit 2, para. 12.
[29] Exhibit 2, para. 13.

an industrial instrument as opposed to an individual contract.[30] MOCA 4 operated from the first pay period on or after the date of certification which was 22 November 2015.[31]

[23] Sub-clause 4.14.3 of MOCA 4 provided:

> 4.14.3 Emergency Department specialty allowance
>
> Where a SMO works in an Emergency Department under a rostering arrangement in accordance with Clause 4.3, and the medical officer's rostered hours include working evening shifts Monday to Friday, and/or shifts anytime on the weekend, an allowance of 25% of base salary is paid in addition to amounts in Clause 4.14.1 and 4.14.2.

[24] On 11 September 2017, the Union notified the Industrial Registrar of the dispute between it and Queensland Health in respect of the Metro South Hospital and Health Service ('the Health Service'). The notification was given number D/2017/82. The notice stated that the subject matter of the dispute was the failure of the Health Service to pay the ED allowance to certain SMOs who worked in the Emergency Department at the Beaudesert Hospital ('the Union's 2017 dispute').[32]

[25] The notice of industrial dispute stated that the Union sought declarations pursuant to s 464 of the Act that the Beaudesert Hospital, on and from 22 November 2015, had an Emergency Department within the meaning of sub-cl 4.14.3 of MOCA 4 and that SMOs working an extended span of ordinary hours in the Emergency Department at the Beaudesert Hospital were entitled to receive the ED allowance on and from 22 November 2015. The notice stated that the Union had obtained the written consent of Dr Wayne Shipley, a member of the Union and a person directly affected by the declarations sought, '… to make this application.'[33]

[26] By letter dated 20 November 2017, Mr Michael Walsh, the Director-General of the Department, was informed by Mr David Quinn, a partner of CRH Law, that:

- his firm acted for multiple SMOs engaged at the Beaudesert Hospital (including Dr Shipley);
- in respect of the Union's earlier notice of industrial dispute, Dr Shipley had informed the Union that he had withdrawn his consent for it to pursue the relief sought; and
- Dr Shipley and the other SMOs his firm represented intended to institute similar proceedings in their own names.[34]

[27] That letter contained a proposal to resolve the issue at the Beaudesert Hospital concerning the payment of the ED allowance to the SMOs concerned.

[28] The matter was not resolved which resulted in ten SMOs, including Dr Shipley, notifying the Industrial Registrar on 22 January 2018 of an industrial dispute between

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[30] Exhibit 2, para.14.
[31] *Medical Officers' (Queensland Health) Certified Agreement (No.4) 2015*, cl 1.4 and Exhibit 2, para. 14.
[32] Exhibit 4, annexure LTF1, page 6.
[33] Exhibit 4, annexure LTF1, page 6.
[34] Exhibit 3, exhibit AW1, page 54.

them and the State of Queensland through the Department of Health. The number given to that notification of industrial dispute was D/2018/6.

[29] That notice of industrial dispute concerned:

- the contention that the Health Service had failed to pay the ED allowance, as contained in sub-cl 4.14.3 of MOCA 4, to SMOs employed at the Beaudesert Hospital who worked an extended span of hours in the Emergency Department, in respect of which the ten SMOs sought declaratory relief that:
  - the Beaudesert Hospital had, on and from 22 November 2015, an Emergency Department within the meaning of sub-cl 4.14.3 of MOCA 4; and
  - SMOs working an extended span of ordinary hours in the Emergency Department at the Beaudesert Hospital were entitled to receive the ED allowance on and from 22 November 2015, and that the allowance was payable on all hours of work;[35] and
- the contention that misrepresentations were made by the Department concerning the entitlements to be provided by the proposed agreement that became MOCA 4 ('the misrepresentation contentions').[36]

[30] On or around 30 January 2018, the Department issued, to the Union and TQ, a notice of intention to bargain to replace MOCA 4.[37]

[31] The dispute, as originally notified by the ten SMOs, was subject to:

- an application to amend filed on 22 March 2018, by which the ten SMOs indicated they did not intend to pursue the misrepresentation contentions[38] and sought, amongst other decisions, that matters D/2018/6 and D/2018/11 '… be heard concurrently';[39] and
- an application to amend filed on 30 August 2018, increasing the number of SMOs who were seeking declaratory relief to 12,[40] and it was those 12 SMOs who were the applicants in *Dr Wayne Shipley & Ors v Metro South Hospital and Health Service* ('*Shipley*').[41]

[32] There is no dispute that:

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[35] Exhibit 3, exhibit AW1, page 35.
[36] Exhibit 3, exhibit AW1, page 35.
[37] Exhibit 2, para. 15.
[38] Exhibit 3, exhibit AW1, page 58.
[39] It is unclear, on the evidence before us, what happened to this aspect of the ten SMOs' application concerning D/2018/11. No evidence was given as to who notified that dispute or what it concerned. However, the decision in *Dr Wayne Shipley & Ors v Metro South Hospital and Health Service* [2019] QIRC 071 ('*Shipley*') only concerned D/2018/6.
[40] Exhibit 3, exhibit AW1, page 64.
[41] *Shipley* (n 39) [1] (Vice President O'Connor).

- on or around 18 September 2018, in principle agreement was reached between the Department, the Union and TQ regarding the terms of MOCA 5 to replace MOCA 4;[42]

- the terms of the proposed agreement were finalised between the above parties on or around 19 March 2019, the relevant consultation period ended on 23 April 2019, and on or around 15 May 2019 the State of Queensland applied to the Commission for certification of MOCA 5;[43] and

- on 31 May 2019, the Commission certified MOCA 5.[44]

[33] Sub-clause 11.24.3 of MOCA 5 relevantly provides:

> 11.24.3 Emergency Department specialty allowance
>
> 11.24.3.1 Where a SMO works in an Emergency Department under a rostering arrangement in accordance with Clause 11.4, and the medical officer's rostered hours include working evening shifts Monday to Friday, and/or shifts anytime on the weekend, an allowance of 25% of base salary is paid in addition to amounts in Clause 11.24.1 and 11.24.2.

The issues, decision and order made in Shipley

[34] The 12 SMOs ('the Applicants') asked the Commission to determine five questions, namely:

- was the Emergency Department at the Beaudesert Hospital an 'Emergency Department' as referred to in sub-cl 4.14.3 of MOCA 4?;

- did the Applicants work 'in' that Emergency Department?;

- were the Applicants working under a rostering arrangement in accordance with cl 4.3 of MOCA 4?;

- did the Applicants' rostered hours include working evening shifts Monday to Friday, and/or shifts anytime on the weekend?; and

- was the allowance of 25% of base salary in sub-cl 4.14.3 payable on all normal hours worked by a SMO entitled to the allowance?[45]

[35] The parties tendered an Agreed Statement of Facts ('ASOF') which relevantly provided:

> **Beaudesert Hospital Emergency Department**
> **Staff**
>
> 1. There are currently about 16 senior doctors who work in the Beaudesert Hospital Emergency Department.

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[42] Exhibit 2, para. 22.
[43] Exhibit 2, paras. 24-26.
[44] Exhibit 2, para. 28.
[45] *Shipley* (n 39), [4] (Vice-President O'Connor).

2. All applicants also work in other departments in Beaudesert Hospital according to their relevant skills.

SMO Roster

3. All applicants work rotating rostered shifts across a two week roster pattern. The shifts they are required to work are:

   7.00am to 3:30pm;

   7:30am to 4:00pm;

   8.00am to 4:30pm;

   9.00am to 5:30pm;

   11:30am to 8.00pm; and

   3.00pm until 11:30pm.

4. The roster requires all the applicants to work week days, weekends and public holidays.

5. All the applicants are also regularly rostered to be on-call from 11.30pm to 8am for the Emergency Department after finishing the 3pm to 11.30pm late shift. Standby or on-call shifts require them to be available to return to the hospital within 10 minutes of a call to attend to emergencies.

6. All of the applicants work an extended span of ordinary hours arrangement in accordance with clause 4.3 of MOCA4.[46]

[36] By decision dated 21 May 2019, Vice President O'Connor found that the ASOF settled the second, third and fourth questions above such that the questions that remained for determination were the first and last questions.[47] After setting out the background to the ED allowance, the relevant parts of the ASOF, and the approach to interpreting a certified agreement, his Honour then dealt with the remaining questions.

[37] In respect of the question of whether the Emergency Department at the Beaudesert Hospital was an 'Emergency Department' as referred to in sub-cl 4.14.3 of MOCA 4, after traversing the evidence, Vice President O'Connor accepted that the Beaudesert Hospital's Emergency Department was an 'Emergency Department' for the purposes of MOCA 4.[48]

[38] In respect of the final question of whether the ED allowance was payable on all normal hours worked by a SMO who was entitled to the allowance, Vice President O'Connor found that the ED allowance was to be calculated and paid upon all paid hours worked by a SMO.[49]

[39] Vice President O'Connor granted the application and said he would hear the parties on the order to be made.[50] It is common ground that there was no appeal by the Department against that decision of Vice President O'Connor.

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[46] Exhibit 3, exhibit AW1, page 91.
[47] *Shipley* (n 39) [5].
[48] Ibid [16]-[58].
[49] *Shipley* (n 39) [59]-[72].
[50] Ibid [79].

[40] On 28 June 2019, Vice President O'Connor made, by consent, the following order:

> THE INDUSTRIAL RELATIONS COMMISSION OF QUEENSLAND DECLARES PURSUANT TO SECTION 463 OF THE INDUSTRIAL RELATIONS ACT 2016 ("THE ACT") THAT:
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> 1. Beaudesert Hospital has, on and from 22 November 2015, an Emergency Department within the meaning of clause 4.14.3 of Medical Officers' (Queensland Health) Certified Agreement No.4) 2015 ("MOCA4").
>
> 2. The Applicants in matter D2018/6 are Senior Medical Officers working in the Emergency Department of Beaudesert Hospital.
>
> 3. For the period the Applicants have been:
>
> a. Senior Medical Officers working in the Emergency Department of Beaudesert Hospital to whom MOCA4 applied, working under a roster arrangement in accordance with Clause 4.3 of MOCA4, and
> b. have rostered hours which include working evening shifts Monday to Friday and/or shifts on the weekend
> c. each Applicant is entitled to the payment of the "Emergency Department specialty allowance" provided for in clause 4.14.3 of MOCA4.
>
> 4. The Emergency Department specialty allowance payable to the Applicants must be calculated on all their normal hours of work.

Abuse of process

[41] The varied circumstances in which the use of a court's processes will amount to an abuse of process, notwithstanding that the use is consistent with the literal application of the court's rules, cannot be exhaustively stated. However, two conditions enliven the power of a court to permanently stay proceedings as an abuse of the process of the court; first, where the use of the court's procedures occasions unjustifiable oppression to a party or, secondly, where the use of the court's procedures serves to bring the administration of justice into disrepute.[51]

[42] Certainly, the raising of issues in successive proceedings can amount to an abuse of process. In *Tomlinson v Ramsey Food Processing Pty Limited* , the majority of the High Court relevantly held:

> Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.[52]

[43] The rationale as to why the bringing of successive proceedings amounts to an abuse of process is in the underlying public interest that there should be finality in litigation, that a party should not be twice vexed in the same matter and where the public interest is

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[51] *UBS AG v Tyne as Trustee of the Argot Trust* [2018] HCA 45; (2018) 265 CLR 77 ('*UBS*'), [1] (Kiefel CJ, Bell and Keane JJ).

[52] [2015] HCA 28; (2015) 256 CLR 507 [26] (French CJ, Bell, Gageler and Keane JJ - footnotes omitted).

reinforced by the current emphasis on efficiency and economy, in the conduct of litigation, in the interests of the parties and the public as a whole.[53]

[44] The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied - with the onus being on the party alleging an abuse - that the claim or defence should have been raised in the early proceedings if it was to be raised at all. Further, it is not necessary, before an abuse may be found, to identify any additional elements such as a collateral attack on a previous decision or some dishonesty; but where those elements are present in the later proceedings, it will be much more obviously abusive and there will rarely be a finding of abuse unless the latter proceeding involves what the court regards as unjust harassment of a party.[54]

[45] However, it is wrong to hold that because the matter could have been raised in earlier proceedings, the raising of it in later proceedings renders the later proceeding necessarily abusive.[55] Thus, whether conduct rises to the level of an abuse of the processes of a court is a determination that requires a consideration of all the circumstances.[56] Specifically, that requires a court to make:

> [A] broad, merits-based judgement which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.[57]

[46] The power to dismiss an application as an abuse of process is to be exercised sparingly and upon an examination of the relevant circumstances of the particular case and, as set out earlier, the guiding considerations are oppression and unfairness to the other party to the litigation and concern for the integrity of the system of administration of justice.[58]

[47] A non-exhaustive list of matters relevant to the determination of whether there is an abuse of process in connection with the issue to be litigated in the second proceedings are:

- the importance of the issue in and to the earlier proceeding, including whether it is an evidentiary issue or an ultimate issue;
- the opportunity available and taken to fully litigate the issue;
- the terms and finality of the finding as to the issue;

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[53] *UBS* (n 51) [66] (Gageler J).
[54] Ibid [67].
[55] *Johnson v Gore Wood & Co* [2000] UKHL 65; [2001] 2 WLR 72 ('*Johnson*'), 90 (Lord Bingham of Cornhill) cited by Gageler J in *UBS* (n 51) [67].
[56] Ibid [7].
[57] Ibid with Kiefel CJ, Bell and Keane JJ citing the decision of Lord Bingham of Cornhill in *Johnson* (n 55) at 90.
[58] *Spalla v St George Motor Finance Ltd (ACN 007 656 555) (No 6)* ('*Spalla*') [2004] FCA 1699, [70] (French J).

- the identity between the relevant issues in the two proceedings;

- any plea or fresh evidence, including the nature and significance of the evidence and the reason why it was not part of the earlier proceedings;

- the extent of the oppression and unfairness to the other party if the issue is re-litigated and the impact of the re-litigation upon the principle of finality of judicial determination and public confidence in the administration of justice; and

- an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process.[59]

[48] The identity of the parties do not have to be the same as between the different proceedings for there to be an abuse of process, however, it is a requirement that there be a relevant earlier proceeding to which one party, said to be the author of the abuse in the later proceeding, was also a party.[60]

The competing contentions

[49] In summary, the Union's contention that the Department's application for declaratory relief is tantamount to an abuse of the process is because:

- the Department knew, prior to the certification of MOCA 4, that there was a live issue with the relevant employee organisations about the number of hours a SMO had to work in an Emergency Department so as to attract the ED allowance as contained in a departmental policy;[61]

- the Department, before the Commission in *Shipley*, made the deliberate concession that a SMO did not have to work full-time in an Emergency Department to be entitled to the ED allowance in MOCA 4 and, contrary to that concession, through its application for declaratory relief, now contends a different construction, namely, that a SMO must work all the rostered hours under the extended hours roster in the Emergency Department to be entitled to the ED allowance;[62]

- the Department, by agreeing to the same ED allowance clause in MOCA 5, as was used in MOCA 4, agreed to apply the decision in *Shipley*;[63]

- the Department did not appeal the decision in *Shipley*;[64] and

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[59] *Commissioner of State Revenue v Mondus* [2018] VSCA 185; (2018) 55 VR 643, [116] and the authorities referred to in that paragraph (McLeish JA with McDonald AJA at [26] agreeing).
[60] *O'Shane v Harbour Radio Pty Ltd* [2013] NSWCA 315; (2013) 85 NSWLR 698, [110] (Beazley P, with McColl JA at [131] and Tobias AJA at [243] agreeing).
[61] T 1-58, l 26 to T 1-65, l 13.
[62] T 1-65, l 17 to T 1-66, l 34.
[63] T 1-66, l 36 to T 1-67, l 47.
[64] T 1-68, l 1 to T 1-69, l 5.

- because the decision in *Shipley* was about the construction of sub-cl 4.14.3 of MOCA 4, and even if the declarations made in *Shipley* do not bind the Union, the Department should be bound by its conduct in *Shipley*.[65]

[50] In its written submissions, the Union summarised its case this way:

> 59. Having regard to the scope and purpose of the Act, ASMOF contends that it is not in the public interest for the Commission to entertain the present application. The issues raised have already been considered and determined in previous proceedings. The respondent has given no explanation why the matters it wishes now to raise were not raised previously, in circumstances where the Commission was clearly called upon to determine those issues. The entertainment of the present proceedings is designed to produce a result which is contrary to that in Shipley and which will be productive of confusion, and which will render the Shipley proceeding a waste of the applicants' time and money. It is not desirable in the public [sic] for the proceedings designed to resolve industrial dispute to be conducted in such a way. Parties before the Commission are entitled to know that (subject to the exercise of appeal rights in the usual way), decisions of the Commission are final.

[51] The Department contends that no abuse of process arises because, in summary:

- the efficient way to resolve the question of the correct construction of the ED allowance clauses in MOCA 4 and MOCA 5, which covered and cover a large number of employees, is for the Department's application for declaratory relief to be heard and determined;[66]

- the Department made a wrong concession regarding the number of hours a SMO had to work in an Emergency Department to be entitled to the ED allowance in MOCA 4;[67]

- that error was discovered upon a subsequent review conducted by Ms Rachel Borger, Director of Industrial Relations of the Department;[68]

- the Department did not appeal the decision in *Shipley* because the Vice President, in the context in which the questions were presented to him, answered the questions correctly and the decision was only confined to what happened at the Beaudesert Hospital;[69]

- the Commission, in *Shipley,* did not have before it all the relevant extrinsic material necessary to construe the ED allowance clause contained in MOCA 4;[70] and

- the declaration made in *Shipley* only bound the Department and the SMOs who were party to that decision, and while the decision in *Shipley* was probably correct on the questions as put to the Commission in that case, there is an

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[65] T 1-69, ll 17-46.
[66] T 1-73, l 15 to T 1-74, l 24 and T 1-78, l 16 to T 1-87, l 12.
[67] T 1-74, l 40 to T 1-76, l 46.
[68] T 1-77, ll 1-11.
[69] T 1-88, ll 16-24.
[70] T 1-88, l 26 to T 1-100, l 47.

arguable case that the construction given to the ED allowance in MOCA 4 clause was wrong.[71]

[52] The Department in its written submissions, contends:

> 54. QH does not merely characterise its application as a declaration to avoid the necessity of appealing Shipley or explaining the delay in instituting an appeal. QH is undertaking a completely different case by the lawful path of seeking a declaration from the Commission which has universal application, and which is based upon its current insight and understanding of the history of the various instruments in which ED 25 and its forebears appeared.

What was the concession made by the Department in Shipley and what was its effect?

[53] The third eligibility requirement, for a SMO to be entitled to the ED allowance contained in MOCA 4 and contained in MOCA 5, as asserted in the Department's application for declaratory relief, is that the '… person must work all of their rostered hours under the extended hours roster in that emergency department.' This claim is fundamental to the present issue between the parties.

[54] The Union submitted that the Department in *Shipley*, in respect of a long standing, state wide issue of which it was aware, namely, whether or not a SMO had to work full-time in an emergency department to be entitled to the ED allowance in sub-cl 4.14.3 of MOCA 4, conceded that a SMO only had to work to some extent in an Emergency Department to be entitled to the allowance.[72]

[55] The Union pointed to exhibits tendered in *Shipley* in support of the submission that the question about the hours SMOs had to work in an emergency department, to become entitled to the ED allowance, was a state wide matter of long standing prior to MOCA 4.[73] The evidence included:

- a memorandum to the Director-General of the Department in May 2016 seeking approval of the criteria to entitle SMOs working extended hours in emergency departments to attract the ED allowance paid as part of Option A contracts, which referred to an emergency department operating at least two shifts a day, Monday to Friday, and providing weekend coverage;[74]

- an internal departmental memorandum dated 2 February 2010, concerning the number of hours a SMO must be working in an emergency department to obtain the ED allowance under the Department's HR Policy B48;[75]

- the minutes of a meeting held on 15 November 2010, between representatives of the Department and trade union representatives, which records that discussion was held around the requirements of all hours needing to be worked by a SMO in an emergency department so as to attract the ED allowance;[76]

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[71] T 1-101, l 15 to T 1-103, l 13.
[72] See generally, T 1-59, l 1 to T 1-66, ll 27.
[73] T 1-59, ll 1-9.
[74] Exhibit 3, page 73.
[75] Exhibit 3, page 81.
[76] Exhibit 3, page 83.

- the correspondence exchanged between the Union and the Health Service in 2017, prior to the Union's 2017 dispute, about whether SMOs working at the Beaudesert Hospital qualified to be entitled to the ED allowance;[77]

- an email from the Health Service to the Union dated 13 June 2017, confirming the Department's reasons why the SMOs at the Beaudesert Hospital were not entitled to the ED allowance, which stated that the matter was a '… state wide issue and not solely in relation to Beaudesert Hospital', the consequence of which was that '… a universal approach is therefore required.';[78]

- the notice of industrial dispute, in the Union's 2017 dispute, in which the Union contended that the Department's position was that SMOs were only entitled to receive the ED allowance for time they worked in an Emergency Department;[79] and

- prior to the original ten SMOs at the Beaudesert Hospital being represented by Mr Quinn, the without prejudice offer of settlement made by the Department by letter dated 25 October 2017 to the Union, in respect of the Union's 2017 dispute, which included that SMOs should only be paid the ED allowance for shifts actually worked in the Emergency Department and not for shifts worked in other areas of the Beaudesert Hospital.[80]

[56] The Union submitted that what was significant about the above-mentioned correspondence was that the Department well understood, by about 25 October 2017, that the SMOs at the Beaudesert Hospital were not working all of their working hours in the Emergency Department.[81]

[57] The Union then pointed to the Department's outline of submissions in *Shipley*[82] where the Department submitted that:

- while the Applicants were concerned with the ED allowance at the Beaudesert Hospital, the issues had potential state wide impact on other hospitals which did not have emergency departments, but where patients were treated in emergency situations;[83]

- the only matters the Vice-President had to decide, in interpreting MOCA 4, were whether:

  – the Emergency Department at the Beaudesert Hospital was an 'Emergency Department' within the meaning of sub-cl 4.14.3 of MOCA 4; and

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[77] Exhibit 4, pages 9-15.
[78] Exhibit 3, page 47.
[79] Exhibit 4, page 6.
[80] Exhibit 3, page 52.
[81] T 1-63, ll 44-46.
[82] T 1-65, l 29 to T 1-66, l 15.
[83] Exhibit 3, page 162, para. 5.

  - the ED allowance contained in sub-cl 4.14.3 of MOCA 4 was payable on all normal hours worked by a SMO who was entitled to the allowance;[84] and

- SMOs employed in emergency departments, as defined by the Clinical Services Capability Framework ('CSCF') in accordance with sub-cl 4.14.3 of MOCA 4, were employed to work in emergency departments full-time and were not employed in generalist roles to perform roles outside of the relevant emergency department.[85]

[58] The Union also pointed to the Department's final submissions in *Shipley*[86] and submitted that the Department failed to press, as it had done in its outline of submissions, that a SMO had to work in an emergency department full-time to be entitled to the ED allowance.[87]

[59] As we understand the Union's argument, that failure together with paragraphs 1, 3, 4, 5 and 6 of the ASOF, is the concession to which the Union refers.[88] The concession said to be made by the Department in *Shipley* was that the Applicants did not have to work full-time in the Emergency Department at the Beaudesert Hospital to be entitled to the ED allowance.

[60] The Union then submitted that was how the Vice President dealt with that question in that his Honour stated that the Department had effectively conceded the question of what was admitted in the ASOF and that the words '… in an Emergency Department' in sub-cl 4.14.3 of MOCA 4 meant working to some extent in an Emergency Department.[89]

[61] The Union claimed that, contrary to the Department's submissions in these proceedings, it is not correct to say that there were wrong or misconceived questions posed for the Vice-President in *Shipley*. The Union submitted that the Department knew the number of hours to be worked in an emergency department to attract the ED allowance was a live, state wide issue and that the Department did not press its claim that the Applicants had to work all their rostered hours in the Emergency Department at the Beaudesert Hospital to attract the ED allowance.[90]

[62] The Department submitted that:

- the concessions it made in the ASOF were made in error;[91]

- all the concessions made were about the doctors at the Beaudesert Hospital;[92] and

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[84] Exhibit 3, pages 162-163, para. 7.
[85] Exhibit 3, page 174, para. 49.
[86] Exhibit 3, pages 239-246.
[87] T 1-66, ll 17-22.
[88] The Union's submissions, paras. 15-20 and T 1-65, l 17 to T 1-66, l 27.
[89] T 1-66, ll 24-27.
[90] T 1-66, ll 33-38.
[91] The Department's submissions, para. 19 and T 1-74, l 47 to T 1-75, l 1.
[92] T 1-89, ll 39-40.

- the error was discovered upon a review of the evidence and history of the matter conducted by Ms Borger.[93]

[63] Ms Borger's evidence-in-chief was that, upon her reviewing the evidence relating to the history of the ED allowance, through no fault of Vice President O'Connor, a '… wrong and misconceived question' was posed for decision by his Honour in *Shipley* based on concessions incorrectly made by the Department in that proceeding.[94]

[64] Ms Borger's further evidence was that:

- she believed the question placed before Vice President O'Connor was based on an incorrect assumption that the entitlement to the ED allowance was based primarily on a question of whether a facility in which work was being performed was, or was not, an 'Emergency Department' within the meaning of sub-cl 4.14.3 of MOCA 4;[95] and

- upon her review of '… the evidence now available', she believed that:

  – an enquiry into the definition or characteristics of an 'Emergency Department' is not determinative of the true eligibility requirements for payment of the ED allowance under either MOCA 4 or under MOCA 5;[96] and

  – the categorisation of facilities into emergency departments which qualified for the allowance, and those which did not, was not a consideration entertained by the parties upon the formulation and introduction of the allowance in 2006; but rather, the sole purpose of the ED allowance '… was to make the taking up and retention of a career as an emergency medicine specialist in Queensland Health a more attractive option, so as to address the shortage of emergency medicine specialists available to Queensland Health.'[97]

[65] Ms Borger referred to '… the evidence now available' in her affidavit filed in Matter No. B/2019/70.[98] In cross-examination, Ms Borger stated that the evidence that she said was now available was material that she had unearthed by her searches within Queensland Health files and by speaking to people, who were involved in the original allowance, that no longer worked in Queensland Health.[99] Ms Borger also stated that the steps she took in researching the evidence now available could have been taken by the Department's advocate in the proceedings before Vice President O'Connor and that she did not believe such steps were taken by the advocate.[100]

[66] The advocate was not called as a witness on behalf of the Department.

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[93] T 1-77, ll 5-9.
[94] Exhibit 1, para. 11.
[95] Exhibit 1, para. 13.
[96] Exhibit 1, para. 14.
[97] Exhibit 1, paras. 15-16.
[98] Exhibit 2, paras. 3 and 4 and exhibits RB-1, RB-2, RB-3, RB-4 and RB-5. See also T 1-49, l 18 to T 1-50, l 4.
[99] T 1-49, l 41 to T 1-50, l 27.
[100] T 1-50, ll 29-33.

[67] We accept that, on Ms Borger's evidence, the advocate who appeared for the Department in *Shipley* had access to the evidence, now available, to which Ms Borger has referred to in her affidavit.

[68] There is no suggestion that the evidence now available, as referred to by Ms Borger, was sought to be tendered or was tendered in *Shipley*.

[69] True, in paragraphs 49 to 51 of the Department's outline of submissions in *Shipley*, it submitted that SMOs employed in 'Emergency Departments', as the Department sought to define the phrase 'Emergency Department' in sub-cl 4.14.3 of MOCA 4, were employed to work in such Emergency Departments full-time.[101] However, those submissions were in respect of the last question the parties had posed for determination, namely, whether the ED allowance was payable on all hours worked by a SMO who was entitled to the ED allowance.[102] Those submissions were pressed in the Department's closing submissions in *Shipley*[103] and were considered by the Vice President to the extent of answering that question.[104]

[70] In our view, the material concession made by the Department in *Shipley* were the facts agreed upon in paragraphs 1, 3, 4, 5 and 6 of the ASOF. It was the ASOF, about those matters, that resulted in the Vice President only being required to consider two issues about sub-cl 4.14.3 of MOCA 4, namely:

- whether the Emergency Department at the Beaudesert Hospital was an 'Emergency Department' within the meaning of that sub-clause; and

- whether the ED allowance was payable on all normal hours worked by a SMO entitled to the allowance.

[71] Therefore, we consider that because of the ASOF, Vice President O'Connor was not called upon to give consideration, in construing sub-cl 4.14.3 of MOCA 4, as to whether SMOs had to work full-time in an 'Emergency Department' to have any entitlement to the ED allowance.

Who is bound by the consent declarations made in Shipley?

[72] The consent declarations made by Vice President O'Connor in *Shipley* were made pursuant to s 463 of the Act.

[73] The Union:

- referred to the Explanatory Notes for the Industrial Relations Bill 2016, which stated that cl 463 of that Bill preserved s 274A of the 1999 Act that provided power to the Commission to make a declaration on application;[105]

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[101] Exhibit 3, page 174, paras. 49-51.
[102] Exhibit 3, page 174, and the heading to paras. 49-51.
[103] Exhibit 3, page 246, para. 35.
[104] *Shipley* (n 39) [60]-[72].
[105] Industrial Relations Bill 2016 (Qld), 79.

- referred to the Explanatory Notes for the Industrial Relations Act and Other Legislation Amendment Bill 2007, which stated that s 274A(4) of the 1999 Act provided that, subject to the right of appeal, '… a declaration is binding in other proceedings under the Act in relation to the issue determined by the declaration';[106]

- relying on the decision of Martin J, President, in *Queensland Nurses and Midwives' Union of Employees v State of Queensland (Department of Health)* ('*QNMU*'),[107] submitted that a declaration made pursuant to s 463 of the Act binds not just the immediate parties to a proceeding but all employees covered by the same instrument; and, in that case, his Honour relevantly stated that the power to make a declaration should not be exercised lightly and that a declaration, once made, binds not just the parties but all the employees; and

- as a consequence of the above, submitted that the Department was bound, '… in respect of all of its SMOs employed under MOCA 4, by the declarations made in the *Shipley* proceeding.'[108]

[74] The Department submits that the paragraph in *QNMU* relied upon by the Union:

- does not state, as a general proposition, that a declaration binds all employees covered by the same instrument; and

- must be read in context against the facts of the case.[109]

[75] In *QNMU*, the parties were the Queensland Nurses and Midwives' Union of Employees ('the QNMU'*)* and the State of Queensland. The QNMU sought declarations as to whether the exceptions in the 1999 Act and in the Act, that annual leave was exclusive of a public holiday other than additional annual leave as compensation for working on a particular public holiday, applied to particular employees who were covered by three awards.[110] A specific question identified by the Full Bench of the Commission, in determining whether or not to grant the declaratory relief sought, was whether the additional annual leave for public hospital nurses and midwives in the awards was compensation for working on a particular public holiday.[111] In dismissing the QNMU's appeal against the dismissal by the Full Bench of the QNMU's application, Martin J, President, relevantly stated:

> [47] The power to make a declaration should not be exercised lightly. A declaration, once made, binds not just the parties but all the employees. The discretion to make a declaration should, as a general proposition, be confined to the resolution of genuine disputes.

[76] We agree with the Department's submission about the issue to which his Honour was referring in paragraph [47] of *QNMU*. In the context of that case, his Honour was referring to the fact that if a declaration had been made it would have bound all

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[106] Industrial Relations Act and Other Legislation Amendment Bill 2007 (Qld), 12.
[107] [2019] ICQ 12; (2019) 289 IR 202 ('*QNMU*'), [47] (Martin J, President).
[108] The Union's submissions, paras. 32-34.
[109] The Department's submissions, para. 36.
[110] *QNMU* (n 107) [4].
[111] Ibid [11].

employees covered by the awards the subject of the QNMU's application. For this reason, we reject the basis upon which the Union contends that the order made by the Vice President binds the Department in respect of its application for declaratory relief.

[77] Having regard to the Applicants' claim in *Shipley*, the ASOF, the Vice President's reasons for decision and his Honour's order (as set out in paragraph [40] of these reasons), the declarations are limited by their own terms to the Applicants and to the Department. For these reasons, we are of the view that the order made by the Vice President only binds the Applicants in *Shipley* and the Department and does not bind the Department in respect of other persons or parties.

[78] In her oral submissions in reply, Ms Doust, counsel for the Union, submitted that even if the declarations made in *Shipley* were not binding on the Department, the question still remains as to whether or not the public interest calls for the Department to be prevented from agitating an entirely different approach to the construction of a certified agreement, to which it is a party, and in respect of which it has had ample opportunity to put a different argument; and that further agitation would involve further use of the Commission's resources and which, if successful, would produce inconsistent results.[112] These are submissions which we consider later in these reasons.

Is it material that the Department did not appeal the decision in Shipley?

[79] Ms Borger's evidence was that because incorrect and inappropriate concessions and assumptions were placed before the Commission in *Shipley*, there was no proper basis for contending that Vice President O'Connor had erred in reaching the conclusion that his Honour did and, therefore, no appeal against that decision was made.[113] However, in cross-examination, Ms Borger agreed that she was not the person responsible for considering whether or not to appeal the decision in *Shipley*.[114]

[80] The Union referred to the concession made by the Department in *Shipley*, namely, that the words '… in an Emergency Department' in sub-cl 4.14.3 of MOCA 4 meant working to some extent in an Emergency Department and the fact that the Vice President acted on that concession.[115] The Union submits that by its application for declaratory relief, the Department is, in effect, appealing the decision in *Shipley* well outside the 21 day time limit specified in s 564 of the Act. The Union also submits that by characterising the matter as an application for declaratory relief, it seeks to avoid the usual burden on appellants of explaining the delay and dealing with the general principles that where, in the absence of some cogent explanation, a party, on appeal, will be bound by its conduct at first instance and will need to seek leave to adduce new evidence on appeal.[116]

[81] The Department submitted that the decision made in *Shipley* could have been appealed but only if there was error on the part of the decision-maker and that little could be

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[112] T 1-69, ll 36-41.
[113] Exhibit 1, para. 12.
[114] T 1-48, l 46 to T 1-49, l 14.
[115] T 1-66, ll 24-29.
[116] The Union's submissions, paras. 45-52.

gained by instituting an appeal against a decision produced by the asking and answering of immaterial questions and the making of orders which were largely by consent.[117]

[82] Further, the Department:

- concedes that because the decision in *Shipley* was not appealed, it can now not challenge the entitlement of the Applicants in that case to the benefit of the order made by Vice President O'Connor;[118]

- accepts that its application for declaratory relief will not apply to the order made in *Shipley* that binds the Department;[119] and

- submits that despite there being no appeal in *Shipley*, there is no rule of law or principle that would shield such a decision from any future scrutiny in other proceedings.[120]

[83] Because the Department did not appeal the decision in *Shipley*, then that decision, and the subsequent order, are binding on the Department in respect of the Applicants in that case. In our view, subject to other considerations we refer to below, the fact the Department did not appeal that decision, and it is final, is relevant as to whether or not its application for declaratory relief is an abuse of process.

Did the Department, by agreeing to sub-cl 11.24.3.1 in MOCA 5, assume the outcome of the Shipley matter would determine its construction?

[84] Ms Borger's evidence-in-chief was that because MOCA 5 was being negotiated and drafted whilst the *Shipley* matter was before the Commission, the parties to the negotiations agreed not to address or negotiate claims made by the Union and by TQ in relation to the ED allowance, agreed not to vary the terms of the ED allowance entitlement in the proposed agreement, and instead drafted MOCA 5 to reflect exactly the ED allowance clause in MOCA 4.[121]

[85] It was put to Ms Borger, in cross-examination, that the Department would only 'roll over' the terms of sub-cl 4.14.3 of MOCA 4 into MOCA 5 if the *Shipley* decision was going to answer all of the relevant questions about the operation of the sub-clause. Ms Borger denied that proposition and stated that there was no agreement by the parties to negotiate on that clause and so, in the interest of getting MOCA 5 bargained and settled, that sub-clause was directly translated over.[122]

[86] It was also put to Ms Borger that the Department, in the negotiation of that sub-clause, gave no indication that it was proposing to run a different argument to the argument it had run in *Shipley* about the construction of the sub-clause. Ms Borger disagreed with that proposition and stated that there had not been any thinking about running another argument and that there was no agreement to change the clause which was strongly

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[117] The Department's submissions, para. 42.
[118] The Department's submissions, para. 43
[119] Ibid para. 41.
[120] Ibid para. 43.
[121] Exhibit 2, para. 29.
[122] T 1-46, l 40 to T 1-47, l 3.

communicated at the beginning of the negotiations. Ms Borger also stated that if the Department had a commitment to implement *Shipley* more broadly, then that would have formed part of the negotiations, that would have been a '… huge decision to have [sic] made without an exchange of letters or be drafted into the agreement', that she could not make such unilateral decisions and that the Director-General had to review to make the final decision.[123]

[87] The Union submitted that Ms Borger's evidence-in-chief, referred to above, did not make any sense unless it was assumed that the outcome of the *Shipley* matter would be dispositive of the dispute, namely, that all the right questions had been asked in that matter and that the issues were going to be resolved. The Union further submitted that in the absence of that assumption, there is no logical explanation for why there should be a link between reproducing the terms in a further agreement, and that particular dispute. Further, the Union submitted that Ms Borger's evidence was that, at the very least, nothing was flagged by the Department, despite the *Shipley* dispute being in the minds of the parties, in the negotiations of the new clause.[124]

[88] We are unable to accept the Union's submissions on this point.

[89] On the undisputed evidence,[125] the terms of the proposed agreement (which became MOCA 5) were agreed between the Department, the Union and TQ prior to Vice President O'Connor releasing his decision in *Shipley.* The effect of Ms Borger's evidence in cross-examination was that the Department would not agree to include a provision in MOCA 5, having state wide application, on the basis that an undecided case would be dispositive of all the issues regarding the construction of the provision. That evidence, it seems to us, is highly plausible. On the Union's contention, the Department would be agreeing to an unknown, in respect of a matter of great significance, in the proposed certified agreement.

[90] Secondly, the Union, which, on Ms Borger's evidence, was involved in negotiations for MOCA 5, called no evidence to contradict Ms Borger's evidence-in-chief about why sub-cl 4.14.3 of MOCA 4 was replicated in MOCA 5.[126] For these reasons, we accept Ms Borger's evidence about this issue.

[91] We do not find that by the Department agreeing to replicate the terms of sub-cl 4.14.3 of MOCA 4 in MOCA 5, it was agreeing to apply the *Shipley* decision in respect of all questions about the operation of that provision.

Is the Department's application for declaratory relief tantamount to an abuse of process?

[92] On the evidence, the Department, in *Shipley,* had at its disposal relevant material going to the history and purpose of the ED allowance which it could have sought to tender in the proceedings before the Vice President. Equally, it seems obvious to us that it was open to the Department to make the argument it now seeks to make about the

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[123] T 1-47, ll 32-44.
[124] T 1-67, ll 10-19.
[125] Exhibit 5, paras. 8-9 and Exhibit 2, para. 24.
[126] See Exhibit 5.

construction of sub-cl 4.14.3 of MOCA 4, namely, than a SMO must work full-time in an Emergency Department to be entitled to the ED allowance at all.

[93] It is extraordinary that the Department was unable to marshal its resources to:

- identify all the relevant issues about the construction of sub-cl 4.14.3 of MOCA 4 in respect of its response to the dispute as notified by the Applicants in *Shipley*; and

- put before Vice President O'Connor all admissible material as an aid to the construction of sub-cl 4.14.3 of MOCA 4.

[94] While the Union was not a party to the proceedings in *Shipley*, such that it could not be said (as the Department submits) that the Union has been 'twice vexed,' on the authority we have referred to earlier at paragraph [48] of these reasons, that fact is not necessarily a barrier to finding that the Department's application for declaratory relief is tantamount to an abuse of process. There is no dispute that the Department was a party in *Shipley* and that the Department, as claimed by the Union, is the author of the abuse of process by its application for declaratory relief.

[95] The issue, about whether SMOs have to work full-time in an Emergency Department to be entitled to the ED allowance, was an important issue. It was originally identified by the Applicants as one of the five questions the Vice President was asked to answer.[127] The Department conceded, because of the ASOF, that SMOs did not have to work full-time in an Emergency Department to be entitled to the allowance.[128] The Department is attempting to relitigate a matter it conceded in *Shipley*.

[96] Further:

- on the evidence before us, the claim the Department now wants to pursue is one it had the means to pursue in *Shipley*;

- there is a close identity between the issues in both cases, namely, the construction of sub-cl 4.14.3 of MOCA 4; and

- the decision in *Shipley* is final.

[97] Having regard to all the circumstances of the case, and because the Department had the ability to run, in *Shipley,* the case it now wants to run, it is open to conclude that the Department's application for declaratory relief is 'tantamount' to an abuse of process as the Union claims. However, the matter we have to determine is not that narrow in that we are not determining whether the Department's application for declaratory relief should be stayed on the basis that its application is an abuse of process.

[98] The provision of the Act the Union seeks to enliven is s 541(b)(ii). As referred to earlier in these reasons, the question we have to determine is whether the Department's

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[127] *Shipley* (n 39) [4]b).
[128] Exhibit 3, page 162, para. [7] - the Department's Outline of Submissions in *Shipley*.

application for declaratory relief should be dismissed or should not be further heard because further proceedings are not necessary or desirable in the public interest.

Should the Department's application for declaratory relief be dismissed or not heard because further proceedings are not necessary or desirable in the public interest?

[99] The value judgment incorporated in s 541(b)(ii) of the Act is a broad one.[129]

[100] The Department submitted that:

- the issue of the identity of persons, to whom the ED allowance provisions in the two certified agreements applied, was plainly a matter of public importance; and

- a conclusion about that matter, made in a confined dispute setting, should not be allowed to stand if it was 'wrongly decided', at least partly because of an ill-advised and plainly erroneous concession made by a party (namely, the Department) on a number of mixed questions of fact and law, including the question of the meaning of the words found in sub-cl 4.14.3 of MOCA 4 in its historical and textual context.[130]

[101] Despite the Department's unexplained failures about the way it conducted its case in *Shipley* (other than that the concessions it made were wrongly made), we accept these submissions by the Department.

[102] The main purpose of the Act is to provide for a framework for co-operative industrial relations that is fair and balanced and supports the delivery of high quality services, economic prosperity and social justice for Queenslanders.[131] Section 4 of the Act sets out how the main purpose of the Act is to be primarily achieved and, relevantly to the matter we presently have to decide, the means of achieving the main purpose of the Act are:

> …
>
> (d) providing for a fair and equitable framework of employment standards, awards, determinations, orders and agreements; and
>
> …
>
> (p) providing for effective, responsive and accessible mechanisms to support negotiations and resolve industrial disputes; and
>
> (q) establishing an independent court and tribunal to facilitate fair, balanced and productive industrial relations;

[103] Section 463 of the Act confers on the Commission discretion, on application by an entity mentioned in s 464, to make a declaration about an industrial matter. Section 9 of the Act relevantly provides that an industrial matter is a matter that affects or relates to

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[129] *Campbell v Queensland* [2019] ICQ 18; (2019) 291 IR 171, [32] (Martin J, President).
[130] The Department's submissions, paras. 26-28, citing *Aldi Foods Pty Limited v Shop, Distributive and Allied Employees Association* [2017] HCA 53; (2017) 262 CLR 593, [90] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[131] *Industrial Relations Act 2016* s 3.

the privileges, rights or functions of employers or employees or a matter the Commission considers has been, is or may be a cause or contributory cause of an industrial action or industrial dispute. Schedule 1 to the Act also defines what are industrial matters and, as referred to earlier, provides that the interpretation of an industrial instrument, unless the Act otherwise provides, is an industrial matter.

[104] In this case, in balancing the public interest of finality of litigation (that is the decision and order in *Shipley*) with the public interest in ensuring sub-cl 4.14.3 of MOCA 4 and sub-cl 11.24.3.1 of MOCA 5 are construed by considering all the relevant questions and upon all admissible material, we are of the view that the greater public interest lies in the latter. There are a number of reasons for this.

[105] First, the ED allowances in MOCA 4 and MOCA 5 are important to the provision of public health services in Queensland. This is because of their importance:

- to the SMOs who are lawfully entitled to the ED allowance as a fair and equitable entitlement; and

- to the Department in attracting and retaining SMOs to work in emergency departments.

[106] Secondly, for the reasons given in paragraphs [63] to [71] of these reasons, Vice President O'Connor, in *Shipley*, did not have the benefit of full assistance from the parties in construing sub-cl 4.14.3 of MOCA 4. In our view, because of the ASOF, the Vice President was not asked to consider all the relevant matters in the construction of sub-cl 4.14.3 of MOCA 4. [132]

[107] While sub-cl 4.14.3 of MOCA 4 is not one of the clearest examples of drafting, on the face of that sub-clause, there is a real question as to the construction of the phrase: 'Where a SMO works in an Emergency Department …' and whether or not that means, in construing sub-cl 4.14.3, a SMO has to work full-time in an Emergency Department so as to have any entitlement to the ED allowance. That question, because of the position taken by the parties in *Shipley*, was not put to the Vice President for his Honour's consideration. It is a question that, in our view, needs to be considered.

[108] Similarly, because of the ASOF and the focus of the parties in *Shipley* on the meaning of the phrase 'Emergency Department,' it does not appear to us that submissions were made concerning the heading to that sub-clause, namely, 'Emergency Department speciality allowance' and to the relevance, if any, of that heading to the construction of sub-cl 4.14.3 of MOCA 4 and to the question of whether or not a SMO has to work full-time in an Emergency Department to be entitled to the ED allowance.

[109] Thirdly, on Ms Borger's evidence, there may be extrinsic material which may be admissible as an aid to the construction of the ED allowance provisions and to answering the issues we have identified immediately above. In our view, some of the evidence before the Vice President, which was tendered before us for the purpose of us considering the Union's present application, may be admissible for the same purposes.

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[132] In respect of the questions the Vice President had to answer in *Shipley*, his Honour was critical of the state of the evidence before the Commission: *Shipley* (n 39) [73].

[110] Fourthly, it seems to us that while hearing and determining the Department's application for declaratory relief would involve further use of the Commission's resources, for the reasons we have given, including the importance of the ED allowance provisions, the balance of the public interest lies in the Commission's resources being directed to the construction of those provisions.

[111] For these reasons, we are of the view that the balance of the public interest lies in the Full Bench hearing and determining the Department's application for declaratory relief and, in doing so, the Full Bench giving consideration, with full assistance being provided by the present parties, to the construction of the ED allowance provisions in MOCA 4 and MOCA 5.

[112] The Union submitted there were two reasons why the Full Bench should not consider that the public interest lay in us hearing the Department's application for declaratory relief.

[113] The first was that the public interest consideration in ensuring the correct construction of the ED allowance provisions does not overwhelm what was the irresponsible management (by the Department) of the previous proceeding and the consequences of that proceeding that led to the negotiation of MOCA 5.[133] We disagree. We are of the view that if the Department's mishandling of the proceedings before Vice President O'Connor led to the parties not identifying the correct issues for the construction of sub-cl 4.14.3 of MOCA 4, then given the importance of that provision and of sub-cl 11.24.3 of MOCA 5, there is a greater public interest in consideration being given to their construction upon full assistance being provided by the present parties. Further, for the reasons given earlier, we are not persuaded that the Department agreed to sub-cl 11.24.3 of MOCA 5 on the basis that the decision in *Shipley* would resolve all questions about the meaning of that provision.

[114] The second reason raised by the Union was that the issue sought to be agitated by the Department should have been agitated in an appeal and that the Department, by its application for declaratory relief, is sidestepping all the issues that it would need to argue in respect of launching such an appeal, such that those public interest considerations are paramount.[134] We also disagree for the same reasons we have given immediately above. Given the importance of the ED allowance provisions, there is a greater public interest in ensuring that the ED allowance provisions are construed upon the consideration of all relevant questions and all admissible material.

[115] Our decision about these matters is one that is confined to the facts of the present case. In another case and in different factual circumstances, the outcome may be different.

Does the Department's application for declaratory relief give rise to the application of the *Anshun* principle?

The Anshun principle

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[133] T 1-70, ll 36-41.
[134] T 1-70, l 41 to T 1-71, l 33.

[116] In *Anshun*, the owner of a crane which was involved in an accident was prevented from pursuing separate proceedings in which it sought an indemnity from the hirer of the crane when it had only claimed a contribution from the hirer in the first proceeding.[135] The majority of the High Court held that it would have been expected that the owner of the crane would have sought an indemnity in the first proceeding and litigated the questions of law and fact relevant to the indemnity claim at that time and, as a consequence, the owner of the crane was estopped from seeking an indemnity from the hirer in the subsequent proceeding.[136]

[117] In coming to this conclusion, the majority held that:

- there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it;[137]

- generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim and its subject matter, it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding;[138]

- there are a variety of circumstances why a party may justifiably refrain from litigating an issue in one proceeding, yet wish to litigate the issue in another proceeding, for example, expense, importance of the particular issue and motives extraneous to the actual litigation;[139] and

- it has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment; and conflicting judgments includes judgments which are contradictory though they may not be pronounced on the same cause of action and it is enough that they appear to declare rights which are inconsistent in respect of the same transaction.[140]

[118] In *Tomlinson v Ramsey Food Processing Pty Limited,*[141] French CJ, Bell, Gageler and Keane JJ summarised the principle stating:

> … The third form of estoppel is now most often referred to as "*Anshun* estoppel", although it is still sometimes referred to as the "extended principle" in *Henderson v Henderson*. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a "true

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[135] *Anshun* (n 3) 593-594 (Gibbs CJ and Mason and Aiken JJ).
[136] Ibid 602-604.
[137] Ibid 602.
[138] Ibid.
[139] Ibid 603.
[140] Ibid 603-604.
[141] [2015] HCA 28; (2015) 256 CLR 5.

> estoppel" and not as a form of res judicata in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.[142]

[119] In written submissions, the Union submitted that the Department's application for declaratory relief is an attempt to bring a proceeding raising matters that should, on any reasonable view, have been raised in the context of the *Shipley* decision.[143]

[120] In its written submissions, the Department submitted that the *Anshun* principle is closely confined to the circumstance where there are 'conflicting judgments' which was intended to include judgments which are contradictory, though they may not be pronounced on the same cause of action in that it was thought enough that they appear to declare rights which are inconsistent in respect of the same transaction.[144] The Department further submitted that the Union's submissions did not indicate in which 'same transaction' it, the Department and the Applicants in *Shipley,* were involved, so as to invoke the principle because there was no such same transaction and the *Anshun* principle does not apply.[145]

[121] The Department,[146] then referred to the decision of French J in *Spalla v St George Motor Finance Ltd (ACN 007 656 555) (No 6)*[147] as authority for the proposition that an *Anshun* estoppel arises as between the same parties to the same subject of litigation.[148]

[122] However, a person (the second party) who seeks to make a claim in later proceedings may be bound by the actions of a party in early proceedings if the party in those proceedings represented the second party such that they could be described as the privy in interest of the second party. This principle applies with respect to all forms of estoppel, including an *Anshun* estoppel.[149]

The Anshun principle is not applicable to the Department's application for declaratory relief

[123] Some of the elements giving rise to an *Anshun* estoppel are present in this case.

[124] The subject matter in *Shipley* and in the Department's application for declaratory relief are connected, namely, the circumstances in which SMOs are lawfully entitled to the ED allowance within the meaning of sub-cl 4.14.3 of MOCA 4.

[125] Further, because of the ASOF, the Department conceded that the SMOs did not have to work all their hours in the Emergency Department at the Beaudesert Hospital to be entitled to the ED allowance. The Department now contends that SMOs have to work full-time in an Emergency Department to be entitled to the ED allowance. Given the nature of the claims by the Applicants in *Shipley*, it is reasonable to conclude that the

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[142] Ibid [22] (citations omitted).
[143] The Union's submissions, para. 53.
[144] The Department's submissions, para. 56.
[145] Ibid para. 57.
[146] Ibid para. 58.
[147] *Spalla* (n 58).
[148] Ibid [65] (French J).
[149] *Timbercorp Finance Pty Ltd v Collins* [2016] HCA 44; (2016) 259 CLR 212 [36] (French CJ, Kiefel, Keane and Nettle JJ).

Department should have put in issue, in *Shipley*, the number of hours a SMO had to work in an Emergency Department to be lawfully entitled to the ED allowance at all.

[126] In addition, it is possible that any decision we make about the construction of sub-cl 4.14.3 of MOCA 4 may conflict with the decision given by the Vice President.

[127] However, the parties in *Shipley* were different to the parties in the present matter. The Union was not a party in Matter No. D/2018/6 which was the matter heard and determined by the Vice President in *Shipley*.

[128] For this reason, no *Anshun* estoppel can arise for our consideration in the context of whether we would exercise discretion, pursuant to s 541(b)(ii) of the Act, to dismiss, or refrain from hearing or further hearing the Department's application for declaratory relief on public interest grounds.

Conclusion

[129] The onus was on the Union to persuade us that we should exercise discretion pursuant to s 541(b)(ii) of the Act to dismiss, or refrain from hearing or further hearing the Department's application for declaratory relief because further proceedings are not necessary or desirable in the public interest.

[130] Even though the Department's application for declaratory relief is tantamount to an abuse of process, for the reasons that we have given, we are not persuaded that we should exercise our discretion and grant the relief sought by the Union.

[131] In balancing the public interest considerations raised by the parties, we are of the view that the balance of the public interest lies in the Full Bench being satisfied, given the importance of the ED allowance provisions in the certified agreements, that those provisions are construed having regard to all relevant arguments and all admissible material.

[132] For these reasons, the Union's application is dismissed.

[133] Matter Nos. D/2019/114 and B/2019/70 will be mentioned on a date to be fixed before Deputy President Merrell only so as to schedule the progress of their hearing and determination before the Full Bench.

Orders

[134] We make the following orders:

1. **The application by the Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees pursuant to s 541(b)(ii) of the *Industrial Relations Act 2016*, that the Full Bench dismiss, or refrain from hearing or further hearing Matter No. B/2019/70, is dismissed.**

2. **Matter No. D/2019/114 and Matter No. B/2019/70 will be mentioned before Deputy President Merrell only on a date to be fixed.**