[2023] FWC 2077 [Note: An appeal pursuant to s.604 (C2023/5323) was lodged against this decision - refer to Full Bench decision dated 31 October 2023 [[2023] FWCFB 200] for result of appeal.]

DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Southern Cross University
(AG2022/4745)

COMMISSIONER P RYAN SYDNEY, 18 AUGUST 2023

Application for approval of the Southern Cross University Enterprise Agreement 2021

Introduction

[1] Southern Cross University (**Applicant**) has made an application for approval of an enterprise agreement known as the *Southern Cross University Enterprise Agreement 2021* (**Proposed Agreement**) pursuant to s.185 of the *Fair Work Act 2009* (Cth) (**FW Act**).

[2] The Proposed Agreement is expressed to cover its academic and professional employees employed in the classifications detailed in Schedules 1, 2 and 3 of the Proposed Agreement, other than those senior managerial employees as described in clause 4.

[3] The relevant modern awards that would otherwise cover the employee classifications are the *Higher Education Industry – Academic Staff – Award 2020* (**Academic Staff Award**) and the *Higher Education Industry – General Staff – Award 2020* (**General Staff Award**) (collectively the **Higher Education Awards**).

[4] The current instrument that applies to the Applicant and its employees is the *Southern Cross University Enterprise Agreement 2018*[1] (**2018 Agreement**).

[5] The access period for the Proposed Agreement was from 26 October 2022 until 1 November 2022 (inclusive). The voting period was open from 9:00am on 2 November 2022 until 4:00pm on 4 November 2022. The Form F17 Declaration records the following details about the vote:

> *26.1 At the time of the vote, how many employees were covered by the agreement?*
>
> *1931*
>
> *26.2 How many of these employees cast a valid vote?*
>
> *1289*

26.3 How many of these employees voted to approve the agreement?

685.

[6] The Form F16 Application identified the Community and Public Sector Union (**CPSU**) and the National Tertiary Education Industry Union (**NTEU**) as union bargaining representatives. Both the CPSU and the NTEU filed a Form F18 Declaration.

[7] In its Form F18 Declaration, the CPSU supports the approval of the Proposed Agreement and gave notice pursuant to s.183 of the FW Act that it wants to be covered by the Proposed Agreement.

[8] In its Form F18 Declaration, the NTEU opposes the approval of the Proposed Agreement and set out a number of issues that form the basis for its opposition. The NTEU also gave notice pursuant to s.183 of the FW Act that it wants to be covered by the Proposed Agreement.

[9] Following an exchange of correspondence identifying initial issues and concerns, and conducting a conference with the parties, the matter was set down for hearing on 6 and 10 March 2023.

[10] I exercised my discretion to grant permission to the parties to be represented by a lawyer, as I was satisfied as to the matters set out in s.596(2)(a) of the FW Act. The Applicant was represented by Mr R Dalton KC and Mr N Burmeister, the CPSU was represented by Mr N Keats, and the NTEU was represented by Mr C Dowling SC.

Issues to be determined

[11] While the range of issues raised by the NTEU in its Form F18 Declaration have narrowed, the following issues remained in contention at the hearing of the matter:

(i) That the Proposed Agreement has not been genuinely agreed due to a failure to establish that casual employees were employed at the relevant time;

(ii) That the Proposed Agreement has not been genuinely agreed due to a failure to establish the validity of the voter roll;

(iii) That the Proposed Agreement has not been genuinely agreed due to a failure by the Applicant to take all reasonable steps to provide material incorporated by reference;

(iv) That the Proposed Agreement has not been genuinely agreed due to the making of misleading statements;

(v) That the Proposed Agreement does not pass the 'better off overall test' due to the removal of restrictions on the use of Fixed Term Employment; and

(vi) That the Proposed Agreement does not pass the 'better off overall test' in relation to:

a. Minimum engagement periods for casual employees;

b. Apprentice and trainee rates pay;

c. Notice of termination for apprentices; and

d. Schedule 4 employees.

Materials before the Commission

[12] The following materials were admitted into evidence:

Exhibit No.	Description
1	Witness statement of Andrew Crichton
2	Witness statement of Christina Kenny
3	Witness statement of Kenneth McAlpine
4	Witness statement of Sean O'Brien
5	Witness statement of Suzanne Rienks
6	Witness statement of Jubilee Smith
7	Witness statement of Alison Watts
8	Reply witness statement of Kenneth McAlpine
9	Reply witness statement of Sean O'Brien
10	Reply witness statement of Suzanne Rienks
11	Reply witness statement of Jubilee Smith
12	Applicant's Objections to NETU's Evidence
13	Form F16 Application
14	Form F17 Declaration
15	Proposed Agreement
16	Witness statement of Sharon Farquhar

17	Amended Witness statement of Deborah Lisetto
18	Staff List for Vote 25/10/2022*
19	A4 Document identified with 'Real Voter List'
20	A4 Document identified with 'Big Pulse User Internal ID'
21	Supplementary Witness statement of Deborah Lisetto
22	Report 2
23	Report 4
24	Report 1
25	Report 3
26	List of names not in Exhibit 18, but appearing in both Exhibit 19 and Exhibit 20
27	Email from S. Fawcett to HR Services dated 7/11/2022
28	Email trail between S. Garvey and J. Watson dated 7/11/22

[13] The following submission documents were marked for identification:

Identifier	Description
MFI 1	Wage Rate Comparison Document
MFI 2	Aide Memoire – Value of Entitlements
MFI 3	Aide Memoire – Compilation of Voter Roll
MFI 4	Duplicate Spreadsheet

[14] The parties also filed written submissions and made oral submissions during the hearing.

[15] In coming to this decision, I have had regard to the evidence and submissions of the parties, including the oral evidence and written and oral submissions even if they are not expressly referred to in this decision.

Confidentiality Order

[16] During the course of the proceedings, I issued a confidentiality order[2] limiting access to, and preventing publication and disclosure beyond those permitted access, in relation to the following documents:

- Exhibit 18;
- Annexures DL1 and DL2 to Exhibit 21;
- Exhibit 26;
- MFI 3; and
- MFI 4.

[17] I also conducted parts of the proceedings which traversed the contents of the confidential documents in private, allowing only those who were permitted access to the confidential documents to be present in the hearing room. The transcript of those parts of the proceedings is also subject to the confidentiality order.[3]

Relevant Legislative Provisions

[18] As set out above, a number of the issues in dispute concern whether the employees genuinely agreed to the Proposed Agreement.

[19] The *fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Amending Act**) made a number of changes to enterprise agreement approval processes in Part 2-4 of the FW Act, which commenced operation on 6 June 2023.

[20] Under transitional arrangements, amendments made by Part 14 of Schedule 1 to the Amending Act in relation to the genuine agreement requirements for agreement approval applications apply where the notification time for the agreement was on or after 6 June 2023.

[21] The notification time for the Proposed Agreement was 18 June 2021.[4] Accordingly, the provisions in Part 2-4 of the FW Act, as it was before 6 June 2023, continue to apply in relation to my consideration of this matter. I set out the relevant legislative provisions of Part 2-4 of the FW Act below.

[22] Section 180(1)-(4) of the FW Act provides as follows:

> **180 Employees must be given a copy of a proposed enterprise agreement etc.**
>
> Pre-approval requirements
>
> i. Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.
>
> Employees must be given copy of the agreement etc.
>
> ii. The employer must take all reasonable steps to ensure that:
>
> 1. during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be

covered by the agreement are given a copy of the following materials:

(i) the written text of the agreement;

(ii) any other material incorporated by reference in the agreement; or

2. the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

iii. The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

1. the time and place at which the vote will occur;

2. the voting method that will be used.

iv. The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).

[23] Section 181 of the FW Act provides as follows:

181 Employers may request employees to approve a proposed enterprise agreement

(1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

[24] Section 182(1) of the FW Act provides as follows:

182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement

under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

[25] Section 186 of the FW Act provides as follows:

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

1. if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

2. if the agreement is a multi-enterprise agreement:

   (i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

   (ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

3. the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

4. the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

(a) the agreement specifies a date as its nominal expiry date; and

(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

[26] Section 188 of the FW Act provides as follows:

188 When employees have genuinely agreed to an enterprise agreement

(1) An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

(2) An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and

(b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.

[27] Section 190(1)-(3) of the FW Act provides as follows:

190 FWC may approve an enterprise agreement with undertakings

Application of this section

(1) This section applies if:

(a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and

(b) the FWC has a concern that the agreement does not meet the requirements set out in sections 186 and 187.

Approval of agreement with undertakings

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:

(a) cause financial detriment to any employee covered by the agreement; or

(b) result in substantial changes to the agreement.

[28] Section 193(1) of the FW Act provides as follows:

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Issue (i) – Whether the casual employees were employed at the relevant time for the purposes of s.181(1)

[29] As set out above, s.181(1) of the FW Act provides that an employer (that will be covered by a proposed enterprise agreement) may request employees employed at the time who will be covered by the agreement by voting for it.

[30] The NTEU contends that the Applicant has not established that the casual employees were 'employed at the time' of the access period and vote and therefore, the Proposed Agreement was not genuinely agreed to by the employees.

2022 Terms and Sessions

[31] The Applicant divides its academic year into six separate terms, each including six full weeks of teaching. The Applicant refers to this as the '6 x 6 Model.'[5] In addition to the teaching weeks, each term includes:

- Orientation Period – this is the week immediately prior to the first week of teaching in each term;

- Assessment and Grading Week – this is the week immediately following the last week of teaching in each term.[6]

[32] Notwithstanding the implementation of the 6 x 6 Model, the Applicant's Faculty of Health courses and Law courses within the Faculty of Business remain scheduled over a 'three 'sessions model'. The Applicant also incorporates four weeks each year which are designated as Teaching-Free Weeks.[7]

[33] Relevantly to this matter the term/session dates for the period of October/November 2022 were as follows:

- 6 x 6 Model:
    - Term 4
        - Teaching Starts – 29 August 2022
        - Teaching Ends – 7 October 2022
        - Assessment and Grading Week – 10 October 2022
        - Teaching-Free Week – 17 October 2022.
    - Term 5
        - Orientation Period – 24 October 2022
        - Teaching Starts – 31 October 2022
        - Teaching Ends – 9 December 2022
        - Assessment and Grading Week – 12 December 2022.
- Three Sessions Model:
        - Orientation – 24-28 October 2022
        - Classes commence – 31 October 2022
        - Study Break – 12-16 December 2022
        - Recess – 19-31 December 2022
        - Class end – 8 February 2023
        - Study Break – 9-10 February 2023
        - Exams – 13-15 February 2023
        - Grade Publication – 1 March 2023.[8]

Casual Employees

[34] The Applicant employs casual employees in a range of circumstances to meet its operational and organisation needs which are categorised as follows:

- Casual Teaching (Academic);
- Casual Single Rate (Academic);
- Casual English Language;
- Engagement Casual; and
- Casual Professional.[9]

[35] Casual Teaching (Academic) employees are academic staff that have relevant academic qualifications and are engaged to perform academic related duties including teaching and the associated preparation, marking, and student consultation. This category of employee is typically employed for, or by reference to, one or more Terms.[10]

[36] A Casual Teaching (Academic) employee's start date will generally pre-date the Orientation Period in order to provide sufficient time for teaching preparation, consultation with supervisor, engaging in student consultation in advance of the first week of teaching.[11]

[37] A Casual Teaching (Academic) employee's end date will generally post-date the end of the teaching weeks to allow for the completion/finalisation of any outstanding assessment matters or teaching-related administrative processes. This includes attending to any issues and disputes relating to student grades following the Assessment and Grading Week.[12]

[38] A Casual Teaching (Academic) does not have any autonomy over what is required to be taught or when teaching occurs, which is undertaken in accordance with the Applicant's timetable. However, a Casual Teaching (Academic) has autonomy over when any 'non-contact' duties, such as administrative matters, teaching preparation, marking and student consultation, are undertaken.[13]

[39] A pro-forma and redacted contract for a Casual Teaching (Academic) was admitted into evidence for an employee in the Faculty of Business, Law, and Arts.[14] The redacted contract provides for the following:

- A defined start date, 30 September 2022;
- A defined end date, 31 January 2023;
- An estimated maximum of 87 hours to be worked over the period, separated into categories such as Tutorial, Workshop, Marking, Repeat Tutorials, and in this case, Unit Assessor as the employee had additional duties associated with the management and administration of a Unit of study.;
- That the estimated maximum hours are an estimated maximum and that actual hours may vary and that any additional hours in excess of the estimated maximum require approval;

- A condition that the employee will be paid an hourly rate in accordance with the relevant instrument;

- That either party may terminate the contract on one hour's notice; and

- A list of duties setting out the number of hours allocated to each category of duty over the period.

[40] It is important to note, that while the contract specifies an estimated maximum of 87 hours, this does not include the additional non-contact hours. Depending upon the nature of the work performed the additional non-contact hours could be based on a ratio as high as three additional non-contact hours for each hour of teaching. In the case of the redacted Casual Teaching (Academic) contract, Ms Farquhar gave evidence that the duties set out in that contract would require, and include payment for, an additional 54 hours.[15]

[41] Casual Single Rate (Academic) employees are employed to undertake research or other academic work not classified as typical teaching activity. This includes research and other academic-related projects such as collecting and analysing data, writing reports or papers, and contributing to research publications. The work is directed by the senior leader or Research Project Lead and varies from week-to-week.[16]

[42] A Casual Single Rate (Academic) employee's start date and end date is determined by reference to the need to have these employees start and undertake the specific research activity or project within a pre-determine period of time. The work performed under this type of engagement is typically highly autonomous and self-directed, primarily because of the flexible nature of research-related work.[17]

[43] A pro-forma and redacted contract for a Casual Single Rate (Academic) was admitted into evidence for an employee in the Science and Engineering Work Unit.[18] The redacted contract provides for the following:

- A defined start date, 25 July 2022;

- A defined end date, 28 February 2023;

- An estimated maximum of 400 hours to be worked over the period for a project on the Richmond River;

- That the estimated maximum hours are an estimated maximum and that actual hours may vary and that any additional hours in excess of the estimated maximum require approval;

- A condition that the employee will be paid an hourly rate in accordance with the relevant instrument;

- That either party may terminate the contract on one hour's notice; and

- A list of duties including relevant to the project including project delivery, data collection, and the compilation of reports.

[44] Casual English Language employees are employed to teach English to international students in accordance with a schedule of classes in each Term or Session, which includes classes scheduled during Orientation Periods and Teaching Weeks. Casual English Language employees are generally contracted for a period spanning two terms or one session.[19]

[45] A pro-forma and redacted contract for a Casual English Language employee was admitted into evidence.[20] The redacted contract provides for the following:

- A defined start date, 24 October 2022;
- A defined end date, 24 February 2023;
- An estimated maximum of 380 hours to be worked over the period, separated into categories such as preparation, teaching and a study tour;
- That the estimated maximum hours are an estimated maximum and that actual hours may vary and that any additional hours in excess of the estimated maximum require approval;
- A condition that the employee will be paid an hourly rate in accordance with the relevant instrument;
- That either party may terminate the contract on one hour's notice; and
- A list of duties setting out the number of hours allocated to each category of duty over the period.

[46] An Engagement Casual employee is an employee with specialist expertise in a particular disciplinary area with higher teaching experience who is typically engaged to develop teaching and learning materials.[21] Engagement Casual employees are not covered by the Proposed Agreement.[22]

[47] Casual Professional employees are employed to perform general administrative duties, act as a research assistant, or perform ad hoc student support work. Casual Professional employees typically to work structured days and times for a defined period.[23]

[48] A pro-forma and redacted contract for a Casual Professional employee in the position of Technical Assistant was admitted into evidence.[24] The redacted contract provides for the following:

- A defined start date, 19 April 2022;
- A defined end date, 24 March 2023;
- An estimated maximum of 250 hours to be worked over the period;

- That the estimated maximum hours are an estimated maximum and that actual hours may vary and that any additional hours in excess of the estimated maximum require approval;

- A condition that the employee will be paid an hourly rate in accordance with the relevant instrument;

- That either party may terminate the contract on one hour's notice; and

- A list of duties which include assisting with glasshouse and incubation studies, quantifying AM fungi using microscopy, and quantifying root growth in response to regenerative treatments.

[49] Casual employees are paid by making a pay claim through the Applicant's payroll and HR systems. A pay claim is typically processed on a fortnightly basis in arrears. However, Ms Farquhar, the Applicant's director of human resources, stated that it was not uncommon for pay claims to be submitted for work undertaken more than a fortnight prior. Furthermore, because casual employees have autonomy as to when they undertake non-contact work, the precise working times cannot be determined.[25]

[50] The NTEU relied on two Casual Teaching (Academic) employment contracts[26] which set out the employment periods as follows:

Contract SO1	
Start date:	18 August 2022
End date:	30 November 2022
Term/Session:	Term 4
Duties:	Teaching, Unit Assessor.

Contract SO3	
Start date:	26 October 2022
End date:	31 January 2023
Term/Session:	Term 5
Duties:	Marking and Meetings.

[51] The NTEU sought to illustrate that in relation to Contract SO1, any work performed would have been completed prior to the commencement of the access period, and in relation to Contract SO3, any work performed as a marker would have occurred well after the cessation of the access period.

[52] However, Ms Farquhar identified that those contracts (SO1 and SO3) both apply to the same employee and the duties relevant to Contract SO1 continued beyond the end of the Assessment and Grading Week as the employee was employed as a Unit Assessor and was required to complete a range of tasks including implementing a study unit review and compiling a Unit Report and iQILT Report.[27]

[53] Furthermore, in relation to Contract SO3, it was Ms Farquhar's evidence, that some work had to be performed prior to the commencement of the first teaching week of Term 5 (that is, within the access period), despite the majority of the work being performed later in the Term 5.[28]

Summary of the NTEU's Submissions

[54] The NTEU referred to following authorities that apply in determining whether casual employees are *'employed at the time'* for the purposes of s.181(1):

- *National Tertiary Education Industry Union v Swinburne University of Technology*[29] (***Swinburne***) – that only those employees employed at the time the employer requests a vote are eligible to vote and that 'employed' does not include those persons that are 'usually employed.'

- *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd (t/as Manly Fast Ferry)*[30] (***Noorton***) – which considered the 'unique' features of casual employment in the context of voter eligibility and held that a person who is a casual employee but who is not working on a particular day or during a particular is *unlikely* to be employed on that day or during that period.

- *Workpac Pty Ltd v Rossato*[31] (***Rossato***) – where the High Court held that although the rosters exhibited features of regularity and consistency it did not establish a commitment between the parties to an ongoing working relationship after each assignment was completed. The NTEU submitted that *Rossato* makes clear that the determinative factor is the terms of the contract in each case. In this respect the NTEU submitted that Rossato did not exclude the position that casual employees may be engaged in such a way that there are new employment relationships each time they attend for work.[32]

[55] The NTEU cited the decision in *MTCT Services Pty Ltd*[33] (**MTCT Services**) in which Commissioner Cirkovic considered the decisions in *McDermott Australia Pty Ltd v The Australian Workers Union*[34] (***McDermott***) and *Noorton* and concluded that the casual employees in that case were not ongoing and were not 'employed at the time' unless they were engaged on a work shift at the time.

[56] The NTEU also cited the decision in *Charles Darwin University*[35] where Commissioner Platt found that casual employees who had not performed work during the access period were not entitled to vote.

[57] The NTEU submitted that the contracts before the Commission make it clear that the employment of each casual employee is terminable on one hours' notice, the number of hours specified are estimated maximums and the actual hours worked may vary (that is there is no guarantee of any work), and that the employment is subject to the 2018 Agreement which makes clear that casual employees are *'engaged by the hour.'*[36]

[58] The NTEU submitted that the employment could be hardly described as 'ongoing' and that on the material before the Commission it could not be satisfied that the casual employees

were 'employed at the time' and therefore, the Proposed Agreement was not genuinely agreed to in accordance with s.188(1)(b).

Summary of the Applicant's Submissions

[59] The Applicant submitted that the valid members of the 'voting cohort' are those employees who will be covered by the Proposed Agreement and who:

(i) For the purposes s.180(2), (3) and (5), were employed during the access period, but not necessarily from the start of it; and

(ii) For the purposes of s.181(1), were employed at the time the employer requests employees to vote for the Proposed Agreement.

[60] The Applicant cited the decision in *Appeal by Shop, Distributive and Allied Employees Association*[37] (***Kmart***) where the Full Bench held that the voting cohort does not crystallise until the end of the access period, which is the same time at which the employer makes a request the employees employed at that time who will be covered by the agreement vote to approve it.

[61] The Applicant submitted that the inclusion of one or more ineligible people in the voting cohort is not of itself fatal to an approval application. The Applicant submitted that regardless of who is requested to vote, the statutory question is whether the Commission is satisfied that a majority of eligible voters voted to approve the agreement.

[62] The Applicant submitted that the terms and conditions of the Applicant's casual employment contracts are not distinguishable from the facts in *Rossato* and that in assessing 'employed at the time' by reference to the access period and request time, it is not necessary for the Applicant to prove in respect of each casual employee that they worked at the relevant times. The Applicant submitted that it is sufficient to demonstrate that the terms of employment of the casual employees subsist across the relevant periods.

[63] The Applicant referred to *McDermott* where the Full Bench stated that it would be inappropriate and counter intuitive to disenfranchise casual employees of a right to vote on the basis that they were not rostered to work on the day of the vote or during the access period.

[64] The Applicant noted the obiter remarks by the Full Bench in *Noorton* regarding the correctness of *McDermott* but submitted that the Full Bench in *Noorton* did not rule out a casual employee being included in a voting cohort by reference to the terms of the employment, and not just by reference to whether they performed work at the relevant times. The Applicant noted in *Noorton* there was a complete absence of evidence as to the employment arrangements in the terms of the contracts for casual employees.

[65] The Applicant submitted that the proper enquiry is whether the employee was contracted to perform work at the relevant times and if they were, they were employed and that consistent with *Rossato*, casual employment may subsist across periods of 'assignment' during which many shifts are work or a unit of study is delivered.

Summary of the CPSU's Submissions

[66] The CPSU made submissions that were largely consistent with the Applicant. The CPSU submitted that ultimately it is the casual employment contracts that need to be considered to determine whether the casual employees were 'employed at the time'.

[67] The CPSU referred to the various casual employment contracts in evidence and noted that some of the features were unusual for 'true' casual employment.

[68] The CPSU submitted that *MTCT Services Pty Ltd* and *Charles Darwin University* are distinguishable from the current matter.

Summary of the NTEU's Submissions in Reply

[69] The NETU submitted that the Applicant's reliance on *McDermott* is misplaced, noting that the Full Bench in *Noorton* expressed some misgivings about the correctness of *McDermott*. The NTEU submitted that the critical conclusion in *McDermott* was that the employees were found to have accepted ongoing employment.

[70] With respect to *Rossato*, the NTEU submitted that while there are some similarities, the significant difference is that in *Rossato* the employee was engaged for an assignment and in this matter, the employees are engaged by the hour.

[71] The NTEU submitted that the particular circumstances must be assessed in each case.

Consideration

[72] The issue for determination is whether the Applicant's casual employees were 'employed at the time' with reference to the representative casual employment contracts before the Commission.

[73] The Applicant employs casual employees in each case for a specific period defined by a start date and an end date. Within that period, each casual employee is required to perform work for a number of hours which are described as an estimated maximum. In other words, there is certainty about the period over which the work will be offered and the number of hours that will be required.

[74] Unlike the case in *MTCT Services*, the casual contracts of employment do not contain a provision that each shift is a separate period of employment, nor do they state that there is no guarantee that the employees will be offered any pattern or number of casual shifts, or that there is no guarantee of any casual shifts.[38] Rather, there is an obligation on the employees to work the hours pursuant to the contract over the defined period.

[75] Put another way, and in the context of the Applicant's operations, the casual employees are not free to reject employment to deliver a tutorial on one day and accept employment to deliver a tutorial the next over the course of the term or session.

[76] While in *Noorton* the Full Bench held that ordinarily a casual employee will not be engaged under a continuous contract of employment, and if not working on a particular day is

unlikely to be employed on that day or during that period, the Full Bench observed there were, albeit rare, exceptions.[39] The Full Bench also distinguished *McDermott* on the basis that the employees in *McDermott* had accepted ongoing employment.[40]

[77] In *McDermott*, the Full Bench found that casual employees had accepted ongoing employment for the *duration of a project* and that it would be *"inappropriate and counter intuitive to disenfranchise casual employees of a right to vote on the basis that they were not rostered to work on the day of the vote or during the access period."*[41]

[78] Having regard to the material before me and the submissions of the parties, I consider the nature of the casual employment in this matter to be analogous to that in *McDermott* in that the employees have been offered and accepted ongoing employment for the duration of a 'project' or 'assignment' being in this case the relevant term/s, session/s, or other defined period set out in the contract.

[79] Subject to my findings in issue (ii) below, I am satisfied, and so find, that the casual employees were 'employed at the time' for the purposes of s.181(1) of the FW Act.

Issue (ii) – That the Proposed Agreement has not been genuinely agreed due to a failure to establish the validity of the voter roll

[80] The NTEU contends that the Commission cannot be satisfied that a majority of employees who were employed at the time cast a valid vote to approve the Proposed Agreement and therefore, the Commission cannot be satisfied that the Proposed Agreement has been genuinely agreed.

[81] The Applicant concedes that there were errors with the compilation of the roll of voters but submits subject to some adjustments, that it does not affect the outcome that a majority of employees who will be covered by the Proposed Agreement cast a valid vote to approve it.

[82] The errors have been identified through a comparison of Exhibits 18, 19 and 20, additional data reports prepared by the Applicant,[42] and the evidence of Ms Deborah Lisetto, the Applicant's Manager, Client Services (Remuneration and HRIS).[43] The errors comprise:

- Persons who were not covered by the Proposed Agreement were included on the roll of voters;
- Persons whose employment ceased prior to the end of the access period were not removed from the roll of voters;
- Persons who commenced employment during the voting period were included on the roll of voters;
- Persons whose employment was due to end during the voting period were not included on the roll of voters;
- Persons who commenced employment during the access period were not included on the roll of voters; and

- Persons were duplicated (assigned two voting IDs) on the roll of voters; and

[83] To assess the impact of the errors on the roll of voters, I now set out the steps taken by the Applicant to compile the roll of voters and then make the relevant adjustments taking into the nature of the error and the decisions of the Commission in *Kmart* (at [43]) and *Appeal by Charles Darwin University* [2023] FWCFB 65 (at [11]).

Compilation of roll of voters

[84] The Form F17 Declaration records that there were 1931 persons on the roll of voters, of which 1289 voted and 685 voted to approve the Proposed Agreement.

[85] The following steps were taken to compile the roll of voters.

Step 1

On 25 October 2022, Ms Lisetto extracted the raw employee data from the Applicant's HR management system into a file with the name: Staff List for Vote 25/10/2022. This document is Exhibit 18 and contains 2106 persons. [44]

Step 2

157 duplicate employee entries were removed (1949 persons).[45]

Step 3

26 senior managerial employees designated as 'Above Academic Contract' (AACON) who are not covered by the Proposed Agreement were removed (1923 persons).[46]

Five of the 26 employees who were later identified to have a separate contract covered by the Proposed Agreement were reinstated to the roll of voters (1928 persons).[47]

Three further AACON employees who were incorrectly recorded as SCUEBA employees in Exhibit 18 were removed (1925 persons).[48]

Step 4

11 employees were identified as ceasing employment on or before 4 November 2022 were removed (1914 persons).[49]

Step 5

11 persons were identified as commencing employment on or before 4 November 2022 were added to the roll of voters (1925 persons).[50]

The roll of voter document containing 1925 persons is provided to Ms Rebecca Moore, a workplace relations advisor employed by the Applicant, and uploaded by her to the external ballot provider.[51]

Step 6

Ms Moore adds 6 persons to the roll of voters. One person who was inadvertently omitted and five persons who commenced employment during the access period (1931 persons).[52]

Step 7

Ms Moore makes some amendments to correct incomplete or update email addresses. In the process, Ms Moore erroneously duplicates 2 persons on the roll of voters (1933 persons).[53]

Final Roll – 1933 (1931 persons plus 2 duplicates).

Adjustments for errors

[86] As stated earlier, the roll of voters contained various errors. Accordingly, it is necessary to make adjustments to the voting figures.[54] Having regard to the evidence and the submissions of the parties, I make the following adjustments:

Adjustment 1

Report 3 identified that 16 persons that were employed as Engagement Casuals who will not be covered by the Proposed Agreement were not removed from the roll of voters.[55] Assuming each of these persons voted and voted yes, 16 persons are deducted from the total and 16 votes are deducted from the yes vote.

Total: 1289 – 16 = 1273
Yes: 685 – 16 = 669
No: 604.

Adjustment 2

Report 2 identified 16 persons whose employment ended during the access period (14 persons) or voting period (2 persons) on the roll of voters.[56]

The 14 persons who were not employed as at the relevant time were not eligible to vote. However, one of those employees[57], was also employed as an engagement casual and was removed under Adjustment 1.

Assuming each of the remaining 13 persons voted yes, 13 persons are deducted from the total and 13 votes are deducted from the yes vote.

Total: 1273 – 13 = 1260

Yes: 669 – 13 = 656
No: 604.

Adjustment 3

Report 1 identified 1 person who had commenced employment during the voting period and was added to the roll of voters.[58]

Assuming this person voted yes, 1 person is deducted from the total and 1 vote is deducted from the yes vote.

Total: 1260 – 1 = 1259
Yes: 656 – 1 = 655
No: 604.

Adjustment 4

The two persons who were duplicated by Ms Moore in Step 7 of compiling the roll of voters were allocated 2 voting IDs.

Assuming both employees voted twice and voted yes, 2 persons are deducted from the total and 2 votes are deducted from the yes vote.

Total: 1259 – 2 = 1257
Yes: 655 – 2 = 653
No: 604.

Adjustment 5

Report 4 identified 6 employees who commenced employment during the access period but were not added to the roll of voters.[59]

Assuming each of these employees voted and voted no, 6 persons are added to the total and 6 votes are added to the no vote.

Total: 1257 + 6 = 1263
Yes: 653
No: 604 + 6 = 610.

Adjustment 6

Ms Lisetto identified 6 employees who ceased employed during the voting period and were not included on the roll of voters.[60]

Assuming each of these employees voted and voted no, 6 persons are added to the total and 6 votes are added to the no vote.

Total: 1263 + 6 = 1269

Yes: 653
No: 610 + 6 = 616.

Adjustment 7

Attached to the NTEU's closing submissions was a schedule of 27 persons that it submitted ceased employment during the access period or voting period. The majority of these persons were eligible to vote or otherwise accounted for in other adjustments.[61]

However, there are 5 persons[62] in this schedule that ceased employment prior to the end of the access period and were included on the roll of voters.

Assuming each of these employees voted and voted yes, 5 persons are deducted from the total and 5 votes are deducted from the yes vote.

Total: 1269 – 5 = 1264
Yes: 653 – 5 = 648
No: 616.

Adjustment 8

There was one person classified as a Schedule 4 employee on the roll of voters.[63] Schedule 4 employees do not fall within coverage of the Proposed Agreement.

Assuming this person voted yes, 1 person is deducted from the total and 1 vote is deducted from the yes vote.

Total: 1264 – 1 = 1263
Yes: 648 – 1 = 647
No: 616.

[87] In her evidence Jubilee Smith sets out some concerns that particular persons may not have been included on the roll of voters.[64] The persons identified by Ms Smith were included on the roll of voters and therefore, no adjustment is necessary.[65]

Conclusion – Roll of Voters

[88] The NTEU submits that because of the range of errors that have been identified, there must be more. However, the composition of the roll of voters and the material before the Commission has been subject to robust interrogation by the parties throughout these proceedings and in my consideration. Of note, is that 10 of the 28 Exhibits in these proceedings are directly related to this issue.

[89] It is apparent that the bulk of the errors arose out of a misunderstanding as to the cut-off times for voter eligibility or the failure to remove persons who will not be covered by the Proposed Agreement.

[90] Having regard to the evidence and submissions of the parties, I am satisfied that notwithstanding the errors set out above, a majority of employees who will be covered by the Proposed Agreement cast a valid vote to approve it.

Issue (iii) - Did the Applicant to take all reasonable steps to ensure employees were given a copy or access to material incorporated by reference in the Proposed Agreement?

[91] As set out above, s.180(2) of the FW Act requires an employer to take all reasonable steps to ensure that during the access period for the agreement the employees employed at the time who will be covered by the agreement are given a copy of the agreement and any other material incorporated by reference in the agreement, or access throughout the access period to those materials.

[92] The issue in dispute is whether the Applicant took all reasonable steps to ensure employees were given a copy of, or access to, material incorporated by reference in the Proposed Agreement.

[93] Clause 81 of the Proposed Agreement states:

> *SCU will recognise service with prior Universities in accordance with the Long Service Leave Procedures.*

[94] The Proposed Agreement establishes a process for Professional Staff to raise concerns about workloads. As part of that process, clause 333 of the Proposed Agreement states:

> *If the matter remains unresolved after review by HR Services, the employee may seek redress either under the Complaint Policy - Staff or the Dispute Resolution Procedures.*

[95] Clause 337 of the Proposed Agreement states:

> *Professional staff undertaking an approved course of study in accordance with the University's policy on study assistance are entitled to receive study leave.*

[96] Part 16 (clauses 460 to 465) of the Proposed Agreement deals with Union Resources. Clause 460 of the Proposed Agreement sets out that the Applicant will provide relevant unions with an email account on the Applicant's system as well as access to its telephone system.

[97] Immediately following is clause 461 which provides:

> *The use by unions of University email and telephone systems is subject to the Computing Conditions of Use Policy and Code of Conduct.*

[98] Clause 463 states:

> *Each union may, with the provision of notice in advance, hold meetings of members on the premises of the University in accordance with the University's Timetable Policy. Union meetings will ordinarily be held during meal or other work breaks and may only*

be held during working hours if agreed in advance between the union and the University.

[99] On 25 October 2022, the Applicant sent correspondence to all of its employees which contained:

- Details of the access period;
- Details of the voting Period and method of voting;
- A link to a copy of the Proposed Agreement;
- A link to a copy of the Model Flexibility Term; and
- A link to a copy of an Explanatory Document, containing a summary of the terms of the Proposed Agreement and their effect.[66]

[100] It is not in dispute that the correspondence sent by the Applicant did not provide links to, or otherwise specifically refer to the policies, procedures or code of conduct referred to in clauses 81, 333, 337, 461 and 463 of the Proposed Agreement (**Referenced Material**).

[101] It was the unchallenged evidence of Ms Farquhar that the Applicant's employees have access to the Applicant's 'Policy Library', including the Referenced Material, upon the commencement of their employment. Furthermore, the Policy Library can be accessed by any device without the need for an 'employee log-in'.[67]

[102] In its Form F17 Declaration, the Applicant provided the following response to the question seeking details of material incorporated by reference in the agreement:

There are no materials (other than the incorporated flexibility term) that are expressly incorporated as a term of the Agreement. In any event, all of the materials referred to in the Agreement are otherwise accessible by all staff via the University's intranet.[68]

[103] Relevant to this response is clause 9 of the Proposed Agreement. It provides as follows:

Nothing in this Agreement will be taken as incorporating as a term of this Agreement, any strategy, policy, procedure or guideline referred to in this Agreement except where incorporation is expressly stated.

Summary of the NTEU's Submissions

[104] The NTEU submitted that the Applicant failed to take reasonable steps to provide, or provide access to, the Referenced Material, and therefore, the Proposed Agreement has not been genuinely agreed within the meaning of s.188(1)(a). The NTEU submitted, with reference to authorities,[69] that the access requirement under s.180(2) creates a positive obligation upon the employer to provide the materials to the employees before the vote on the agreement.

[105] The NTEU submitted that for the purpose of s.180(2)(b), there was no clear information from the Applicant that the material should and could be accessed elsewhere. The NETU submitted that the requirement to take reasonable steps is to ensure employees have access, not merely that access may have been possible.

[106] The NTEU submitted that it would have been reasonable for the Applicant to provide employees with a table of documents or links as part of the access period communication and that there was no reason why such a step could not have been taken.[70]

[107] The NTEU submitted that clause 9 of the Proposed Agreement does not assist the Applicant, as the question of whether a document is incorporated is one of fact given the terms of the agreement, and to allow the Applicant to rely on clause 9 of the Proposed Agreement would subvert the statutory purposes of s.180(2).

Summary of the Applicant's Submissions

[108] The Applicant submitted that the Commission need only be satisfied in relation to the obligation in s.180(2)(a) *or* (b), and that it relies on the latter, access.

[109] The Applicant submitted, with reference to authorities,[71] that the requirement or obligation to take "all reasonable steps" will depend upon the circumstances existing at the time the obligation arises and does not extend to all steps that are reasonably open in some literal or theoretical sense. The Applicant submitted that the objective is directed at ensuring that all relevant employees have access to the material throughout the identified period.

[110] The Applicant submitted that the evidence of Ms Farquhar shows that all employees had access to the Referenced Material. Furthermore, the Applicant observed that all but one of the documents is in precisely the same terms as the 2018 Agreement.[72]

[111] The Applicant submitted that in the alternative the Commission should have regard to any non-compliance in relation to s.180(2) as a minor procedural or technical error and that the employees are not likely to have been disadvantaged by it. In support of this submission, the Applicant relied on s.188(2) of the FW Act and cited the decisions of the Commission in *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019 FWCFB 318 (***Huntsman***) and *Greenfreight Logging (NSW) Pty Ltd* [2019] FWCA 1954 (***Greenfreight Logging***).

Summary of the CPSU's Submissions

[112] The CPSU submitted that the Commission must give full effect to the terms of clause 9 of the Proposed Agreement.

[113] In support of this submission, the CPSU cited the decision in *National Tertiary Education Industry Union v University of New South Wales*[73] (***NTEU v UNSW***) which involved an agreement with a similarly worded provision. The Full Bench was not persuaded that the finding at first instance – that the mere reference to a document was insufficient to establish incorporation – was erroneous. The Full Bench held that to do so would place no weight on the

express terms of the agreement that nothing in the agreement will be taken as incorporating any policy, procedure or guidelines referred to therein.

[114] The CPSU also referred to paragraph [28] in *NTEU v UNSW* where the Full Bench found that all employees had electronic access to the reference material located on the university's website and that satisfied the requirement in s.180(2).

Summary of the NTEU's Submissions in Reply

[115] In reply, the NETU submitted that the Applicant's submissions are inconsistent with the positive obligation identified in *Maroondah.* The NTEU submitted that to simply leave it to the employees to seek out the Referenced Material because it is located on the intranet is approaching the obligation the wrong way around.

[116] In reply to the Applicant's alternative submission, the NTEU submitted that the *Huntsman* and *Greenfreight Logging* are distinguishable from the current matter, as those matters concerned whether the employer had provided access to a modern award whereas in this case, the Referenced Material is six specific policies and procedures with detailed obligations.

Consideration

[117] The obligation is to take all reasonable steps to '*ensure'* that employees are *given a copy of, or have access to,* the Referenced Material.

[118] Irrespective of whether the Referenced Material is incorporated by reference in the Proposed Agreement, it was the unchallenged evidence of Ms Farquhar that all employees have access to the material from the commencement of their employment through the Applicant's Policy Library.

[119] In *NTEU v UNSW*, the Full Bench held, in analogous circumstances, that electronic access to material on an employer's intranet or IT systems was sufficient to meet the access requirement in s.180(2).

[120] In circumstances where the employees have access to the Referenced Material throughout their employment on an ongoing basis, and where there is no evidence that any employee did not, or could not, access the Policy Library, or that the Referenced Material was not available through the Policy Library, I am satisfied that the Applicant complied with requirements of s.180(2).

[121] If, however, I am wrong in this conclusion, I would accept the Applicant's alternative submission, and find, that any non-compliance with s.180(2) was a minor procedural error and that employees covered by the Proposed Agreement were not likely to have been disadvantaged by the error.[74]

Issue (iv) - Did the Applicant mislead employees in relation to statements made by the Applicant regarding a $750 'sign-on bonus'?

[122] Clause 37 of the Proposed Agreement sets out the salary increases during the life of Proposed Agreement. Relevantly clause 37 e) provides:

> *employees will also each be entitled to one $750 payment from the first full pay period following the commencement of this Enterprise Agreement.*

[123] The issue concerning this clause arose when immediately prior to, and throughout, the voting period, the Applicant issued various communications to its employees via email and SMS Text message.

[124] Email communications sent at 6:06pm on 1 November 2022 and 9:34am on 3 November 2022 stated:

> *That is why the proposed pay offer not only increases the hourly rates of pay available to you by between 9 and 10.5% over the life of the agreement, but also, critically, why the sign on bonus of $750 is available to every current casual staff member should the agreement be endorsed by a majority of staff.*[75]

[125] An email communication sent at 11:00am on 3 November 2022 which stated:

> *I am reaching out to encourage you to have your say and to clarify a couple of points raised with me.*
>
> *Casual Staff:*
> ***ALL casual staff with a current contract are entitled to vote**, so please take this opportunity to have your say.*
>
> *All casual staff salary rates will increase, and **all casual staff with a current contract will receive the $750 sign-on bonus** (if the agreement is endorsed by a majority of staff).*
>
> *All Staff:*
> *All staff salary rates will increase, and **all staff, regardless of fixed-term appointment or fractional/part-time hours, will receive the sign-on bonus of $750** (if the agreement is endorsed by a majority of staff).*[76]
>
> (Emphasis in original)

[126] The Applicant's HR website/portal contained the following text on its home page:

> *…If a majority of SCU colleagues VOTE YES you will be eligible for salary increases including a $750 one-off payment.*[77]

[127] An SMS text message sent at 11:17am on 3 November 2022 stated:

> *The University's Enterprise Agreement ballot is now open and you are eligible to vote.*
>
> *You should have received an email to your @scu.edu.au account from Bigpulse Voting at 9am yesterday with a personalised link that will enable you to cast your vote.*

Between 9 and 10.5% salary increase over the life of the agreement +$750 payment is available to every current casual staff member should the agreement be endorsed by a majority of staff.

[128] It is not in dispute that the communications were sent by the Applicant. The dispute concerns whether the communications were misleading, particularly for casual employees.

Summary of the NTEU's Submissions

[129] The NTEU submits that the statements are misleading in two ways – first each statement suggests that employees employed at the time of the vote are eligible for the payment; and second, that the entitlement to the payment arises when the Proposed Agreement is endorsed by a majority of staff.

[130] The NTEU submits that there is sufficient evidence before the Commission to remove any doubt that the statements were misleading. In this respect the NTEU relies on the evidence of Dr Watts, who voted no, and Suzanne Reinks in which both confirm their expectation to be paid the bonus,[78] as well as the evidence of Sean O'Brien, an Organiser employed by the NTEU, who received approximately 15 queries from NTEU members querying when the payment will be made. In one instance, a correspondent refers to the misleading nature of the communications.[79]

[131] The NTEU submitted that the misleading statements establish a reasonable ground for finding that the Proposed Agreement was not genuinely agreed to. The NTEU submitted that the communications contravene the prohibition identified in the decision of the Commission in *Central Queensland Services*[80] that an employer is not permitted to mislead and misinform employees or coerce or intimidate them in a way that interferes with their right to vote.

[132] The NTEU also cited the decision in *Application by Maurice Alexander Management Pty Ltd* [2022] FWC 3236 (***Maurice Alexander***) where it was stated that common sense dictates that at least some employees would have been so influenced by the employer's statement that they would lose their job if the vote was unsuccessful. The statement was made by an employer in dire financial circumstances.

Summary of the Applicant's Submissions

[133] The Applicant submitted that on a fair reading of the communications they are not misleading and that there is a complete lack of evidence of any employee being misled or changing their vote as a result of the communications.

[134] The Applicant submitted the communications go no further than confirming that all employees including casual employees will receive both increased rates of pay and the sign-on bonus if the Proposed Agreement is voted up. Furthermore, the Applicant submitted that there has been no suggestion that the rates of pay would increase upon a yes vote.

[135] The Applicant submitted that many of the queries received by Mr O'Brien were responsive to him sending correspondence to members requesting a reply if they have not received the bonus and believe they should have.

[136] The Applicant submitted that there is a complete lack of evidence that would permit an inference that a sufficient number of employees were misled or likely to have been misled such as to change the outcome of the vote.

Summary of the CPSU's Submissions

[137] The CPSU also submitted that there is no evidence that any employee was misled or that they changed their vote. The CPSU referred to the decision in *University of New South Wales (Professional Staff) Enterprise Agreement 2010*[81] and submitted that there needs to be a proper basis for supposing that these statements were misleading such that the employees did not genuinely agree to the Proposed Agreement.

Consideration

[138] Having regarding to the submissions and the (lack) of evidence before me, I am not satisfied that the communications were misleading and/or that any employee was misled by them.

[139] As both the Applicant and the CPSU submitted, there is no evidence that any employee was misled or changed their vote as a result of the communications. To the contrary, there is a greater weight of evidence that the communications were not determinative in causing employees to vote for the Proposed Agreement.[82]

[140] The NTEU submitted, with reference to *Maurice Alexander,* that it is a matter of common sense that at least some employees would have been influenced. However, in that case the statement was much stronger and even in those circumstances, the Deputy President, having inferred that at least some employees would have been influenced, stated that *"it does not follow that the agreement of the employees was not genuine."*[83]

[141] Furthermore, and as stated in *University of New South Wales (Professional Staff) Enterprise Agreement 2010, "there needs to be a proper basis for supposing that the misleading statements may have determinative in the vote getting over the line."*[84]

[142] Accordingly, even if I was to accept the NTEU's submission that I should infer, as a matter of common sense, that a sufficient number of employees were influenced such as to determine the vote, I would not otherwise have concluded that the agreement of the employees was not genuine.

Issue (v) – BOOT – Removal of restrictions on Fixed Term Employment

[143] The Higher Education Awards both contain restrictions on the use of fixed term employment.[85]

[144] Although the Higher Education Awards both contain restrictions on the use of fixed term employment, that does not prevent an employer seeking to introduce a broader fixed term employment regime through enterprise bargaining.[86]

[145] The current 2018 Agreement largely replicates the restrictions in the Higher Education Awards.

[146] Under the Proposed Agreement, the Applicant has removed the restrictions and associated entitlements, for fixed term employment.

[147] The NTEU contends that the removal of the fixed term employment restrictions and associated entitlements removes a significant protection against the use of fixed term employment compared to ongoing employment. The NTEU contends that as a consequence fixed term employees and prospective fixed term employees will not be better off overall than they would be under the Higher Education Awards.

[148] In support of its position, the NTEU relies on the evidence of:

- Andrew Crichton (Exhibit 1);
- Dr Christina Kenny (Exhibit 2); and
- Kenneth McAlpine (Exhibits 3 and 8).

[149] Mr Crichton and Dr Kenny are both employed by the University of New England on fixed term contracts. They both give evidence of their respective experience as employees of the University of New England over successive fixed term contracts.

[150] Mr McAlpine gives evidence of higher education staff data, data relating to the categories and types of employment in universities, the use of different types of employment, and the effect of deregulating the use of fixed term employment.

[151] The issue before the Commission is whether the Proposed Agreement passes the better off overall test.

[152] The Applicant has objected to each of the above statements on the grounds of relevance.[87] Having regard to the content of each of the statements and the issue before the Commission, I do not consider the statements to be relevant to the issue of whether the Proposed Agreement passes the better off overall test.

[153] The Proposed Agreement provides rates of pay that are more favourable than the Higher Education Awards are follows:

- Rates of Pay between 28.55% and 55.10% above the Academic Staff Award;
- Rates of Pay between 16.99% and 71.37% above the General Staff Award.

[154] The NTEU submitted that a fixed term employee under the Proposed Agreement could be terminated at any time and lose the entitlement to severance pay in clause 13.4. Furthermore, a full-time employee under the award, if made redundant, receives 6 months' notice.

[155] The NTEU submitted that despite the higher rates of pay, a fixed term employee under the Proposed Agreement, that would otherwise be a full-time employee under Academic Staff Award because of the fixed term restrictions, would not pass the better off overall test. The NTEU submitted this is the case even at the Level C1 which has 46% higher rate of pay.

[156] The Applicant submitted that the notice of termination and redundancy benefits are 'contingent benefits' and should be afforded a weighting as to the likelihood that the hypothetical fixed term employee (who would otherwise have been employed on an ongoing basis) might be retrenched or unfairly dismissed in any given year.

[157] The Applicant referred to the decision of the Full Bench in *Hart v Coles Supermarkets Australia Pty Ltd*[88] and submitted that applying a 10% value to 16 weeks redundancy (9 years) and 26 weeks' notice, would amount to a figure of 4.2 weeks' pay. The Applicant submitted that the rates pay at 28.55% above the Academic Staff Award represent a margin of 15 weeks.

[158] The Applicant submitted that on any analysis, the employees are better off overall.

[159] Having regard to the materials before me and submissions of the parties, I agree with the submissions of the Applicant. The rates of pay in the Proposed Agreement are significantly higher than those in the Higher Education Awards. Even if a value of 20% was applied to the Applicant's calculation, the employee under the Proposed Agreement would be better off overall by a considerable margin.

[160] The above analysis focuses on Level A1. The margin is significantly more as one progresses through the classification structure. Furthermore, this analysis does not factor in additional benefits such as superannuation of 17%, additional paid concessional days, and additional paid personal leave.

[161] Accordingly, and subject to the *Other BOOT Matters* that follow, I am satisfied that the Proposed Agreement, passes the better off overall test.

Issue (vi) – Other BOOT Matters

[162] The NTEU submitted that the following matters raise concerns as to whether the Proposed Agreement passes the 'better off overall test':

- Minimum engagement periods for casual employees;
- Apprentice and trainee rates of pay;
- Notice of termination for apprentices; and

- Schedule 4 employees.

Minimum engagement periods for casual employees

[163] The Proposed Agreement is silent on the minimum engagement for casual employees, whereas clause 12.2 of the Academic Staff Award provides for a minimum engagement and payment of two hours.

[164] This issue was identified in the initial issues and concerns correspondence to the parties. The Applicant has agreed to provide an undertaking that is consistent with clause 12.2 of the Academic Staff Award. The CPSU and the NTEU accept that the proposed undertaking would resolve this issue.

[165] I am satisfied that an undertaking that is consistent with clause 12.2 of the Academic Staff Award would resolve this concern.

Apprentice and trainee rates of pay

[166] In relation to apprentices, the NTEU submitted that the rates of pay in clause 39 of the Proposed Agreement are less favourable when compared to the minimum ordinary hourly rates for following classifications in the General Staff Award:

- Adult Electrical Apprentices Year 1 and 2;
- Adult Metal/Engineering Apprentices Years 1 and 2; and
- Apprentice Waitstaff.

[167] The Applicant did not dispute this and agreed to provide an undertaking that it will pay apprentices at a rate that is at least 10% above the relevant apprentice rates in the General Staff Award. The NTEU accepts that the proposed undertaking would resolve this issue. The CPSU submitted that no issue arose because the Applicant did not employ apprentices.

[168] Having regard to the material before me, I agree with the NTEU that the rates of pay for those classifications are less favourable than the minimum hourly rate of pay calculated in accordance with Schedule E of the General Staff Award. However, while I accept the Applicant's proposed undertaking will resolve this concern for those classifications, I am concerned that it *may* have an unintended consequence of reducing the rate for pay for other apprentice classifications under the Proposed Agreement where that rate of pay is greater than 10% above the minimum hourly rate of pay in the General Staff Award.

[169] To avoid any unintended consequences, I invite the Applicant to provide an undertaking that it will pay apprentices in accordance with clause 39 of the Proposed Agreement or at least 10% above the applicable rate of pay in the General Staff Award, whichever is higher.

[170] In relation to trainees, the NTEU submitted that the Proposed Agreement does not provide for trainee rates of pay. The Applicant submitted that the Proposed Agreement does not contain trainee-specific provisions and therefore, they are not covered by the Proposed

Agreement, or are entitled to the applicable non-trainee terms and conditions. The CPSU submitted that no issue arose because the Applicant did not employ trainees.

[171] Clauses 34-36 of the Proposed Agreement contemplate the engagement of trainees for a maximum term up to their conclusion of the traineeship. To the extent that the Applicant engages a trainee pursuant to clause 34 of the Proposed Agreement, I accept the Applicant's submission that they will be entitled to the applicable non-trainee terms and conditions. This resolves any concern in relation to trainees.

Notice of termination for apprentices

[172] Clause 433 of the Proposed Agreement excludes apprentices from the notice of termination under the Proposed Agreement. Although clause 7 of the Proposed Agreement contains a precedence clause in relation to the National Employment Standards, the Applicant has agreed to provide an undertaking that the exemption in clause 433 does not apply to any apprentice whose employment is terminated at the Applicant's initiative prior to the end of the term of their contract. The CPSU submitted that no issue arose because the Applicant did not employ apprentices. The NTEU accepts that the proposed undertaking would resolve this issue.

[173] Having regard to the submissions of the parties, I am satisfied that an undertaking in the proposed terms would resolve this concern.

Schedule 4 employees

[174] The Proposed Agreement contains a schedule of wage rates titled Schedule 4, Casual Indigenous Study Support Officer Rates of Pay. However, the classifications provided for in Schedule 4 do not fall within the coverage clause of the Proposed Agreement. The Applicant has agreed to provide an undertaking that the Proposed Agreement does not cover Casual Indigenous Study Support Officers and that Schedule 4 has no effect. The CPSU supported the Applicant's submission. The NTEU accepts that the proposed undertaking would resolve this issue.

[175] I am satisfied that an undertaking in those terms would resolve this concern.

Conclusion

[176] Subject to the revised consolidated undertakings referred to in this decision, I am satisfied that the Agreement will pass the better off overall test and that the various requirements for approval of the Proposed Agreement have been met.

Next Steps

[177] The Applicant is directed to file in the Commission and serve on the NETU and the CPSU by no later than **4:00pm on Tuesday 22 August 2023**, a consolidated set of proposed undertakings addressing the matters set out in paragraphs **[162]** to **[175]** of this Decision.

[178] The CPSU and the NTEU directed to file in the Commission and serve on the Applicant any views on the proposed undertakings by no later than **4:00pm on Thursday 24 August 2023**.

COMMISSIONER

Appearances:
R Dalton KC and *N Burmeister* of counsel for Southern Cross University.
C Dowling SC of counsel for the National Tertiary Education Industry Union.
N Keats, solicitor for the Community and Public Sector Union.

Hearing details:
2023.
Sydney:
6, 10 March 2023.

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[1] AE503021.

[2] PR760224.

[3] Ibid and see also ss.593 and 594 and of the FW Act.

[4] Form F17 at q.17.

[5] Exhibit 16 at [17].

[6] Exhibit 16 at [17].

[7] Ibid at [18]-[21].

[8] Exhibit 6 at Annexure JS1; Exhibit 16 at Annexures SF2 and SF3.

[9] Exhibit 16.

[10] Exhibit 16 at [33]-[34].

[11] Exhibit 16 at [42].

[12] Exhibit 16 at [44]; See Also Exhibit 6 at [8]-[17] and Exhibit 16 at [102]-[103].

[13] Exhibit 16 at [36], [45]-[46].

[14] Exhibit 16, Annexure SF5.

[15] Transcript at PN272 to PN276.

[16] Exhibit 16 at [49].

[17] Exhibit 16 at [50].

[18] Exhibit 16, Annexure SF6.

[19] Exhibit 16 at [52].

[20] Exhibit 16, Annexure SF7.

[21] Exhibit 16 at [54].

[22] Exhibit 17 at [22].

[23] Exhibit 16

[24] Exhibit 16, Annexure SF8.

[25] Exhibit 16 at [47]-[48], [51], [53]; Transcript at PN661-PN667.

[26] Exhibit 4, Annexures SO1 and SO3.

[27] Exhibit 16 at [124], Annexure SF9.

[28] Transcript at PN636-PN658.

[29] [2015] FCAFC 98 (per Jessup J at [27].

[30] [2018] FWCFB 7224 at [20]-[22].

[31] [2021] HCA 23 at [106].

[32] Ibid; *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2016] FCAFC 187 (***Eastern Colour***) at [95].

[33] [2019] FWCA 4634.

[34] [2016] FWCFB 2222.

[35] [2023] FWC 233.

[36] See clause 28 of the 2018 Agreement.

[37] [2019] FWCFB 7599 at [36].

[38] *MTCT Services* at [37].

[39] *Noorton* at [21]-[22].

[40] *Noorton* at [32].

[41] *McDermott* at [33], [35], [37]-[38].

[42] Exhibits 22, 23, 24 and 25.

[43] Exhibits 17 and 21.

[44] Exhibit 17 at [19]; Exhibit 21 at [4]; Exhibit 18.

[45] MFI 4.

[46] Transcript at PN881.

[47] Transcript at PN883-PN884.

[48] Transcript at PN890; MFI 3 at p.2.

[49] Exhibit 17 at [21].

[50] Ibid; Transcript at PN846.

[51] Exhibit 19.

[52] Exhibit 17 at [26]; Transcript at PN839-PN840; Exhibit 20 at Lines 141, 215, 479, 621, 1520 and 1640.

[53] Exhibit 17 at [26]; Transcript at PN869; Exhibit 20 at Lines 100, 101, 760 and 765.

[54] See Kmart at [43]; *Appeal by Charles Darwin University* [2023] FWCFB 65 at [11].

[55] Exhibit 25; Exhibit 20 at Lines 24, 47, 322, 465, 697, 715, 780, 879, 1173, 1205, 1290, 1509, 1547, 1628, 1747, 1768.

[56] Exhibit 22.

[57] Exhibit 20 at Line 1768.

[58] Exhibit 24; Exhibit 20 at Line 116.

[59] Exhibit 23 at p.1 line 1, p.2 at lines 4, 5, and 14, p.3 at lines 6 and 9.

[60] Exhibit 21, Annexure DL2; Transcript at PN1063-PN1065.

[61] See Exhibits 20, 22 and 23.

[62] See NTEU Closing Submissions, Schedule 1 at Lines 7, 10, 12, 14, 25; Exhibit 20 at Lines 1357, 1417, 1733, 1840, 1875.

[63] Exhibit 18 at Line 502; Exhibit 20 at Line 1529.

[64] Exhibit 6 at [21]-[23].

[65] Exhibit 20 at Lines 91, 215 and 1639.

[66] Exhibit 14, Annexures B and C; Exhibit 16 at [8], [58]-[60].

[67] Exhibit 16 at [78]-[85].

[68] Exhibit 14 at q.21.

[69] *Construction, Forestry, Mining and Energy Union v Sparta Mining Services Pty Ltd* [2016] FWCFB 7057 at [15]; *Maroondah City Council* [2012] FWA 7891 (***Maroondah***) at [19]-[20].

[70] Referring to Exhibit 8 at [22] and citing *BGC Contracting Pty Ltd* [2018] FWC 1466 (***BGC Contracting***) at [43]

[71] *Construction, Forestry, Maritime, Mining and Energy Union; The Australian Maritime Officers' Union v Broome Marine and Tug Pty Ltd* [2021] FWCFB 171 at [35]; *BGC Contracting* at [36].

[72] See clauses 448, 452, 609 and 611 of the 2018 Agreement.

[73] [2011] FWAFB 5163.

[74] See s.188(2) of the FW Act; the principles stated in *Huntsman*; and *Greenfreight Logging* at [10]-[15].

[75] Exhibit 7, Annexures AW4 and AW5; Exhibit 5, Annexure SR4.

[76] Exhibit 4, Annexure SO4.

[77] Exhibit 4, Annexure SO5.

[78] Exhibits 5 and 7.

[79] Exhibits 4 and 9.

[80] [2015] FWC 1554.

[81] [2010] FWAA 9588.

[82] See Exhibit 4, Annexures SO13 and SO14; Exhibit 7.

[83] *Maurice Alexander* at [53].

[84] *University of New South Wales (Professional Staff) Enterprise Agreement 2010* at [51].

[85] Clause 11.2 of the Academic Staff Award; Clause 11.2 of the General Staff Award.

[86] *4 yearly review of modern awards – Education Group* [2018] FWCFB 1087 at [163].

[87] Exhibit 12.

[88] [2016] FWCFB 2887