



Australian Higher Education Industrial Association

Reply Submission to Fair Work Commission

Modern Awards Review 2023 - 2024 – Job Security Stream

Modern Award Review 2023-24 – Job Security stream

AHEIA Submissions in reply

Further to our submission of 5 February 2024, AHEIA provides the following submission in reply to the National Tertiary Education Union's (NTEU) Submission.

AHEIA holds significant concerns about the effect of the HECE provisions (incorporated in the *Higher Education Academic Staff Award 2020 (Academic Staff Award)* and the *Higher Education General Staff Award 2020* (together - **Higher Education Awards**)) as well as the operation of a number of other historic industry specific arrangements in the Higher Education Awards.

The combination of recent changes to the Fair Work Act 2009 (**FW Act**) regarding fixed term and casual employment, together with the amended Modern Award Objective at s134 of the FW Act, warrants a review of the appropriateness of retaining various industry-specific award arrangements.

AHEIA has chosen not to respond to all of the assertions being made by the NTEU in its submission and in support of its proposals. Respectfully, we seek the right to do so later if this should be required and AHEIA's silence on a matter stated by the NTEU in their submission should not be regarded as the matter being uncontested.

Fixed term employment – Higher Education industry specific provisions

In our 5 February submission, AHEIA noted the following:

- “16. *University employees engaged as fixed term under industry specific provisions of the Academic Award and sector EAs are entitled to the following:*
 - *Written notice (or payment in lieu of notice) of renewal or non-renewal prior to the cessation of their fixed term contract; and*
 - *Severance payments equivalent to at least an NES redundancy payment if they are not engaged for a third or more fixed term contract where the employee has been previously engaged to perform a specific task or project or engaged to perform research activity.*
 - *Continuity of service if re-employed within a designated time period*
17. *Fixed-term employees are afforded the same paid and other entitlements as permanent employees in the sector.*
18. *Eligible fixed term employees in the sector have comparable job security to permanent employees in other sectors in terms of notice and severance (NES redundancy paid to permanent national system employees outside the sector).*
19. *For permanent academic employees, the industry-specific provisions in the Academic Award provides redundancy and notice entitlements that significantly exceed the NES.*
20. *The historical rationale for these generous industry specific [redundancy] provisions being put in pre-reform awards in the 1980s was the supposed “giving up of tenure” – where*

tenure statutes had provided a very high degree of protection from termination, requiring a vote to remove an academic staff member.

21. *Currently, the 6 months' notice together with payments for voluntary redundancy of up to 52 weeks can lead to a maximum redundancy of 78 weeks (i.e. 26 weeks of notice or payment in lieu plus up to 52 weeks redundancy). This is reflected, with institutional variation (and often at a premium on these quanta) in enterprise agreements.*
22. *These quanta are clearly out of step with other sectors. In fact, Universities have such generous redundancy provisions that this acts as a significant disincentive to converting fixed term research staff to permanent employment where their employment is underpinned by precarious grant funding."*

NTEU proposals with respect to Fixed term employment

In its [submission](#) the NTEU states the following:

- “4. *Some of those restrictions that are contained in the Awards permit fixed-term contracts for a period greater than two years.*
26. *The (possibly unintended) consequence of the interaction between ss 333E and 333F is that where a modern award applies to an employee and permits, inter alia, a fixed-term contract greater than two years in duration, none of the restrictions on the use of fixed-term employment contained in Part 2-9 of Division 5 will apply to that employee. That is so because of the way that s 333F(1)(h) is drafted. That section relevantly states that subsection 333E(1) (which provides for the restrictions on the use of fixed-term contracts) does not apply in relation to a contract of employment if a modern award that covers an employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur. This drafting means that the exception does not apply only to those circumstances that are permitted by the award, but operate to completely exclude the operation of subsection 333E(1) in relation to any employee covered by an award that allows for any of the circumstances in subsection 333E(2)-(4) to occur.”*
27. *Clauses 11.2(b)(ii) and (v) of the Academic Award and clauses 11.3(b) and (d) of the General Staff Award permit employees to be engaged on fixed-term contracts with identifiable periods of greater than two years.*
28. *As a result, none of the restrictions contained in s 333E apply to any employee covered by the Awards. The way the provisions are drafted, this is true even where an employer was not a respondent to the HECE Award, meaning that the restrictions on the use of fixed-term employment do not apply to them.*
31. *Perversely, the restrictions on the use of fixed-term employment that have existed in higher education awards since the HECE Award have become an obstacle to access to more secure employment in circumstances where their historical objective was to do the opposite. NTEU submits that these restrictions remain appropriate for the higher education sector however they should be slightly modified to ensure the proper operation of s 333E in relation to employees covered by the Awards.”*

In summary, the NTEU proposes the following with respect to fixed term employment:

- Retain “HECE” provisions in the Higher Education Awards that restrict the circumstances in which fixed term employment may be offered, but amend to remove permission to engage an employee on a fixed term contract for Research (in the Academic Staff Award) or Pre-retirement “*for a contract period not exceeding 5 years*”;
- and
- Other proposed amendments purported to facilitate “*..[ensuring] the proper operation of s 333E in relation to employees covered by the Awards*”.

AHEIA response to the NTEU Proposal

1. The proposed NTEU changes seek to nullify the ‘modern award exception’ set out at s333F(1)(h) of the FW Act.

The modern award exception was legislated by Parliament, and recognised the long-standing regulation of fixed term employment in the sector:

*“ 564. This provision would allow existing sector specific arrangements in modern awards that regulate the use of fixed term contracts to remain in place. **These arrangements have been determined by the FWC to be appropriate, and necessary to achieve the modern awards objective in these sectors, and the Bill would not seek to displace these.***

565. In the event that the FWC considered it necessary to give effect to the modern awards objective (section 134), it would be able to vary these arrangements in an existing award, or insert relevant terms into a modern award that does not currently contain such terms. (emphasis added)

In discussions held with the government over the then *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, AHEIA was advised by Senior Advisors from the Department of Employment Workplace Relations that proposed s333F(1)(h) - Modern Award exception was drafted with the Higher Education in mind. It was acknowledged that fixed term employment in the sector occurs mostly in connection with research as a mechanism to ameliorate the precarious nature of grant funding.

2. While yet to receive royal assent, the new s15A(4) (an exception to the general rule), acknowledges the regulation of fixed term employment in the sector by making reference to an academic employee covered by one of the Higher Education Awards.
3. The NTEU Submission does not provide any support for the claimed “*unintended consequence*”, described at para 26 inter alia. As a matter of law, we assert that the NTEU’s position is incorrect and no such unintended consequences arise.
4. It is submitted that this and other proposed amendments are not necessary for the purpose of meeting the new modern award objective. AHEIA submits any consideration of changes to these provisions should take place as part of a wholistic review of all of the HECE provisions and other historic specific industry provisions in the Higher Education awards. These include severance payments for fixed term staff and generous redundancy and notice periods for permanent academic staff.

AHEIA has previously noted in submissions to the Senate that the generous redundancy and notice payments for academic staff are a **significant economic disincentive** to converting more non-permanent staff to permanent.

NTEU proposal with respect to casual employment

“Where a casual employee has been engaged for a period of 6 months and the work that they have been performing continues, they will be entitled to be offered further work subject to satisfactory conduct and performance” emphasis added.

AHEIA response

AHEIA does not believe that the NTEU proposal is necessary to meet the amended modern awards objective because:

- Parliament has recently introduced a new definition of casual employment at section 15A and a new conversion pathway. We believe this pathway obviates the need for additional provisions to the Higher Education Awards;
- Sector enterprise agreements already contain generous conversion arrangements; and
- Due to the considerations set out in the modern award objective at s134 of the FW Act, AHEIA's position is that the appropriate forum to discuss the above NTEU proposal, is during the enterprise bargaining process and should not be considered part of an award safety net review.
- The expression ‘necessary to achieve the modern awards objective’ in s.138 of the FW Act was considered in the case of *CFMEU v Anglo American Metallurgical Coal Pty Ltd*ⁱⁱ:
*“The words “only to the extent necessary” in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.’*ⁱⁱⁱ

ⁱ See [Explanatory Memorandum - Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Bill 2022](#)

ⁱⁱ *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123

ⁱⁱⁱ *Ibid* at [23]