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**Fair Work Commission: 4 yearly review of modern awards**

## **SUBMISSION IN REPLY**

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**AM 2015/6 - EDUCATION GROUP**

**AM 2014/224 - EDUCATIONAL SERVICES (POST-SECONDARY EDUCATION)  
AWARD 2010**

**AM 2014/229 - HIGHER EDUCATION (ACADEMIC STAFF) AWARD 2010**

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**AUSTRALIAN BUSINESS INDUSTRIAL**

**- and -**

**THE NSW BUSINESS CHAMBER LTD**

**29 JUNE 2016**

## 1. BACKGROUND

- 1.1 These submissions are filed in proceedings AM 2015/6 - the Education Group proceedings and in particular relate to:
- (a) the *Higher Education (Academic Staff) Award 2010 (Academic Staff Award)* (AM2015/229); and
  - (b) the *Education Services (Post-Secondary Education) Award 2010 (Post-Secondary Award)* (AM2014/224).
- 1.2 In Further Amended Directions issued on 20 April 2016, the Fair Work Commission (**Commission**) directed:
- (a) interested parties proposing variations to file a written outline of submissions and any witness statements and/or documentary material in support of their variations by 11 March 2016; and
  - (b) interested parties to file a written outline of submissions and any witness statements and/or documentary material in response by 3 June 2016.
- 1.3 Pursuant to the Further Amended Directions, on 11 March 2016 the NTEU filed their outline of submissions and evidentiary materials in support of numerous variations to the Academic Staff Award (**NTEU Submission**).
- 1.4 This submission in reply is confined to responding to the NTEU Submission and, in particular, to their 4 claims relating to the casual rates payable to Academic Teachers as set out at Part D of the NTEU's Submissions (**Casual Academic Claims**).
- 1.5 Those 4 claims are to:
- (a) insert the additional words "*or performs full subject coordination duties*" after "*or holds Doctorate*" in the descriptors contained in clause 18.2 of the Academic Staff Award (and similarly, in clause 14.2 of the Post-Secondary Award);
  - (b) in respect of the Academic Staff Award only, re-insert at clause 18.2 'definitions' of the various types of work as found in the pre-reform award - the *Higher Education Academic Salaries Award 2002 [AP820200] (Pre-reform Award)*;
  - (c) in respect of the Post-Secondary Award only, to vary the content and scope of Schedule B – Classifications – Academic Teachers to include duties not previously referred to in the Schedule; and
  - (d) in respect of the Post-Secondary Award only, vary clause 14.1 to include a note at Level A.6 in relation to a minimum rate payable for work performed.
- 1.6 To the extent that they touch on the Post-Secondary Award, these submissions also reply to the NTEU's submissions filed on 5 February 2016 in the Post-Secondary Award (**NTEU February Submission**).
- 1.7 This reply submission is filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009*.

1.8 For clarity, we note that ABI and NSWBC's primary interest is in relation to the Post-Secondary Award. However, we understand that given the common nature of the Casual Academic Claims, that the claim in respect of the Post-Secondary Award will be heard and determined as part of the Academic Staff Award proceedings.

1.9 Accordingly, ABI and NSWBC seek to address the Casual Academic Claims for both awards in this reply submission.

## **2. APPROACH TO THE DETERMINATION OF THESE CLAIMS**

2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**).

2.2 The Preliminary Issues Decision confirms that the Commission should conduct its review on the basis that *prima facie* the modern award achieved the modern awards objective at the time that it was made and following its review in 2012.<sup>1</sup>

2.3 Further, when considering the merit basis to make variations, the Preliminary Issues Decision held that:

(a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;<sup>2</sup> and

(b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>3</sup>

2.4 Our clients accept that some of the Casual Academic Claims are not 'substantive' (e.g. the proposed variation to clause 14.1 of the Post-Secondary Award), and as such fall within the category at paragraph 2.3(a) above. Therefore, if the Commission forms the view that those variations are 'self-evident', they can be granted with little formality. However, our clients do not consider that all the claims can properly be considered 'self-evident'.

2.5 Further, the Commission must be satisfied that any variation which is made cannot go beyond what is necessary to meet the modern awards objective and, to the extent applicable, the minimum wages objective.<sup>4</sup>

## **3. SUMMARY OF OUR CLIENTS' POSITION**

3.1 The NTEU submits that its proposed variations relating to the Casual Academic Claims do not "*disturb the schema*" of the Award but are necessary in order to "*express the schema clearly*".

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<sup>1</sup> *Preliminary Issues Decision* at [24].

<sup>2</sup> *Ibid* at [23] and [60].

<sup>3</sup> *Ibid*.

<sup>4</sup> Section 138, *Fair Work Act 2009* (Cth).

3.2 Our clients' respective positions in relation to the various Casual Academics Claims are as follows:

- (a) our clients oppose the insertion of the additional words "*or performs full subject coordination duties*" at clause 14.2 of the Post-Secondary Award, as the granting of such a variation would expand the scope of casual academics eligible to receive the higher rate to a group of casual academics who had no previous entitlement;
- (b) our clients acknowledge that clause 18.2 of the Academic Staff Award may require clarification, but oppose the wording proposed by the NTEU and instead submit that payment at the Level A.6 rate should be limited to circumstances where the activity is directly related to the program in which the full subject coordination duties are being undertaken;
- (c) our clients oppose the re-insertion of 'definitions' for the various types of work at clause 18.2 of the Academic Staff Award on the basis that they do not provide additional clarity nor are they any less likely than the current award to avoid potential future confusion or disputation about their operation;
- (d) our clients oppose any variation to the content and scope of Schedule B.6 – Classifications – Academic Teachers in the Post-Secondary Award to include qualifications and duties not previously referred to in the Schedule, on this basis that this would ultimately have the effect of expanding the scope of casual academics eligible to receive the higher rate to a group of casual academics who had no previous entitlement; and
- (e) our clients oppose any variation to the content of clause 14.1 of the Post-Secondary Award to include a note at Level A.6 in relation to a minimum rate payable for work performed, on the basis that such a variation is unnecessary, but accept that this variation would not be a substantive change.

***A consideration of "work value reasons" must be undertaken***

3.3 The NTEU submits that their proposed variations to the Award under the Casual Academic Claims "*does not change any rate of pay, nor change who is entitled to benefit of those rates*".<sup>5</sup> Further, the NTEU claims that adopting their proposed changes "*would not be adding to the employment cost of casual academic teachers covered by this Award*".<sup>6</sup>

3.4 However, as stated at 3.2(a), 3.2(b) and 3.2(d) above, a number of the NTEU's proposed variations seek to extend entitlements to casual academics who previously had no such entitlement (effectively, the creation of a new entitlement to higher rates for these groups of employees) or at least no such entitlement in those specific circumstances.

3.5 That being the case, the Commission must be satisfied that work value reasons justify the changes sought by the NTEU. This is because of the operation of sections 156(3) and (4) of the FW Act, which provide as follows:

*"Variation of modern award minimum wages must be justified by work value reasons*

(3) *In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the*

<sup>5</sup> NTEU Submissions, at paragraph 24, see also NTEU February Submission, at paragraph 31

<sup>6</sup> Ibid, at paragraph 25, see also NTEU February Submission, at paragraph 32

*variation of modern award minimum wages is justified by work value reasons.*

(4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) *the nature of the work;*

(b) *the level of skill or responsibility involved in doing the work;*

*the conditions under which the work is done.*

3.6 Against this backdrop, we address each of the specific claims as follows.

#### 4. SPECIFIC RESPONSES TO THE CASUAL ACADEMIC CLAIMS

4.1 **Proposed variation to clause 18.2 of the Academic Staff Award and clause 14.2 of the Post-Secondary Award**

4.2 Clause 18.2 of the Academic Staff Award sets out the rates payable to casual academic staff in respect of the performance of various activities associated with teaching. Clause 14.2 performs similar work in the Post-Secondary Award.

4.3 In both clauses, the NTEU proposes to insert the words "*or performs full subject coordination duties*" after the words "*or holds Doctorate*" in each of the descriptors of the non-lecturing activities that might be performed by a casual academic (e.g. tutoring, marking, etc).

4.4 As there are some small differences between the two clauses as they appear in each of the current awards, we deal with them separately as follows.

##### Clause 18.2 of the Academic Staff Award

4.5 While it may be arguable by reference to clause 13.2(b) that the Level A.6 rate is payable where the individual holds a doctoral qualification or are undertaking subject coordination, this is qualified by the requirement that "*the duties include full subject coordination*" or are "*involving full-time subject coordination*".

4.6 From this, it is clear that clause 13.2(b) contemplates two distinct situations where the Level A.6 rate is payable:

(a) where the employee holds a doctoral qualification; or

(b) where the employee is undertaking an activity including/involving full-time subject coordination.

4.7 It is apparent that the second limb of clause 13.2(b) is limited to circumstances where the activity is directly related to the program in which the full subject coordination duties are being undertaken.

4.8 However the proposed wording by the NTEU has the potential effect of broadening the application of the Level A.6 rate to subjects that the casual academic may be involved in (e.g. tutoring), but otherwise has no subject coordination responsibilities in. Such an outcome appears antithetical to the modern awards objective - in particular, sub-sections 134(f) and (g).

4.9 The NTEU's current proposed variation and the consequential broadening of the application of the Level A.6 rate to a subject where the casual academic has no subject coordination

responsibilities constitutes a significant change of the type contemplated by 2.3(b) above. Accordingly, the proposed variation must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

- 4.10 If it is the case, as the NTEU appears to submit, that casual academics undertaking full subject coordination activities should be in receipt of the higher rate across all subjects they may be involved in regardless of whether they have subject coordination responsibilities in that particular subject, the operation of section 156(3) would necessitate that the probative evidence adduced must be directed to work value reasons.
- 4.11 However, the NTEU has not advanced any evidence in their submissions and materials filed on 11 March 2016 to substantiate this claim - much less any evidence directed at work value reasons specifically. Instead, the NTEU relies upon an argument that the changes to be made relate to a minor error or omission. However, as submitted above, it is clear that the changes are not minor in nature.
- 4.12 The NTEU's reliance on section 134(e) in support of their variation is misguided and that the principles of equal remuneration simply do not apply since section 302(2) specifically defines the principle of equal remuneration to mean "*equal remuneration for men and women workers for work of equal or comparable value*".
- 4.13 There is nothing in clause 18.2 which suggests that an employer is able to pay a male casual academic and a female casual academic different minimum Award rates for the same or comparable work.
- 4.14 Further, notwithstanding the submission by the NTEU that they seek to "*rely on all outlines, materials and witness statements, for all claims*",<sup>7</sup> ABI and NSWBC note that the witness statements filed on 11 March 2016 do not specifically address this proposed variation.
- 4.15 Accordingly, ABI and NSWBC oppose the NTEU's claim and proposed variation.
- 4.16 However, if the Commission is minded to clarify this provision, then our clients submit that alternative wording to the effect of "*or is performing full subject coordination duties for this subject*" may be more appropriate to communicate the flavour and intention of clause 13.2(b).

Clause 14.2 of the Post-Secondary Award

- 4.17 In contrast to the Academic Staff Award, our clients do not accept that the Post-Secondary Award clearly provides for the payment of the higher rate to casual employees performing marking or tutorial activities. Other than in relation to "other required staff activities", there is simply nothing in the current award which would suggest that a casual academic with subject coordination activities would be paid differently to their peers.
- 4.18 The nature of the proposed variation by the NTEU would therefore be to provide an entitlement to employees who previously did not have this entitlement at all.
- 4.19 As such, it cannot be argued that this proposed change "*would not be adding to the employment cost of casual academic teachers covered by this Award*".<sup>8</sup> For the Commission

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<sup>7</sup> Covering letter to NTEU Submissions of 11 March 2016

<sup>8</sup> Above n 5, see also NTEU February Submission, at paragraph 31

to be satisfied that this variation should be granted, it must be justified by work value reasons (sections 156(3) and (4)).

4.20 For the reasons stated at 4.11 to 4.14 above, ABI and NSWBC oppose this proposed variation.

**Proposed re-insertion of Definitions from the Pre-Reform Award at clause 18.2 of the Academic Staff Award**

4.21 In addition to setting out the rates payable to casual academic staff in respect of the performance of various activities associated with teaching, clause 18.2 also sets out the basis upon which the hourly rate has been calculated (e.g. the rate for one hour of tutoring is arrived at by providing for one hour of delivery and two hours of associated working time).

4.22 The NTEU proposes to re-insert wording from the Pre-Reform award to clarify each of these activities and delimit what 'associated working time' might include.

4.23 ABI and NSWBC oppose this variation on the basis that the re-insertion of these words or descriptors does not make the Academic Staff Award any simpler or easier to understand in a manner that would satisfy section 134(g) and is no less likely than the current award to "avoid potential future confusion or disputation about their operation"<sup>9</sup>.

4.24 Our clients also submit that by delimiting and narrowly defining what types of activities 'associated working time' might include, casual academics are actually disadvantaged.

4.25 ABI and NSWBC submit that any delimiting of the types of activities that may be carried out during 'associated working time' also constitutes a significant change of the type contemplated by 2.3(b) above. This means that this variation must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

4.26 Again, the NTEU rely upon an argument that the changes to be made relate to a minor error or omission. However, as demonstrated, these changes are not minor in nature.

4.27 Again, there is a lack of evidence contained in the witness statements filed on 11 March 2016 which directly addresses this proposed variation. Accordingly, ABI and NSWBC oppose this proposed variation.

**Proposed variation to clause 14.1 of the Post-Secondary Award**

4.28 Clause 14.1 confers rates of pay on permanent salaried staff. The NTEU proposes to insert a new note at the end of clause 14.1 that states:

*"An employee holding a relevant doctorate or responsible for the coordination of a subject or unit, will not be paid less than the sixth step of Level A."*

4.29 Our clients submit that this variation is not necessary, as it simply repeats what is already contained in Schedule B.7.1(c). However, our clients accept that the insertion of the note will not change the substantive entitlements conferred on permanent employees by the Award, and as such would be a claim falling within the category of 2.3(a) above. Therefore, if the Commission forms the view that this variation is 'self-evident', we accept that this variation could be granted with little formality.

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<sup>9</sup> Ibid, at paragraph 24

### Proposed variation to Schedule B.6 of the Academic Staff Award

- 4.30 The NTEU also seeks to make wholesale changes to Schedule B.6. As noted above, Schedule B.6 does not confer rights on employees but explains how certain classifications and rates of pay in clause 14.2 have been calculated.
- 4.31 The changes seek to expand the application of higher rates to employees responsible for the coordination of a subject unit or who perform marking with “*significant academic judgment*”. These provisions would be new to Schedule B.6, and ultimately have the effect of creating a new entitlement to higher rates for casual academics who perform tutoring or marking duties and who either:
- (a) are responsible for the coordination of a subject or unit; or
  - (b) perform marking with significant academic judgment.
- 4.32 The NTEU’s proposed variation and the consequential creation of a new entitlement where one did not previously exist represents a significant change of the type contemplated by 2.3(b) above. This means that this variation must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.
- 4.33 Further, it is clear that contrary to the NTEU’s assertion that this proposed change “*would not be adding to the employment cost of casual academic teachers covered by this Award*”,<sup>10</sup> this variation does exactly that. For the Commission to be satisfied that this variation should be granted, it must be justified by work value reasons (sections 156(3) and (4)).

### 5. CONCLUSION

- 5.1 For the reasons outlined above, our clients submit that the variations should not be granted.



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<sup>10</sup> Ibid, see also February NTEU Submission, at paragraph 31