

<i>AM2014/224</i>	Educational Services (Post-Secondary Education) Award 2010	MA000075
<i>AM2014/229</i>	<i>Higher Education Industry – Academic Staff – Award 2010</i>	<i>MA000006</i>
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## NTEU Closing Submissions

**3 February 2017**

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## Introduction

1. These Submissions are set out in Parts A to M, following the same order as the NTEU's earlier Outline of Submissions lodged on 11 March 2016 (NTEU Exhibit B). Some of the NTEU proposals have been withdrawn as previously indicated.
2. In accordance with the Direction issued, these Submissions relate only to the variations sought by the NTEU, and insofar as they relate to general staff, they are also supported by the CPSU Community & Public Sector Union. These Submissions are lengthy, which is regrettable, but they relate to quite a number of discrete and generally unrelated matters and draw on significant witness evidence and other materials
3. Although specific evidence is cited in these Submissions, the NTEU formally relies upon all the evidence, and all earlier Submissions except to the extent that these have since been modified or withdrawn.

## The Modern Award Objective and the statutory scheme

4. In the specific submissions relating to each proposed variation, NTEU will look at how the statutory scheme – the objects of the *Fair Work Act 2009*, the *modern award objective* and other relevant provisions - relates to that variation and the relevant evidence. However, in outline below are a few general comments about the statutory scheme which we will not repeat in respect of each section.
5. In the *Annual Leave decision*, [2016] FWCFB 6836, the principles governing the proper approach to the modern awards objective and related requirements of the Fair Work Act are usefully set out:

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[18] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a “fair and relevant minimum safety net of terms and conditions” taking into account the particular considerations identified in paragraphs 134(1)(a) to (h). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision-making process.

[19] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant to a particular proposal to vary a modern award.

[20] There is a degree of tension between some s.134 considerations. The Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

[21] The modern awards objective requires the Commission to take into account, among other things, the need to ensure a “stable” modern award system (s.134(1)(g)). The need for a “stable” modern award system supports the proposition that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of the merit argument required will depend on the variation sought. As the Full Bench observed in the *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision:

“Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”

[22] The Review is broader in scope than the transitional (or 2 year) review (Transitional Review) of modern awards provided for in Item 6 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, and is the first full opportunity to consider the content of modern awards. However, the broad scope of the Review does not obviate the need for a merit argument to be advanced in support of a proposed variation. As the Full Bench in *Re Security Services Industry Award 2010* recently observed:

*“[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the*

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*Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.”*

[23] In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made. The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is “necessary” in a particular case is a value judgment based on an assessment of the s.134 considerations having regard to the submissions and evidence directed to those considerations.

[24] In performing functions and exercising powers under a part of the Act (including Part 2-3—Modern Awards) the Commission must take into account the objects of the Act and any particular objects of the relevant part (see s.578(a)). The object of Part 2-3 is expressed in s.134 (the modern awards objective) to which we have already referred.

6. The NTEU submits that each of its proposed variations:

- ✓ Addresses a matter in relation to which the existing modern awards fail to provide a fair and relevant safety net of terms and conditions;
- ✓ Is a term that may be included in a modern award;
- ✓ Gives effect to or advances the modern awards objective, and to the extent applicable, the minimum wages objective;
- ✓ Goes no further (and introduces no greater complexity) than is necessary to achieve the modern awards objective, and to the extent applicable, the minimum wages objective; and
- ✓ Is supported wherever appropriate by probative evidence demonstrating the facts supporting the proposed variation.

7. In relation to each of the proposed variations, the NTEU will address the way in which it satisfies these points and therefore should be granted.

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8. In the case of academic hours (Part A), academic classifications and promotion (Part C), corrections to casual academic rates (Part D), general staff unpaid hours (Part E), the link between general staff wages and classifications (Part F), and the information technology allowance (Part J), the existing awards manifestly fail to provide a fair and objective safety net. They are arguably areas in which the need for change is self-evident and where any argument goes to the question of the form of the remedy. In these circumstances, the onus should lie with the employer parties to demonstrate why the deficiency does not need to be remedied or why the solution proposed by NTEU is not appropriate.
9. Nevertheless NTEU has also provided substantial evidence demonstrating the relevance and merit of the claims.
10. In relation to the remaining NTEU claims, while we do not say they are self-evident, NTEU has provided probative evidence in support of the proposals sought.
11. With the exception of those matters agreed during the exposure draft process, the employer representatives have substantially failed to acknowledge the need for variation to the awards in relation to the matters raised by NTEU, leaving the tribunal with only the proposals presented by NTEU to consider. NTEU has taken the initiative to suggest improvements to our proposals in light of the evidence and concerns raised by the employer associations in the course of proceedings.
12. NTEU also notes the point raised frequently in these proceedings and clearly stated at paragraphs [155] and [156] of the *Annual Leave decision*:

**[155]** We are not bound by either the terms of the relief sought by a party nor by the scope (i.e. the awards to be varied) of the variations proposed. Context is important in this regard.

**[156]** These issues arise in the 4 yearly review of all modern awards. The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum

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safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the Commission in the past. In the Review context, the Commission is not creating an arbitral award in settlement of an *inter partes* industrial dispute—it is reviewing a regulatory instrument.

13. Where the NTEU has satisfied the tribunal that the current award is deficient in relation to a subject matter where regulation is permissible, and regulation is desirable in order to achieve the modern award objective or the minimum wage objective, then neither the tribunal nor the parties are constrained by the particular variations proposed by the parties.
14. In the context of the Commission's review of the modern awards, NTEU has taken the approach of presenting such material as was in our possession which could inform the Commission of facts relevant to the issues under consideration. For example, in relation to the question of academic working hours, we have provided witness evidence, statistical data, survey evidence and an overview of the research literature. In contrast, the employer associations have approached the proceedings as though they were *inter partes*, refraining from volunteering relevant material which was within their knowledge. For example, it emerged in the course of proceedings that most or all Australian universities participate in national benchmarking of matters such as employee satisfaction in relation to workload, yet this material was not provided. Similarly, despite a significant volume of research in relation to the question of academic working hours, the employer associations concentrated their efforts on attacking the evidence provided by the NTEU rather than providing any statistics or research of their own.
15. The Commission is entitled to draw the conclusion that such data as the employers have about the issues in contest would not have assisted their case.

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## **Part A: [AM2014/229, Item 14, Academic hours of work clause]**

That the safety net for academic employees include an enforceable limit on working hours

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### **Introduction**

- A1. In conjunction with the issue of wages, the length of the working day was a foundation issue for the trade union movement, with the “Eight Hour Day” still celebrated in Australia. Wages and the length of the working day have necessarily been considered together throughout the history of industrial struggle and regulation, because the way they combine determines the amount of return the employer is able to gain from labour, and because for the employee the length of the working day not only determines what the *rate* of pay is for any particular wage, it also determines how much time the employee has for the rest of life.
- A2. Certain groups of employees, typically on high wages, have been considered able to determine their own hours, in the sense of determining much of *what* they do, and *how much* work they do, subject to not neglecting their duties. For these groups, while the balance between work and life was just as important, it is something that they determined for themselves. Many employees in this category saw their work as a vocation, which consumed most of their waking hours. For these employees, the idea of “limiting” working time would be a gross interference in that vocation. This is reflected in the fact that the academic union FAUSA did not generally seek even the inclusion of annual leave when federal awards were first made for universities in the late 1980s.
- A3. Certainly before the 1990s, most academic staff would have seen themselves in this largely self-determining category. However, things have changed. Not only are

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academic staff working long hours, with some working very long hours, but more of those hours are taken up with doing work to meet the specific requirements or performance standards of their employer. The causes of this can be debated. However, academic staff now have their work volume and much of their specific work determined at the behest and direction of their employer. Employer-imposed workload (working time) is arguably the equal greatest bone of contention in the industrial landscape of academics alongside job insecurity.

- A4. At the same time, the Commission, which until the mid-1990s was charged in a general sense with the settlement of industrial disputes, is now required to set a minimum of fair and relevant wages and conditions for each award.
- A5. NTEU acknowledges that this presents a difficult problem in relation to the regulation of hours for academic staff – for the Commission, and indeed even for the union itself.
- A6. The last thing the union and its members would wish to see is the loss of remaining autonomy or the sense of vocation which allows those whose life and family responsibilities permit them to work very long hours on their passion. Moreover, the nature of professional academic work is such that for nearly every task, it is only the academic who can determine how much time should be spent on that task. There are many occupations where this is the case and yet the working week and therefore pay, is nevertheless regulated strictly by hours – for example hospital doctors. Nevertheless, in academia, there is a shared concern that an hours-based system pure and simple would somehow prevent the perfectionist or the employee who wants to excel or innovate from doing over-and-above what is “required” in the interests of her students or the advancement of knowledge. For this reason, few academic staff would support the recording of hours *actually worked* as the basis for pay.

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A7. The easy answer to this problem is to leave “working time” unregulated for academics. However, NTEU submits that this also leads to serious problems. To cite only the most self-evident of these:

- It leaves the employee with little way to challenge unreasonable workloads or working hours – a contract for an employee to work for 50 hours per week for nothing more than the award minimum wage is perfectly legal.
- Without doubt, an enterprise agreement under which employees are or could be required to work 50 hours per week could not fail the BOOT test for that reason.
- It renders the award minimum wages of little meaning as an hourly rate of pay, and for part-time employees incoherent and unworkable, as there is no way that a part-time employee has an enforceable wage.
- It is inequitable as between employees, with the same minimum rate attaching to an employee required to work 35, 40 or even 50 hours per week.

A8. NTEU draws several conclusions of principle from this situation, and from the evidence:

- **Principle 1:** There should be no limitation on the hours of work which an academic can choose to work, and the working of additional hours by genuine choice should not attract additional remuneration. Such an arrangement would be unproductive and inefficient and would be a limit on academic autonomy or even academic freedom.

This element of the ‘traditional’ notions of academic work should be retained, despite the enormous benefit it in practice provides *gratis* to employers.

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- **Principle 2:** There should be no direct link between hours *actually worked* and the rate of remuneration for the “ordinary hours of work”. Rather, the amount of time an employee actually spends on his or her work (including that specifically allocated) should be left to individual judgement, subject only to an employer’s and peers’ rights to ensure quality and standards. Pay should correspond to work requirements not hours as such.
- **Principle 3:** The nature of academic work is such that a period of a week is too short a period of account for working hours or workload. This is in part because of fluctuations in work requirements over an academic year are determined by the employer, and in part due to some capacity of academics to determine themselves in which part of the year certain tasks will be performed.
- **Principle 4:** *If the employee is paid only the minimum award wage*, the amount of work required or directed by an employer of an academic (the ***workload***), should be such that the employee can be expected to be able to complete that workload to a professional standard within a standard working week, averaged over an appropriate period, and having regard to objective considerations relating to the academic, such as discipline and level of appointment, rather than individual or subjective considerations such as the relative competence or efficiency of the employee.
- **Principle 5:** Where the required ***workload*** (as described above) of the employee significantly exceeds that which could reasonably be expected to be completed in an average standard working week, the *minimum award remuneration* should be increased to appropriately reflect the proportionate increase in workload.

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- A9. The NTEU's proposed clause is nothing more or less than an attempt to give effect to these principles, and to thereby ensure a fair, relevant and enforceable safety net for employees in relation to minimum wages and working hours. To the extent that there is some complexity involved in formulation of the clause, this is largely because of the particular character of academic work and the union's wish to avoid unfair consequences for employers and to give them the maximum flexibility consistent with a fair and enforceable safety net.
- A10. In the context of this industry, where nearly all employees are covered by enterprise agreements, the main practical effect of a fair and relevant safety net is to act as a comparator for the BOOT test. The clause proposed by the NTEU does not need to be incorporated into enterprise agreements, especially given the fact that agreements currently provide for salary rates mostly between one-third (at junior levels) and two-thirds above the award rates.
- A11. NTEU argues for each element of its claim, but the matter which we ask the Commission to consider are ultimately the five principles listed above.

## **Key contentions drawn from evidence**

- A12. NTEU formally relies on all the witness and other evidence presented. However, set out below is a series of factual contentions, in shaded boxes, which NTEU submits the Commission can find. Under each contention is a general commentary about the evidence and the contention, and its relevance. Then is listed some of the more important evidence adduced which supports that contention.

**[Note about the Tables:** Reference to “Para” is a reference to witness statement numbered paragraphs; Reference to “PN” is a reference to the paragraph number of the

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transcript. Text in *italic script* indicates a quote from a witness statement or transcript.

Other text is a paraphrasing of what the evidence discloses.]

**The following figures relate to 2015 and do not include casual employees. There are approximately 53,000 academics covered by the Modern Award. Of these about 6500 are part time, about 29,000 are engaged on a continuing basis and around 22,000 are employed on limited term contracts, 17,000 are employed as research-only staff, 5,000 are teaching-only and 32,000 are teaching-and-research. Nearly all are employed by institutions covered by the Commonwealth Higher Education Statistics Collection. The industry (37 public providers) has revenues in excess of \$27 billion p.a.**

A13. NTEU evidence as put forward about the basic statistics of the industry was not contested. The figures quoted above are described as approximate because the Commonwealth Higher Education Statistics Collection does not apply to the private universities covered by the award, which account for a relatively small part of the industry.

A14. The number and average fraction of part time employees is calculated from the Commonwealth Higher Education Statistics Collection and the national figures included in the University of Queensland Benchmark Report (p23 of Attachment M to NTEU G).

**Professor Andrew Vann - Witness Statement AHEIA 10**

**PN 5291 - Do you accept that the staffing statistics published by the Federal Department of Education and Training with respect to Charles Sturt University are reasonably accurate?---Yes, we had an issue with the casual staff reporting one or two years ago but apart from that, yes.**

**Professor Glenda Strachan - Witness Statement , Exhibit NTEU Z**

**"Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities" (2012 Report, Attachment 4 to Exhibit #Z))**

**Section 3: Academics (non-casual)**

**Table 66: 44% employed on fixed term contracts**

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**Ken McAlpine - Witness Statements, NTEU G, NTEU H, NTEU I**

**NTEU G Para 13 and Attachments C,D and E**

**NTEU H, Para 3-5 and Attachments L and M.**

**NTEU H, Attachment M, page 23; and NTEU G , referring to *higher Education Staff Statistics (Cwlth) 2015 – Table 2.2 Number of Full-time and Fractional Full-time Staff by Current Duties Classification, 1996 to 2015 and Table 1.2 FTE for Full-time and Fractional Full-time Staff by Current Duties Classification, 1996 to 2015*; The average fraction of part time academic employees is approximately 0.7 of full-time.**

**Academics are required to perform work for their employer and to meet performance or output standards which carry the necessary implication that certain work will be performed.**

A15. Although there was some difference of emphasis about what exactly this means, as stated, the contention seemed to be uncontested. It should be noted that NTEU contends that there are in relation to some areas of work, and at some employers, performance standards which are purely *behavioural*, with little implication for working time, (e.g. ‘provide a roadmap through ambiguity’) or are expressed at a sufficient level of generality that they create very limited requirement for necessary work (e.g. ‘show leadership to junior staff’). On the other hand, some performance or output standards were quite specific about particular outputs which had to be met as a minimum, which had direct implications for working time.

**Professor Philip Andrews - Witness Statements, NTEU P,NTEU Q, NTEU R**

**NTEU Exhibit P**

**Para 8, 10**

**Para 14 - Staff below Level E have an annual performance review in the process of which an online form is filled in listing all the academic's duties, expectations and aspirations for the year. The engagement profile sets out what has to be done, and then there is an aspirational profile setting out what the academic aims to achieve in the next three years. This then forms the basis for performance management discussions.**

**NTEU Exhibit Q**

**Para 1 and Attachment PA - 1** – Monash University has detailed and prescriptive minimum performance standards for academic staff. “Minimum standards refer to minimum acceptable standard of performance”.

**Para 2** - These include “quantitative research performance standards” which set research publication outputs, grant income, and higher degree supervision measures. Examples of these are set out in **Attachment PA-2**.

**Para 3** – These minimum standards are reinforced by a detailed performance management process as described in **Attachment PA-3**.

**Para 4 – Attachment PA-4** sets out detailed and prescriptive procedures and standards for higher degree research supervision.

**Para 8 – Attachment PA-8** shows the workload allocation for members of an academic department at Monash.

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**Professor Marnie Hughes Warrington - Witness Statement, Go8 10**

**PN4864-4866** - *When the university says that it allows peers to determine standards of quality and output, it then adopts these as its standards.*

**Ken McAlpine - Witness Statements, NTEU G, NTEU H, NTEU I**

**NTEU I – Para 4** – detailed and extensive evidence.

**The work of academic staff as a group consists of teaching and related duties, the supervision of research students, research, scholarship, administration, engagement and service. The labels given to these functions and the categorisation of particular work varies, including between institutions, but this does not reflect significant differences in the actual work.**

A16. This contention, as stated, was not contested.

**Professor Michael Leach - Witness Statement, NTEU AE**

**Para 9-17** Extensive and detailed evidence. Including;

*However, none of these differences of approach [nomenclature and categorisation] are inconsistent with the overall conceptual framework I have described above.*

**Professor Michael Hamel-Green - Witness Statement –NTEU AD**

**Para 9**

**Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

**NTEU Exhibit P**

**Para 6**

**Andrew Picouleau - Witness Statement**

**Para16** - *In relation to academics and academic work, academic work is traditionally considered to include teaching and related activities, research and service. ...*

**Professor Marnie Hughes Warrington - Witness Statement, Exhibit - Go8 10**

**Para 27-28**

**Dr John Kenny Witness Statements, Exhibits NTEU AB, NTEU AC, NTEU AF**

**MFI# 31, 32, 33, 34**

**NTEU Exhibit AB, para 5**

**Professor Glenda Strachan - Witness Statement , Exhibit NTEU Z**

**PN4474**

**Ken McAlpine Witness Statements, NTEU G, NTEU H, NTEU I**

**NTEU I – Para 4** – detailed and extensive evidence

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**Although teaching and related duties, the supervision of research students, research, scholarship, administration, engagement and service, describe the components of academic work, the composition of the workload of individual academics will consist of differing combination, of these components, and there is a large minority of academics who are employed predominantly to do research, and a smaller minority who are employed predominantly for teaching and related duties. Teaching-related duties and research-related duties, in some combination constitute the great majority of time academics spend on required work.**

A17. This contention was not contested. It is also supported by the Commonwealth Higher Education Statistics (referred to above). This is significant because there is no “standard” pattern of academic work, whose workload can be regulated fairly simply by a proxy (such as teaching contact hours). What might be a grossly unreasonable teaching allocation for a teaching-and-research academic with significant research or administration responsibility may be insufficient *total* work for a “teaching-only” academic in the same discipline. This variability of the mix of duties means that effective workload regulation can only be meaningful if it relates to the totality of required work.

**Professor Glenda Strachan - Witness Statement , NTEU Z**

**“Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities” (2012 Report, Attachment 4 to Exhibit #Z)**

**Section 3: Academics (non-casual)**

**Table 73:** 11% teaching-focussed, 34% research-focussed and 55% teaching and research.

**Ken McAlpine - Witness Statements, NTEU G, NTEU H and NTEU I**

**NTEU I – Para 4 – detailed and extensive evidence**

**Professor Dawn Freshwater - Witness Statement – Exhibit Go8 13**

**PN6823-6824 - Workload can only be discussed and determined as a whole, including all aspects of the work, including research.**

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**The mix of duties as between the different functions is primarily determined by the employer, either by the nature of the appointment itself or by the employer by periodic decision.**

**Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

**NTEU Q - Para 8 – Attachment PA-8** shows the workload allocation for members of an academic department at Monash.

**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**PN6640 – PN6642** - There is now a greater accountability for what is done in non-teaching time.

**PN6768** - The balance of duties for each academic is set through the annual performance development process, which leads to an engagement profile

**Dr John Kenny Witness Statements, Exhibits NTEU AB, NTEU AC, NTEU AF**

**MFI# 31, 32, 33, 34**

**Exhibit AB, paragraph and Attachment JK-11**

*My personal performance expectations are negotiated with my performance manager for a three year assessment period, based on information in The UTAS Academic and the associated documents.*

**Most academic staff retain considerable autonomy over such matters as the content of teaching units, research interests and methodologies, and choice of service and engagement work, within the constraints imposed by professional standards or their academic discipline.**

A18. This was apparently a major contention of the employers. While the existence of “considerable autonomy” is acknowledged by the Union, it is by no means untrammelled (as is shown by evidence listed under other contentions), nor is the existence of autonomy about how work is performed the same thing as any reasonable limit on total working time, about which academics do not have autonomy.

Nevertheless, the contention is agreed by the Union.

**Professor Michael Leach - Witness Statement, Exhibit NTEU AE**

**Para 21**

**Professor Michael Hamel-Green - Witness Statement, NTEU AD**

**Para 10**

**Para 28** - Academics have flexibility in when and where work is done, which benefits the universities as well as employees, but high workloads mean infringement of work into personal time is often or usually not a matter of employee choice.

*... Unfortunately, the requirement that work extend into people's private time is now treated as an employer expectation rather than an employee choice.*

**Para 32** - There are collegial pressures to maintain a high quality of education and research output.

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**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**PN6784** - *So just backtracking to academics, you mentioned the annual performance process and there's this concept of a supervisor. In a practical sense, what level of supervision does a head of school or a supervisor provide for academic staff at Monash University?--It would be very light touch.*

**PN6785** - *What does that mean?--A head of department - well, apart from sort of deciding on what the teaching allocation is in the year in prospect and agreeing on obligations regarding other administrative activities, I wouldn't have thought there would be much interaction at all.*

**Dr John Kenny - Witness Statements, Exhibits NTEU AB, NTEU AC, NTEU AF**

MFI# 31, 32, 33, 34

**Exhibit AB, paragraph 6**

**Ken McAlpine - Witness Statements, NTEU G, NTEU H, NTEU I**

**NTEU I – Para 4** – detailed and extensive evidence

**There is no or nearly no systematic or official recording of actual hours worked by academics.**

A19. This was not contested.

**Jochen Schroder - Witness Statement, Exhibit NTEU M**

**Para 8**

**Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

**NTEU Exhibit P**

*Monash has an option for academic staff where we can elect either to apply for annual leave and have it approved and recorded, or to simply agree at the beginning of the year that we will take our leave allocation and self-manage our leave. I probably do not take my 20 days leave each year, but it saves putting in the forms. I am aware that many of my colleagues who elect the first option have problems with excessive leave accumulations. Before this option was introduced, everybody in the School was accruing too much leave. There are people who say they are on leave but still come to work. In practice, it is difficult to carve out time when it is possible to take leave.*

**Professor Stephen Garton – Witness Statement Exhibit Go8 - 9**

**Para 19**

**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**PN6756** - *Does Monash University collect data on the actual hours worked by its academic staff?--No*

**Dr John Kenny Witness Statements, Exhibits NTEU AB, NTEU AC and NTEU AF**

MFI# 31, 32, 33, 34

**PN5939** - ... *In terms of their academic work. Outside of casual staff, are there anywhere in the University of Tasmania, where the University of Tasmania is measuring or recording the working time of academic staff?--In terms of recording their actual working time, no ...*

**Sue Thomas - Witness Statement, AHEIA 8**

**PN4156-7**

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**The great majority of academic working hours performed in the course of employment is work required or directed by the employer, being work which is specifically allocated or required of academics or is required to meet the performance standards of employees.**

A20. There was some confusion in the witness evidence about the distinction between the terms “required”, “self-directed” “assigned” and “allocated”. What is meant here in this contention is that the work is “required or directed” in the sense that it is either specifically directed – e.g. “present these classes” or required - e.g. “We expect you to have published a book or 3 journal articles”. The former example might be considered “assigned”, whereas the second may be considered “self-directed”. However they are both *required*.

#### **Professor Michael Hamel-Green Witness Statement –NTEU AD**

**Para 22** - *The proportion of academic working time that is spent doing work necessary to meet the employer's expectations has increased markedly in recent years. In addition to the increase in allocated duties and the imposition of specific research performance targets discussed above, the extent of monitoring, auditing and requirement for responding to central requirements has expanded. There is also an increased expectation that academics will attend workshops to learn new software systems and other administrative changes, a greater requirement to engage in course promotion activities to maintain student enrolment numbers.*

#### **Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

##### **NTEU Exhibit P**

**Para 47** - *The balance within my working week between work required to meet my employer's expectations and work I do out of personal choice has shifted significantly. There is very little time left to do creative work.*

#### **Professor Stephen Garton - Witness Exhibit Go8 - 9**

**Para 25, 26 and Attachment SG-3** Industry has developed mechanisms for allocating and monitoring work. In Sydney University's case “required work” in EBA can be up to a 38-hour week (average).

#### **Ken McAlpine Witness Statements, NTEU G, NTEU H, NTEU I**

**NTEU G – Attachment B** – To the extent that EBAs talk about required work or required duties, they acknowledge that these can be allocated up to the normal weekly hours (derived from some number of hours between 35 and 38 per week. See for example, ANU 52.4 (page 253 of the consolidated document), Sydney University EBA clause 267 (page 272), Swinburne 15.1.2 page 325).

See also Murdoch Agreement at page 65 of **Attachment B - 50.2 Academic work is a combination of assigned tasks and self-determined work. Assigned tasks include teaching and teaching related activities such as preparation for teaching, student assessment, student supervision, and the necessary administrative and partnership activities associated with teaching and research at the University. The remainder of an academic staff member's working time is the time in which an academic conducts research and other scholarly activity appropriate to their appointment at the University. While such work may be directed by the University, the staff member will have some discretion as to how such work is performed (i.e. self-determined work).**

#### **NTEU I – Para 4**

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**Dr John Kenny Witness Statements, Exhibits NTEU AB, NTEU AC and NTEU AF**

**MFI# 31, 32, 33, 34**

**Exhibit AB, paragraph 6 - 12**

**For academic staff whose duties include the delivery of educational programmes, this aspect of workload includes the specifically allocated responsibilities for educational delivery and nearly always for some or all of the associated duties, such as preparation, student consultation and assessment. The contractual obligation to perform these duties is not discharged by the employee having worked on them for a particular number of hours, but rather by the performance of specifically allocated duties to a professional academic standard. Despite this, most or many institutions (including directly or indirectly through their enterprise agreements) establish hours-equivalence or “fair average” for these duties through a variety of methods, based on the knowledge of what is required.**

A21. This contention was essentially not contested. What this shows is that teaching, like research, is not “measureable” in advance by reference to an instruction to work a particular number of hours on any task or related groups of tasks. The time actually taken will vary greatly depending on a large number of factors. The preparation of a lecture may take 1 hour or 8 hours. Nevertheless, for many years’ academic staff and university managements have accepted systems of work allocation based on a “fair average” time. In fact, of course, the award safety net already does this for the largest group of employees – casual teaching staff, where preparation and consultation are “deemed” to take a certain amount of time despite the huge differences which will occur between one situation and another. This approach to the accounting for teaching is entirely consistent with the approach in the NTEU claim.

**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**PN6703 – PN6706 - Monash workload and working hours regulation does not measure actual time worked, but is based on a reasonable estimate for research AND teaching.**

**PN6643 – PN6658 - Monash workloads clause encompasses research within 1645 hours of workload allocation.**

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**Professor Stephen Garton - Witness Exhibit Go8 - 9**

**Para 29**

**Professor Marnie Hughes-Warrington - Witness Statement, Go8 10**

**Para 32 - Most academic activities other than teaching and assessment related duties are not "assigned" as such**

**Dr John Kenny - Witness Statements, NTEU AB, NTEU AC, NTEU AF**

**MFI# 31, 32, 33, 34**

**Exhibit AB, para 13-15**

**Para 13 -** *The allocation of teaching duties incorporates many assumptions about the time taken to perform particular academic tasks. For example, in my large second year Primary Science Education subject, there are three standard assessment tasks to be completed by each student. I am allocated 70 minutes per student for marking all three pieces of assessment. I am allocated 20 minutes per student for student consultation (30 minutes for online students). Time is allocated for the moderation of results, and of course for the preparation and delivery of teaching.*

**Sue Thomas - Witness Statement, AHEIA 8**

**PN4164-PN4171**

**Professor Dawn Freshwater - Witness Statement – Exhibit Go8 13**

**PN6805-6806 - Workloads are appropriately managed in a way that meets the operational requirements of the University of WA (UWA).**

**PN6827-6836 -** Workload consists of required tasks and self-directed work, even where this is limited by reference to annual hours of work.

**PN6834-6835 -** Even an explicit working hours provision such as UWA 36.3 - "The workload allocated to an employee should not exceed an average 37.5 hours per week averaged over a calendar year.." does not require the use of time recording, and does not prevent an employing performing additional self-directed work

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**For academic staff whose duties include conducting research and duties related to this research, the contractual obligation to perform these duties is rarely or never discharged by the employee having worked on them for a particular number of hours. The discharge of these obligations is performed and accounted for by one or some combination of the following:**

- a) the performance of specific allocated work (as in the case of a research assistant working on a project);
- b) the completion of particular work activities which might be described as “inputs” (for example, applying for a research grant, supervising a PhD student, or completing a journal article and submitting it for publication);
- c) the achievement of particular research “outputs” which require the performance of work (the publication of journal articles in journals of a particular quality, research grant or consultancy income, PhD completions by supervised students).

**These different methods of account as between different institutions do not reflect a difference in the way research is actually performed.**

A22. Professor Hughes-Warrington (ANU) was an exception to the general evidence. At PN4870 -4872 she said that the ANU does not have codified standards for research outputs, but that performance is dealt with on a case-by-case basis. NTEU would consider that ANU would almost certainly comply with the proposed NTEU clause automatically, subject to the size of other work allocation components.

A23. However, the evidence disclosed that most staff responsible for research have specific “input” or output or similar standards which they are required to meet, some junior staff work primarily on allocated tasks from other staff. The point of this evidence, in part, is to show that research work (which is mostly “self-directed) is nevertheless required work.

**Ken McAlpine - Witness Statements, NTEU G, NTEU H, NTEU I**

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**NTEU G Para 6** – No letters of appointment for non-casual academics specify maximum, or any, hours of work for non-casual academics.

**NTEU I , Para 4 (h)** – Many research assistants have little autonomy about their work.

#### **Jochen Schroder - Witness Statement, Exhibit NTEU M**

##### **Para 6 & 12**

#### **Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

##### **NTEU Q**

**Para 8 - Attachment PA-8** shows the workload allocation for members of an academic department at Monash.

#### **Professor Michael Leach - Witness Statement, Exhibit NTEU AE**

**Para 11** - *However, in the context of understanding workloads of academics, research work would generally be taken as including applying for research grants (a very time consuming task) and may include supervision of PhD or other research students (see further below).*

**Para 11** - *...in a university context, to be research there has to be some identifiable research output which attempts to advance some aspect of knowledge within an academic discipline. The most common forms of this are peer-reviewed articles in journals, chapters in books, a book, peer-reviewed conference papers or a PhD thesis. In some disciplines, these research outputs may also be associated with some direct product, such as a new drug treatment or new engineering method. The production of these research outputs, and especially in the sciences and social sciences, the collection of the data and information on which knowledge is built, can be considered the core of research work*

**PN6364 - COMMISSIONER JOHNS:** Sorry, can I just then ask, Prof Leach?---Yes.

**PN6365** - When you starting with the research component, as I understand it research is output based as opposed to input based?---Yes.

#### **Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

##### **NTEU Q**

**Para 1 and Attachment PA - 1** – Monash University has detailed and prescriptive minimum performance standards for academic staff which include detailed elements going to research outputs. “Minimum standards refer to minimum acceptable standard of performance”.

**Para 2** - These include “quantitative research performance standards” which set research publication outputs, grant income, and higher degree supervision measures. Examples of these are set out in **Attachment PA-2**.

#### **Professor Michael Hamel-Green Witness Statement –NTEU AD**

##### **Para 14 and Attachment MHG-2**

##### **VU Measure of Research Activity document (MORA).**

*The MORA imposes definite performance requirements on academic staff in relation to their research effort.*

**Para 15** - *While the MORA is an instrument developed by VU, it is similar to indexes of research activity used by most, if not all, Australian universities. Tools which articulate definite requirements for academic staff to demonstrate research activity against set expectations for research income generated and for tangible outputs in terms of publications and higher degree supervisions, were rapidly implemented across the sector in response to Commonwealth policy changes which linked university funding, in part, to being able to demonstrate their research activity against those metrics.*

#### **Andrew Picouleau - Witness Statement – Exhibit 12**

**PN6681 – PN6686** - Academic managers are already expected to assess progress towards long term research output goals

##### **PN6687 -At Monash**

*"Certainly, our measures of research performance are all measures of research outputs. ..." There is no explicit link between research expectations and time.*

#### **Professor Simon Biggs - Witness Statement, Go8 11**

**PN 5185** - University of Queensland employs about 40% of its academic staff as research-only staff. For these compliance with the EBA workload requirements re 1725 hours would be determined by reference to research outcomes.

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**Dr John Kenny Witness Statements, NTEU AB, NTEU AC, NTEU AF**

**MFI# 31, 32, 33, 34**

**Exhibit AB, para24 and Attachment JK-4 - University of Tasmania Research Performance Expectations.**

**A number of employers already have provisions in their enterprise agreements which are in large part consistent with the limitation to *ordinary hours workload* as provided for in the NTEU claim (except for the provision of additional remuneration for more than a full-time workload). These employers did not give evidence of the inappropriateness or impossibility of implementation.**

A24. There is no enterprise agreement which is in the form of the NTEU's proposed clause

22. It is conceded that to the best of the NTEU's knowledge, none of its University Branches has ever claimed in bargaining for overtime in anything like the form proposed for the Award.

A25. Nevertheless, the evidence shows (with the exception of the "overtime") element, the existence of the concept of "*required work*" or "*required duties*". The term "*work allocation*" is also common in the evidence and in agreements, which term implies that part of work which is allocated by the employer, as opposed to all work the employee may perform.

A26. Moreover, given the extensive rhetorical evidence about employees not wanting to be limited or restricted in what they do (especially in relation to research), the references in many agreements to specified or maximum annual hours can only mean one of two things: Either the universities are preventing employees from following their passion by restricting the hours they are permitted to work; *or*, as is proposed by the NTEU, accepting the distinction between *required* or *allocated* work (which must fit within the cap specified in the agreement) and all the work performed by the employee. NTEU contends that it is the latter. Moreover, whereas there are some agreements which only really limit teaching time, there are research-intensive universities such as Sydney,

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ANU, University of Queensland and the University of Western Australia which specify total annual hours and include research and other self-directed work within that cap.

Moreover, while employer witnesses from each of these four universities, and other employers were at the same time happy to agree that their enterprise agreement provisions about workload were fair and appropriate, and had no complaints that these provisions were outrageous or unworkable, yet attacked essentially the same or similar types of provisions in the NTEU claim as outrageous, unworkable or inconsistent with academic freedom.

A27. This analysis is not presented to suggest that a provision should be included in a safety net award simply because it has been gained in bargaining, or even that it now represents a “community standard”. Rather, we present the argument to show that to the extent that employers expressed opinion and conclusion evidence about the NTEU claim, it contradicts the evidence about their own existing arrangements.

A28. Of particular note was the acknowledgement by employer witnesses of the fact that their existing arrangements, about which they did not complain, required an estimate to be made of total time required to complete required or allocated duties, and that this included research.

A29. It is not suggested that the claim for additional remuneration is shown to be workable and appropriate on the basis of existing practice, though there was some limited evidence that academics are sometimes paid extra for work overload.

#### **Catherine Ruth Rytmeister - Witness Statement, Exhibit NTEU AA**

**Para 8 –** *To the best of my knowledge, on the basis of those direct discussions and reports , management representatives of the University [Macquarie] have never raised any concerns on behalf of the University about the practicalities of implementing or applying, or any matters arising under Sub-clause 4.3.29, which states: 4.3.29 Maximum workload allocations are to be set within a nominal limit of 1575 working hours per year (45 weeks at 35 nominal hours per week) for full-time staff (based on the Staff Member accessing four weeks annual leave). Accordingly, a full-time Staff Member's allocated workload must be able to be completed within a 35-hour week, averaged over a year. By mutual agreement, a Staff Member's workload allocation may be averaged over a two-year period. Workload allocations, including research expectations, for part-time staff should reflect the appropriate employment fraction.*

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**Professor Michael Leach - Witness Statement, Exhibit NTEU AE**

**PN6364** -COMMISSIONER JOHNS: Sorry, can I just then ask, Prof Leach?---Yes.

**PN6365** - [In allocating workload] When you starting with the research component, as I understand it research is output based as opposed to input based?---Yes.

**PN6366** - So do you convert that somehow to hours?---That's right. So there'll be a document that's provided by the university, which is itself an artefact of a negotiation that takes place with the union to some degree. There's a research expectations performance criteria. So your percentage allocated to research will be based on, as a rule, your performance over the previous three years in relation to publications, grants and higher degree by research students completions, PhD completions. In other words, there is also another component that's about real time, current time, how many students do you - how many post graduate students, PhD students do you have today and what grants do you have to perform today if you've actually got the grant money. But basically you're looking at the last three years and then some stuff to do with this year. There'll be a performance criteria table and you'll work out that that person is on a 10 per cent research load or up to 40, depending on their performance.

**PN6367** - But you the do convert that into input hours?---Absolutely. So 40 per cent say is 40 per cent of their annual workload that's now research and I don't allocate that to teaching you see, so, yes.

**PN6368** - Thank you.

Also

**PN6387** - MS PUGSLEY: Prof Leach, do you have a copy of clause 15 of the enterprise agreement [MFI# #36] in front of you, the workload process?---Yes.

**PN6388** - At paragraph (e) on page 27?---Yes.

**PN6389** - This is typical of most universities as the Bench has heard, that there are academic workload models put together at local levels?---Yes.

**PN6390** - The university - I beg your pardon - the workload model at (e) shall allocate hours other than for self-corrected work for each element, which represents a fair, sufficient and accurate estimate of the time that a staff member would take. How does that fit in with the total accountable hours of 1800 and not more than 1620 is being allocated?---So as you say, the first thing that happens is that 10 per cent is taken off unallocatable as opposed to unallocated, and then the time is allocated between the three components, and as I explained to you typically or the most efficient way to do that is to work out their research loading first to take that off, because that varies on performance. Then any leadership roles they might have, service roles, and then we see what's left. Of course in the workload model that we're talking about in 2016, there's a 65 per cent cap on teaching as well. So that's another factor, it can't go above 65. That's the process.

**PN6391** - What do you mean by self-directed work?---Okay, so in academic life there are, as I say in my submission at various points, there are some required work, there is required work, whether it be explicitly or implicitly required around teaching and your research performance that you would commit to in your PDR, in your personal development statement for a year, that would reflect your research loading, your service roles and then your teaching roles. Self-directed work, there's also work that academics would be committed to and some of that I go to in my statement, give some certain examples there that might be considered likely to advance your career, things that you're involved in; community organisations and so on, that we know most academics do, especially if you're going to get a - what's called an ARC linkage grant, which you might be familiar with here, which involves a community organisation. You put a lot of hours into building a relationship with that organisation in order to get the research funding. If we were to stick every hour of those on a workload model they'd very quickly exceed 1620, so there is some self-directed work as well. But - yes.

**PN6392** - Do you as an academic supervisor ever direct any of your staff not to work any of those hours that go above what's referred to in the enterprise agreement?---No, I don't. I don't direct them to do that, no. Because they would be doing that for reasons to do with their desire for advancement and promotion. What I do do is make sure that the required work that we have is as allocated in the normal way, that there's an expectation on them coming from us around teaching and research and service.

See also some qualification and elaboration at **PN6407-6454**

**Professor Michael Hamel-Green - Witness Statement –NTEU AD**

**Para 11**

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#### **Professor Stephen Garton - Witness Exhibit Go8 - 9**

**PN4671-4672** - The NTEU claim would not limit the amount of work an academic can do.

**PN4679** - The Sydney University EBA limits the required research workload of an academic as well as the teaching workload, to 690 hours.

**PN 4694- 4700** MR McALPINE: *For teaching and research staff, I'm sorry. So that means that 40 per cent of the total workload in those circumstances should be teaching; is that right?*---Yes, and related activities.

*If we want to know how many hours' work that is we refer back to [EBA Cause]267?*---Yes.

*Now, the term in 267, if I can take you to that one - the term, "required duties", encompasses the teaching, the research and the other duties; isn't that correct?*---Yes.

*Okay. So that means that it necessarily follows that there is a limit on the number of hours of required duties that can be required in relation to research, does it not?*---There is an implication, yes.

*Now, the other thing we know in relation to research is that the university in the last five years, six years, has introduced much clearer minimum research expectations for academic staff, is that correct?*---Yes, although I think it dates back longer than that.

*Those minimum research expectations set out by faculty specific research outputs that are required as minima; is that correct?*---They're not - they set out what they expect the minimums to be and they were developed by the local work units; the faculties.

*Yes, but the university says that those standards, once adopted locally, are minimum performance expectations; the meeting of those outputs are minimum performance expectations, isn't that correct?*---That is the implication of the minimum standards, yes. They would be the basis for assessing staff performance.

#### **Diana Chegwidden - Witness Statement, AHEIA 11**

**PN9477-9481** – University under the terms of EBA (which incorporates Policy MFI# #48) pays additional remuneration to employees working more than a full-time load.

**9488-9489**- *It's fair to say, isn't it, that the understanding is that when those are allocated, those are used, if you like, as part of that process of adding up to 1595 or whatever the proportion of 1595, for example, that's allocated to teaching. Is that fair?*---Yes, these are the identified allocations for a range of academic activities that are undertaken and their value.

*The assumption of this is that these are all considered to be fair averages across the institution, but obviously I may take longer to prepare this lecture than that lecture, but this is a fair sort of average. That's the sort of assumption that we're using, is it?*---The words that we use in our enterprise agreement is the competent academic, so we would expect a competent academic to be able to undertake the work activity that's described within the hours that we've identified for allocation

#### **Andrew Picouleau - Witness Statement – Exhibit 12**

**PN6643 – PN6658** - Monash workloads clause encompasses research within 1645 hours of workload allocation.

**PN6662 – 6677** - Monash workload allocation is designed so as to leave enough working time to meet performance expectations for Research within 1645 hours. Line managers know how to work out if research expectations and time allowed for research are a reasonable match.

**PN6724 – PN6726** - Departmental or organisational unit workload models are by default developed for disciplines or groups of disciplines, since that is what academic departments are.

#### **Professor Marie Herberstein - Witness Statement, AHEIA**

**Para 15 – 19** – detailed and clear evidence about the process of allocation work within 1575 hrs/p.a and what counts and what doesn't.

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#### Professor Dawn Freshwater - Witness Statement – Exhibit Go8 13

**PN6805-6806** - Workloads are appropriately managed in a way that meets the operational requirements of the University of WA (UWA).

**PN6827-6836** - Workload consists of required tasks and self-directed work, even where this is limited by reference to annual hours of work.

**PN6834-6835** - Even an explicit working hours provision such as UWA 36.3 - "The workload allocated to an employee should not exceed an average 37.5 hours per week averaged over a calendar year.." does not require the use of time recording, and does not prevent an employing performing additional self-directed work

#### Professor Marnie Hughes-Warrington - Witness Statement, Exhibit - Go8 10

**Para 45** – The ANU enterprise agreement includes the following:

*"the required duties of academic staff will be agreed so they can be reasonably expected to be completed in a professional and competent manner within an average of 37.5 hours per week. Hence academic staff will not be directly instructed to work more than 1725 hours per year. These required duties are agreed on an individual basis with academic staff during their performance development discussions each year and are tailored specifically to the individual academic"*

#### Professor Simon Biggs - Witness Statement, Exhibit Go8 11

**PN5137-5144** - The limitation in the University of Queensland Agreement to 1725 hours does not require the keeping of time sheets, but is a representation of the amount of work that can be expected within that number of hours at a professional standard. What that work is, will vary between different disciplines.

**PN5168-5181** - University of Queensland uses a quantitative tool allocating points to activities, for the purpose of compliance with the enterprise agreement's requirement for workload to be achievable (subject to certain criteria) within 1725 hours.

**PN 5185** - University of Queensland employs about 40% of its academic staff as research-only staff. For these compliance with the EBA workload requirements re 1725 hours would be determined by reference to research outcomes.

#### Professor Andrew Vann - Witness Statement, AHEIA 10

**PN5445 -5472** Well, perhaps if we had a look at the academic workload clause that's in the document that the excerpts from the enterprise agreement, which has been marked **MFI#29**, I think the workloads clause is at page 22 and it is clause 30?--Yes.

*Now, you were talking about flexibility under the agreement for different proportions of teaching, research and other things. That is set out, really, at clauses 30.9 through to 30.15, isn't it, that there are different models there for proportions of teaching, research and shall we call it administration? I think you will see there at 30.93 it's administration, management, leadership, professionally-related engagement and with the disciplines, the professions and the community. So let's just call that admin for the purpose of this discussion, though obviously it is administration and service, perhaps?--Yes, okay.*

*Okay. So at clause 30.9 you see the teaching and research academic and it talks about a ratio there that teaching and teaching-related activities will be a maximum of 60 per cent. Research and creative activity, a minimum of 30 per cent and the admin and service or engagement section, a minimum of 10 per cent. So there's maximums and minimums there and you're saying that through individual discussion with a supervisor perhaps, those people can negotiate above and below - above the minimum and below the maximum.*

*Yes. So yes. I mean, typically the way this works and as I said, it's on some way back from the day-to-day practice on this, but reflecting back on when I was in school, there are a certain amount of tasks that need to be done for the effective functioning of the school in terms of committee membership, leadership roles. Obviously, there is an amount of teaching that needs to be done that's linked to the subjects that are being offered through the school. Those need to be distributed through the academic staff, so that you can fit within the requirements of the EA and so that you can get everything you need to get done.*

*So those need to be distributed. They will be distributed. Hopefully relatively, fairly, according to clause 30.4?--Yes.*

*And once those allocations are made then there's room for a bit of negotiation around the edges of those and around what the impact of that is on other parts of the workload. Is that right?--Yes, that's correct. And, I mean, if changes are happening; you know, if you are introducing new programs or, as we mentioned earlier, if there are substantial*

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*increases or decreases in student load, there may be different negotiations to be done, but often it's a tweaking from one year to the next of workload allocation.*

*Now, am I right in assuming that where there is a maximum of 60, a minimum of 30 and a minimum of 10, that if one of those goes up or down, the objective is to still come out with a load of 100 per cent?---Yes. That's the objective, yes.*

*Okay. That's as a percentage of the working time that will be devoted to those activities. Is that right?---Well, broadly speaking, but I think it tends to be fuzzier than that in that, you know, teaching is usually the thing that is most closely managed. Often administration - you know, the way I often put it is that there is basically a market price for the work inside - that's done inside a department and for example, I'll just go back to thing from my own professional experience, but you know, for example, running the second year surveying camp in a civil engineering department attracted a relatively high workload, because it was something that nobody really wanted to do, whereas supervising a PhD student was kind of discounted in terms of workload model, because it was something that everybody did want to do, because it was intrinsically rewarding and also it was probably seen to be - you know, for better or worse at that time it seemed to count more towards your career aspirations. So it is - one of the difficulties about academic workload management is that it is not really a time allocation. It's kind of a market price for the things that academics are willing to spend their time doing, and this goes back to the very - you know, the flexible nature of academic work, the high degree of autonomy that academics expect to have in terms of determining their own workload.*

*Well, you've said that. Can I ask you to look at clause 30.9(i)?---Yes.*

*Now, there is a very specific time allocation there, isn't there? 1035 hours per annum?---Yes, there is.*

*For teaching and teaching -related activities. Now, is it fair to say that it's unlikely that any particular academic allocated 60 per cent for teaching, would teach exactly - or teach and do , teaching -related duties for exactly 1035 hours?---I think that is correct. As I said, they are kind of notional hours, a bit like the discussion we had about casual academics and to be honest, I believe the reason that explicit hours figures have showed up in enterprise agreements has been the inclusion of the 40 hours within the modern award and the insistence of the NTEU in particular that explicit hours figures were introduced to enterprise agreements. So I don't personally feel that that has been very helpful. When I was in school, there was a point system. It seemed to work very well. There was - you know, it wasn't - no-one pretended that they were hours, but there was agreement about the relative kind of price, if you like, of academic time and that was seen to be a fair mechanism within the discipline. So in discussions I've had at my previous university, actually I think after the hours were introduced into enterprise agreements and probably the round before this or the round before that, one of the heads of faculty talked about "hour-oids". You know, they are not actually hours, they are notional hours or fictional hours which are done to manage workload allocation, but no-one believes that they are - that you would pull up stumps at the end of 1035 hours or that that's a crisp definition of how many hours are expected to be involved. It's rough. It varies by discipline. It varies by subjects you teach and, as I've said, academics by and large, I think the thing that they would hate more than anything would be to be asked to fill in a time sheet.*

*Well, I think we are on common ground there?---Good.*

*So the teaching and related duties is allocated according to an allocation of hours, but in practice, you are saying that that it's actually based on - in the same way as casual academic work is allocated, it's based on an estimated average time for that - those particular bundle of duties?---Yes. Something like that.*

*And that average will be inaccurate in most specific instances as averages tend to be?---Yes, as averages have to be, I think. But yes, it's an indicative figure and it's not very productive to argue about whether it should be 1035 or 1040, or 1038.*

*And if a workload model has worked out, for example, that each lecture will be allocated three hours within the model, then it's going to be the case, isn't it, that even one academic might spend more than three hours on one lecture and less than three hours on the next. You can't say, "This academic takes this long and that academic takes that long." It is very much dependent on the specific activity that they are doing at that time?---Yes. It tends to be highly variable and, as I mentioned before, certainly my experience as an academic in terms of preparing lectures was that there is a certain amount of time that you have to invest in about how the whole course plays out. There will be ups and downs in terms of materials you might have to prepare or source. So it is pretty variable. That's where I say, I think most workload allocations have operated as what is seen to be a fair figure to the assembled community and that's usually at the school level. It can be at the faculty level sometimes, but it has tended in the past to be more at the school level.*

*And what is a fair figure is affected by discipline factors. So that is why it's better done close to the chalk face?---Yes, I think so.*

*Yes. So if the collegially developed model in my school allows, let's say, two hours marking time per student and I decide to add in an extra piece of continuous assessment to my unit and I end up, as a result, spending more time marking than two hours per student, I can't then turn around and say, "I need to be given less admin work," or to have my research*

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*expectations lightened as a result, can I?---No, and I would also qualify that by saying that I think there - going back to what we talked about in terms of the more professional approach to learning and teaching, there is a greater expectation that things are specified ahead of time so that it is clear to the students and for the academic staff, and that should also assist heads of schools to manage workload and make sure that people aren't, you know, over-assessing and increasing their own workload or students' workload unnecessarily.*

*And if I am a remarkably productive worker and get through my marking faster than the average that's been allowed for in the model, I don't run the risk of having my workload topped up with extra teaching duties, so that I can reach my 1035 hours, do I?---No. Not on my understanding.*

*And if I am teaching Industrial Law and they rewrite the whole Workplace Relations Act mid-semester, I'm probably going to have to do a lot more work to get on top of that change in my discipline area, than the person office next to me who teaches trusts and successions, when nothing has happened in 20 years. Now, that sort of variation in terms of the - you talked about it earlier in comparing, I think, solid something - I've lost it. But there are quite distinct variations and that can be from one year to the next in the same discipline area, can't it, about how much work is required to be done for discipline currency?---Yes. Roughly speaking, yes. I mean, I think it's always an interesting question that if a discipline is changing very rapidly and law and tax are the areas that I have had quoted to me in the past as areas that change quite rapidly as a reason for putting off finalising assessments. I think you have to ask whether you should be teaching students the law as it is at that moment in time, or the ability to interpret the law as it changes, but that's by the by perhaps. But, yes, there are variances.*

*Okay. And the fact that workload models are developed at collegial level and emerge from collegial discussions means that they can take account of those sorts of discipline factors?--- Ideally, yes.*

*So thinking now about research, is it fair to describe the current system as follows: in the workload model you allocate a percentage of the annual time that will be spent or is available for research activity. So if you've got a 30 per cent allocation for research activity, you would expect that you would have your other load organised such that you would have at least 517 hours available for research activity. Is that right?---That's the theory, yes.*

*Okay. And then someone, whether it is institution-wide or whether it is in a discussion with my supervisor or whether it's according to faculty metrics, someone sets some expectations for research outputs over a period of time that might be expressed as an average number of outputs per year, or an average number of outputs over three years or five years are likely to be identified for someone at my classification level in my discipline area. Is that right?---Yes. Well, typically, yes. I mean there are some - so in our case, for example, we have some broad expectations of research activity, but it usually has to be interrogated both in the light of personal circumstances and in the light of discipline. So, you know, for example, typically the creative arts have a problem that their outputs are not necessarily recognised as HERTZE outputs, so you usually had to make some allowances for discipline differences and there are, you know, very different volumes of publication that come out of different disciplines, so it is very contextual and, again, that is why I think these things are best managed at the school level where you can get some reasonable view onto a cognate group of people.*

*And those expectations are not set on the basis of any micro-measurement of the time to be spent by particular academic on a particular research activity, are they?---No.*

*No. They are set on the basis that the expectation is reasonable, considering what the average research productivity is that could be expected of academics at that level and that discipline, with those particular factors applying?---Broadly speaking, yes.*

*Yes. Are similar approach is then taken to admin and engagement allocations? Like, the admin - you said that there might be some specific tasks that have to be done for the department or the faculty?---Yes.*

*Particular positions on committees that have to be filled, et cetera, and then in terms of someone's professional engagement or community engagement it would be more akin to the research, a discussion with their supervisor about what their expectations are for that year or that two years and then they've got an allocation within their time that they can spend on that activity. Is that a fair summary?---It sounds about right, yes. I mean, usually there are a number of roles that absolutely need to be filled on behalf of the school which would have a specific allocation. Look, it's some time since I've had my hands in the details are workload allocation mechanisms as such, but if - you mentioned, for instance, professional placement. When I was working in an engineering school, there was an expectation that some part of the load was engaging with industry placement supervisors and visiting students in industry placements. So there are a number of ways that can be done, but yes.*

*Okay. Not contract of employment at Charles Sturt University for academic staff don't specify working hours, do they?---I don't believe so.*

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**Sue Thomas - Witness Statement, AHEIA 8**

**PN4175** - Are there any circumstances in which university academics at Wollongong receive extra payments if they work extra hours?---We do have provision for those who go above the teaching allocations and are required to do extra work to receive an additional payment.

**Academic staff on average work significantly longer hours than a standard working week of 37.5 hours or 38 hours, or relevant pro-rata amounts for part-time employment.**

A30. Remarkably, for a \$30 billion industry employing nearly 200,000 and made up entirely of very large corporations dedicated to research, the universities had very little evidence about working hours, nor was there any evidence that they had taken account of working hours as a staff welfare or health and safety issue. Certainly, to the extent that they have any data, research or information, they were not forthcoming with it. To the extent they have done no research and have no data or information, NTEU contends this indicates they indeed have a problem – they do not want to know.

A31. By contrast, the NTEU has taken various actions to try to ascertain the actual working hours of academic staff – including by conducting a survey, and as a good industrial citizen has tried to assist the present proceedings, which are in the nature of an Inquiry, with all the data and information it has.

A32. No employer witnesses were brought forward to contest any of the NTEU's witness or research evidence about actual hours worked by academic staff.

A33. Despite the absence of any employer efforts to inform themselves, some academic researchers have collected useful data indicating the actual working hours of academic staff. In particular the research of Professor Strachan suggests that 51% of academic staff are working more than 50 hours per week, and, extraordinarily, that 13% of *part-time* academic staff are working more than 40 hours per week.

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A34. Professor Strachan's research indicated a higher figure than did the 2011 ABS Census, which suggests an average working week between of about 45 hours per week among self-identified "university lecturers and tutors". On the other hand, the 2011 national Survey conducted in mostly non-teaching weeks, for the Commonwealth Government among academic staff, indicated average weekly working hours of 48.1 hours per week.

A35. The Commission cannot on the basis of the evidence available make a finding about what the actual working hours of academic staff are in Australia – no-one claims to know that. However, taken together, the Commission is entitled, without even looking at the NTEU Survey (which merely corroborates other results), to make a finding that this contention is made out.

#### **Professor Michael Leach - Witness Statement, NTEU AE**

**Para 22** - *I am well-placed to comment on the workload requirements of the 40 non-casual academic staff in my Department. I am their supervisor, I am responsible for their workload allocation and performance review. I can make a sound estimate of the likely working hours of the academic staff under my supervision, based upon my own experience as an academic in each of the classification levels and based upon my knowledge arising from discussions with them in workload allocation and performance review. That estimate is that all or almost all of the full-time academic staff I supervise would have working hours within the range of 45 to 55 hours each week. I am well qualified to make this estimate because I do take active measures to consider and review the estimates of staff as to how long particular tasks take. ....*

*During my time as an academic at Deakin University,[2001-2008] I estimate my own average working week was between 45 and 50 hours per week.*

**Para 23** - *In principle staff with higher levels of research activity receive reductions in their teaching allocations. However, as general rule established by management, an employee can only receive such a reduction where the employee has two out of three of PhD students, research grants and sufficient publications. Where an employee with an excellent record of publications who for whatever reason currently has no PhD students does not get a research grant (the success rate for which is generally below 25%), they are liable to lose their allowance for research. This arbitrary decision will often not result in the employee abandoning or reducing his or her research effort. Rather, the research work will simply be done in the employee's "own time". Another effect is that even when academic staff take periods of leave, other than lengthy long service leave, they will continue to undertake PhD supervision work while on leave because to do otherwise might result in those students being allocated to a different supervisor, with the result that by taking leave, an academic would put themselves in a position where they no longer met the employer's criteria for receiving a higher time allocation for research.*

See for completeness, however, important qualifications about required and non-required work, in **Para 26, and 27**.

**Para 24** - *.... as a manager, I can state that while quite clearly many managers attempt to be equitable in the distribution of workload as between individual staff members, the general level of work to be allocated within an academic unit is almost exclusively a function of available staff resources, which in turn is a function of the share of the university's total revenue which is allocated to an academic unit. Certainly as a manager, and in discussions with other managers, the question as to whether the work actually being allocated could be performed within a standard 38-hour week has never been a consideration. Given the performance expectations and work allocation within my Department, very few or no full time employees could perform their required duties to a satisfactory level within a 38-hour week, averaged over a whole year.*

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#### Jochen Schroder - Witness Statement, Exhibit NTEU M

**Para 14, 19** *In the first semester of 2015, I was regularly working a 70-hour working week, mostly just keeping up with teaching and associated duties, but also modernising the content of the unit. Para 21-23 At the moment because of my teaching workload, my research output is fairly limited unless I am willing to work somewhat in excess of 50 hours per week.*

#### Dr Michael Dix - Witness Statement NTEU AU

**Para 67** - *I estimate that in this first week and a half of Semester 2 2016 I have worked upwards of 110 hours.*

#### Professor Michael Hamel-Green Witness Statement –NTEU AD

**Para 12** - *Within this workload allocation, as Dean I would aim to establish maximum fairness as between staff. This in fact mitigates against individual staff being given a workload they could be expected to perform competently within a forty hour week, because that could only be achieved by loading additional work onto others. As faculties and decision-makers are constrained by the available staffing budget, the system enables a fair distribution of overwork, rather than allowing for the total volume of work to be limited to anything approaching standard hours.*

**Paras 23, 24** - *After relinquishing the position of Dean and returning to a teaching and research academic role, I was working approximately 60 hours a week, when averaged across the year. Of that, approximately 55 hours a week was spent in doing what was absolutely essential to complete the work required of me by VU. The remaining 5 hours a week was spent either in going “above and beyond” expectations in relation to required work, or in work activities which were self-motivated and not required of me by my employer. There were no weeks (except while on leave) when I worked less than 45 hours.*

*This is despite my workload in 2015, for example, being calculated by the VU workload system as being only 91% of a full academic workload ...*

**Paras 29, 30** - Practical constraints mean that some academics will do some work while they are formally on leave. Examples: PhD supervision and completion of time-constrained research.

**Para 33** - *An academic who stopped working after 38 hours in a week (other than as a form of protected industrial action) would find themselves subject to consequences in their employment. They would be perceived as uncooperative or not a team member, and this would damage their chances of promotion or contract renewal.*

**PN6247** - *At paragraph 28, why is it that you say that academic work can't be constrained to a 9 to 5 working week?--The nature of the various categories of academic work just cannot be achieved within the time allocated under the 38 hour week notional requirement. The time taken to prepare lectures to keep your subject up to date, this is in the teaching area or the demands in terms of assessment, the rising numbers of students and class sizes, the increasing demands in terms of online and new administer of the systems, the impact of all those means that it can't easily be done within the normal time. That's in teaching. In terms of research which is one of the key aspects of the academic role, the workload system at its best would be giving you an average of - if you're research active, something equivalent to, you know, close to six hours, 5.9 hours a week for research. It can't possibly, particularly at the senior levels, achieve the kind of research outputs under the MORA, the benchmarks. You can't possibly achieve that very easily in terms of doing all of those aspects of research, you know, the initial applications for funding or project design, the actual field work or experimentation, the actual writing up and then the - all the time required for that goes well beyond six hours a week. Then you've got the problem within the notional working days, of a 38 hour working week of trying to do that with competing demands on you from your teaching role. Beyond those teaching roles and beyond the research roles is other roles that the university expects of you as an academic. You know, the governance roles, the student liaison roles, participation in curriculum development, course restructuring and organisational restructuring. It means in effect that it can't possibly be done within the 38 hours that is notionally allocated and on which the various allocations ultimately based.*

**PN6248** - *If a staff member at VU, academic staff member, considers that they are overloaded both in terms of their formal work allocation and that they are working excessive hours, there are mechanism aren't there for them to talk to their supervisor about moderating their work?--Correct. They can talk to their supervisor, the problem is that everyone being overloaded there's a sense that you don't want to be under - in seeking less overloading for yourself increase loading for somebody else. You're aware that the whole enterprise, the importance of the you know quality education for the students and for the region your serving. So all those factors mean that the most important criterion in terms of whether you're being overloaded is whether you're being unfairly overloaded, not whether you're being overloaded per se. ...*

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#### Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R

##### NTEU P

**Para 34** - *The deadline for grant applications for these major funding bodies coincides with the peak workload period for preparing for the new teaching year. As a result, despite a community perception that university staff enjoy a long, lazy summer, most staff are back at work by mid-January, and working long hours through January and February in order to have everything ready for when the students return to campus.*

**Para 39-43** – *I currently work approximately 50 hours a week on completing my allocated duties and meeting the written and implicit performance expectations of Monash. My hours of work fluctuate – some weeks are heavy and some are not. There is no part of the year when I work as little as a standard 38 or 40 hour week.*

**40.** *Due to my family responsibilities I impose greater limits on my working time than I could otherwise justify to myself. Three days a week I do not arrive at work until 9am, as I do school drop-off on those days. One day a week I leave at 2.30pm to take my daughter swimming, but I will then work in the evening just to catch up. There is sufficient flexibility in the organisation of my working hours to allow this, which I value.*

**41.** *The volume of work means that other activities that I value are squeezed out by the time required to keep up with my workload.*

**42.** *So I work on campus for at least 38 hours a week, plus all the additional stuff I do in the evenings and in the early mornings. There are scheduled seminars and meetings, but also a lot of my own work that I do from home in the evenings and on Sundays. I try not to work on Saturdays. After my children go to bed, I usually do a couple of hours work in the evening, doing prep for the next day's meetings and classes, checking emails, and reading materials sent by my postgraduate students.*

**43.** *We use drop box for reviewing and updating documents, and materials are uploaded on Moodle – an online teaching platform. It is clear from the times when documents are updated in these tools that the majority of academic staff in the School work on Sundays. Sunday is, for me and my colleagues, the day when a substantial amount of preparation of teaching materials for the following week will occur. This enables me to get ahead of the game, before the week starts.*

#### Dr John Kenny - Witness Statements, Exhibits NTEU AB, NTEU AC and NTEU AF

##### MFI# 31, 32, 33, 34

##### Exhibit AB, para 19

*From my discussions with other staff and from my research into the question, I have identified the following factors as reasons why academic staff take on workloads that require them to work very long hours:*

- *There is pressure on faculty budgets which pressures Faculty managers to squeeze as much juice out of the academic lemon as possible;*
- *Many academics are on short term contracts (or three year probation) and fear they will not be re-appointed if they insist on their rights;*
- *There is a wide-spread culture of just accepting more demands with little or no negotiation or subtle pressure to comply;*
- *People don't want to admit that they can't cope, as this may make them vulnerable when it comes to decisions on probation, promotion, contract renewal, performance appraisal, etc;*
- *People don't want to stand out from the crowd by being seen as a squeaky wheel or troublemaker;*
- *Professional commitment: people don't want to let the students down;*
- *Professional commitment: people don't want to let their colleagues down, or be seen as not pulling their weight;*
- *Generally, high-achieving people don't like to admit that they're struggling;*

##### Exhibit AB, Para 29 - 30

**29.** *The spread of particular duties across the academic year means that working hours pressure varies from time to time. For example, during marking periods, it is typical for myself and other staff to work very long hours in order to meet tight deadlines. Unfortunately, this is not adequately balanced by periods of low work intensity because outside of teaching and assessment periods, most staff have to attend to our research and service obligations. The preponderance of teaching periods (at UTAS we have five teaching periods) encroaches on time for these other duties for many academics. Staff typically try to attend conferences between semester breaks, write papers or conduct research. There is no working week in which I would perform less than 38 hours required work.*

**30.** *I estimate I typically work about 45 hours a week these days. This has come down from about 65 hours per week because of the application of the workload model we have established through the enterprise agreement. This model has allowed me to reduce my teaching load from 90% in 2006 to 40% today and to put more time into my research and generate a very good research record. To me this attests the importance of a transparent and fair workload allocation process.*

##### Exhibit AB, Paragraph 32-35

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**Professor Glenda Strachan - Witness Statement, Exhibit NTEU Z**

**“Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities” (2012 Report, Attachment 4 to Exhibit #Z)**

**Section 3:** Academics (non-casual)

**Table 75** sets out self-reported hours of work usually worked.

Note 51% of full time workers report usually working 50 hours or more, and another 39% between 40 and 49 hours a week.

13% of part time workers report usually working more than 40 hours a week.

**Ken McAlpine Witness Statements, NTEU G, NTEU H, NTEU I**

**NTEU G Para 17-18** - 2011 Census data strongly suggests academics are working more than 45 hours per week, also that general staff are working more hours than those for which paid overtime is available.

**NTEU G – Para 20-21** – Survey conducted in 2011, in mostly non-teaching weeks, for the Commonwealth Government among academic staff indicated average weekly working hours of 48.1 hours.

**NTEU H Para 13-20 and Attachment S** – The Commonwealth Government-commissioned survey referred to above in 2011 also collected figures for average hours of work by field-of-study and by institution.

**In the negotiation or consultation about academic workloads, the widespread insecurity of employment of many employees further exacerbates the imbalance of power between employer and employee.**

A36. Given about 44% of academics (non-casual) are employed on fixed term contracts, this contention is not central and largely stands to reason without evidence. Nevertheless there was some evidence about workload being difficult to negotiate for those who did not enjoy job security or where staff might be selected for redundancy.

**Jochen Schroder - Witness Statement, Exhibit NTEU M**

**Para 15-16**

**Professor Michael Leach - Witness Statement, Exhibit NTEU AE**

**Para 24** - . . . Given the regular regime of restructuring and so-called academic “redundancies” which occur across the higher education sector, I or any other employee who decided to limit his or her working hours to 38 would without doubt significantly increase our chance of being selected for termination.

**Para 33** - An academic who stopped working after 38 hours in a week (other than as a form of protected industrial action) would find themselves subject to consequences in their employment. They would be perceived as uncooperative or not a team member, and this would damage their chances of promotion or contract renewal.

**Professor Michael Hamel-Green - Witness Statement – Exhibit NTEU AD**

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**Paras 25, 26 - 25.** *Academics employed on short term appointments are the most vulnerable to pressure to work long hours. Staff on fixed term contracts are a younger cohort than those with ongoing employment, and therefore occupy more junior positions. This compounds their vulnerability to taking on excessive workloads. This is even more so for sessional academics.*

**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**PN6679** - Low research output has been the basis for identifying people as redundant at Monash

**PN6680** - low research output can be the basis for non-renewal of fixed term contracts at Monash

**There is widespread existence of part-time (non-casual) academic employment. An employer is necessarily required to make an estimate of the hours required to perform the duties they allot to the employee, in order to determine the appropriate fraction and salary, under the terms of the Award and various agreements.**

A37. This appeared to be uncontested.

**Professor Glenda Strachan Witness Statement, Exhibit NTEU Z**

**"Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities" (2012 Report, Attachment 4 to Exhibit #Z)**

**Section 3: Academics (non-casual)**

**Table 74:** 17% employed part time

**Sue Thomas Witness Statement, AHEIA 8**

**PN4159-PN4163**

**For academic staff, workload is as important and central an issue as any other in higher education, and a great a source of dissatisfaction.**

A38. If workload and working hours was an issue which staff did not care about, or in respect of which they were very satisfied, this might assist an argument that these issues were, in the context of academic staff, not *relevant or necessary* as part of an award safety net.

A39. Employer evidence supported the view that academic workload is a central industrial issue in higher education bargaining negotiations. Employer witnesses presented no evidence-in-chief about the levels of staff satisfaction about workload, despite the

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universities being in possession of such evidence through internal staff surveys, such as the Climate Survey conducted by University of Wollongong, which showed levels of satisfaction on a range of issues (MFI# 23 & 24). As employer witness Sue Thomas acknowledged in evidence, while there were many factors about which staff were quite satisfied, workload was an area which stood out amongst academics as giving low satisfaction (MFI#23 at page 11 shows three questions about aspects of satisfaction with workload, and MFI#24 at page 1 shows a general level of employee satisfaction with workload, based upon the answers to those three questions. That figure, which combines academic and general staff, is 44%. MFI#24 disaggregates that general level of dissatisfaction and shows an academic level of satisfaction with workload at only 36%. That figure of 36% compares with 61% satisfaction for the general workforce as shown in the “All Ind % Dif” column, which is drawn from an All Industries database of 2700 organisations.

A40. Even more informative (though not disaggregated for academic and general staff) is the information, also at page 1 of MFI#24, which compares satisfaction at the University of Wollongong with “Other Australian and NZ Universities”. This indicates that the low satisfaction with workloads at Wollongong matches the average of other Australian and New Zealand universities, which gives us something of a national picture.

A41. It is also of passing interest that, at least at Wollongong University, the Group described as “Senior Management” were 73% “satisfied” with their workload. This may explain some of the character of the evidence from the senior managers who constituted nearly all the employer witnesses.

A42. Dr Kenny provides a number of the responses to the open question “In general, how would you describe the changes to your workload in the last five years?” He groups these under the following themes:

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- *A general expectation that work will be done outside working hours*
- *An increased requirement for administrative and teaching-related duties, such that time available for doing research has been squeezed*
- *University workloads are higher in Australia than in comparable countries*
- *Working in an academic's own time is necessary to maintain an academic career: prospects of contract renewal, probation confirmation, promotion, satisfactory performance appraisal depend on working additional hours.*
- *Long working hours have a negative impact on family responsibilities*
- *Long working hours have a negative impact on stress levels and health*

A43. Under each of these themes he reports a significant number of responses, each of which is indicative of a problem with workloads being set at a level which imposes longer working hours than the survey respondent thinks reasonable. These responses are worth reading. They reveal a genuine problem with long hours worked not as an act of individual passion for their disciplines or determination to go above and beyond the minimum necessary to perform their job satisfactorily, but worked as a result of clear expectations and workloads imposed by their employers. An examination of **JK-12**, where all the responses are provided, demonstrates that the sample selected by Dr Kenny are far from atypical.

A44. At paragraph 42, he summarises the answers to another open question:

42. 964 respondents answered the open question “To what extent do you feel you can competently fulfil the requirements of your role within a normal 38 hour week?” The answers to that question are Attachment JK-13. The most common answers are “impossible” or “not at all”. 34 (3.5%) gave ambiguous or non-responsive answers. 45 (4.7%) indicated they felt able to fulfil the requirements of their role within a 38 hour week. The remaining 885 (91.8%) answered with varying degrees of outrage, that they could not perform the role that is expected of them within a 38 hour week.

A45. Again, an examination of the full set of answers to this question at JK-13 shows that the overwhelming bulk of the answers reflected strong dissatisfaction.

A46. Dr Kenny does not assert that these are the only views held by academic staff, or that the survey was drawn from a random sample group. It was conducted among those

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respondents to an earlier NTEU survey who had indicated a readiness to be asked further questions about workload issues (PN5977), and to that extent the participants were self-selected and had indicated a prior interest in (or at least readiness to be asked about) workload issues. Nevertheless there is no basis on which to doubt that they were Australian academic staff, nor that their responses were genuine. The Commission should be satisfied that the Kenny survey provides a valuable insight into the practical experience of working hours of the academic respondents to the survey, and of the pressures they perceive as impacting on their working hours, even if the results cannot be extrapolated such that they can be said to be representative of all academic employees. (ref. the *Annual Leave* case[2016] FWCFB 6836, [39] – [47].)

A47. The respondents' voices are strongly corroborative of the other evidence in these proceedings which indicates that, contrary to the picture painted by the employer associations in these proceedings of an academic workforce who could down tools at 5pm if they chose to, but who, as a voluntary and un-prompted exercise of academic freedom, choose to continue doing "self-directed" research in the evenings, on weekends and while on leave, the reality is far bleaker for many academics, who feel they have no option but to work long hours. As one of the respondents to the Kenny survey put it, "*To meet the research expectation I have to work on the weekends and outside normal working hours.*" Another reports "*To keep up with the marking and administration (I do OHS as well) I have worked evenings and weekends regularly for the last five years.*"

A48. It is interesting to note that a number of respondents provided unprompted views comparing their experience in Australian universities with work in other countries. People who had also worked at universities in the UK, the USA and Europe all volunteered that the workload and working hours pressures in Australia compared

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unfavourably. The general dissatisfaction, resentment, anxiety and stress evident in many of the responses is inconsistent with the proposition that academics are working long hours as a result of personal preference or choice.

A49. The same can be said about the open-ended responses to the NTEU Survey, about which all the same qualifications are conceded about representativeness. Nevertheless, there was a very high proportion of survey respondents who took the time to write an open-comment response to the question: *Do you have any comments you wish to make about workload?* These 1165 respondent-commenters constitute about 2% of all academic staff in Australia, and their comments are real comments from real people who answered the question. Their 1165 comments, which are at **Attachment H** to Exhibit **NTEU G**, from pg. 2458 (of the consolidated exhibit numbering), are in the NTEU's opinion, quite instructive about the ways in which workloads are a concern to academic staff.

#### Catherine Rytmeister - Witness Statement, Exhibit NTEU AA

**Para 4-5** – I have been involved as a negotiator in enterprise bargaining for academic staff at the University [Macquarie] for 4 agreements over the years since 2003. On each of these occasions I have played a leading role in the negotiations. In all the time I have been involved in negotiations for enterprise agreements, academic workloads has been an issue of central concern to academic staff, to members of the NTEU, and at the bargaining table.

#### Jochen Schroder - Witness Statement, Exhibit NTEU M

**Para 24** - Although the situation has now stabilised for the reasons I have given, I think in the middle of last year I suffered something like a minor nervous breakdown, or at least nervous exhaustion.

**Para 25 – 26** - There have been a number of discussions with supervisors and managers and other employees about the issues of the workload of staff in my Department.

The issue of high workloads has been discussed and raised in various staff meetings prior to the middle of last year, and the response from managers (Head of School and Deputy) has been to the effect that that is the way it is, and that it is the same for everyone. At a mid-year meeting of staff in the Department last year, there were many complaints about the workload of staff. The new Head of School and Deputy Head of School, who had recently replaced the previous incumbents, acknowledged that there was a problem and undertook to try to address it.

**PN2251** - Do you have any corrections or updates you need to make to that statement?---Yes, I'd like to update. So in the statement, I say that I work at RMIT University. I have since then, some weeks ago, put in my resignation and am leaving RMIT at the beginning of next month, August - 9 August, I think this my last day at work - to take on a position in Sweden at Chalmers University. The main reason was essentially my workload, which I felt was killing my research career and was affecting my mental and social wellbeing.

#### Professor Philip Andrews Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R

##### NTEU P

**Para 52-54** - I would prefer to work fewer hours, but if I do not keep on top of things, work pressures spiral out of control. I feel an obligation to my students, and particularly to my research higher degree students, to spend time with

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*them and to do all the follow-up work, which includes reviewing their thesis chapters and draft papers - I often do that in the evening when there is uninterrupted time to concentrate. I am in part motivated by the small amount of time I can devote to my own research interests.*

*I am on medication for high blood pressure. I experience a constant tiredness, and this is something which many of my colleagues also report.*

*When I was President of the NTEU Monash Branch, I met with many members of academic staff from a wide range of faculties and schools who were experiencing high levels of stress and in some cases mental health issues arising from their long working hours and from work intensification.*

**Para 55-58** - *I have been a senior member of the NTEU enterprise bargaining team for Monash in the last two rounds, for the 2009 and 2014 Agreements. Given the length of time it took to finalise an agreement each time, this means I have several years of bargaining experience.*

*Academic workloads was a central issue in both rounds of bargaining. The Union's objective was to regulate workload in order to create time for people to have lives outside work. Monash management have vigorously resisted such regulation in enterprise bargaining. It is my assessment of the dynamics of bargaining that this resistance to effective and enforceable workload regulation is so strong and so entrenched that if the Union had held out for what we wanted, we would never have got an agreement.*

*Without any award provisions about academic working hours or workloads to provide a safety net for this aspect of bargaining, the Union negotiators have been in the invidious position of bargaining to establish any regulation at all.*

*As a result, the majority of academic workers have little faith that there will ever be a solution to the unreasonably long working hours required of them, and so instead they urge the Union to pursue higher wage outcomes.*

#### **Andrew Picouleau - Witness Statement – Exhibit 12**

**Para 61 (a)** - *I agree that academic workloads was a central issue in bargaining ...*

#### **Professor Glenda Strachan - Witness Statement , Exhibit NTEU Z**

**"Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities" (2012 Report, Attachment 4 to Exhibit #Z)**

#### **Section 3: Academics (non-casual)**

**Table 77:** 52% of respondents would prefer to work fewer hours than they do now.

**Table 79:** 67% would prefer to have more time for research.

**Table 85:** 49% not satisfied with work life balance (52% of women).

**Table 112:** impact of work life balance.

**Table 116:** 66% saw workloads as more than a minor impediment to balancing work and family life.

#### **Sue Thomas - Witness Statement, AHEIA 8**

**MFI#23, MFI#24, Climate Survey**

#### **Ken McAlpine Witness Statements, NTEU G, NTEU H, NTEU I**

**Para 7** - *Academic workloads has been a central issue in the industrial relations landscape since the late 1990s, reflecting the concerns of the Union, the expressed concern of members, and the negotiation of provisions in all or nearly all enterprise agreements. Among academic staff, workload is an issue of widespread concerns, and a key condition of employment.*

**Academic workloads have increased over time and the extent of managerial control and direction of academic work has also increased.**

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A50. This is difficult to “prove” beyond any doubt, and some employer witnesses correctly pointed to some technological advances which make, for example, some areas of research somewhat faster. However, no witnesses contradicted the evidence of those who said that workloads in various ways have increased.

#### **Professor Michael Leach Witness Statement, Exhibit NTEU AE**

**Para 21** - Nevertheless, within my areas of experience at Deakin and Swinburne, there has been a gradual but significant increase in workload, and consequently working time, associated with several aspects of teaching. These include:

- a. Increased work associated with student evaluation of teaching;
- b. Re-accreditation of units and courses. In previous times this was done centrally, but now requires a significant amount of time spent by the academic in form-filling and meeting strict deadlines;
- c. The need for unit (subject) guides to comply with fairly detailed models and rubrics, such as around assessment and content.

*None of these requirements do I necessarily consider unreasonable, but they have probably increased the work required of the average full-time academic by an hour or two each week over the year.*

#### **Professor Michael Hamel-Green - Witness Statement – NTEU AD**

**Para 17** - Administrative duties of academic staff have expanded in recent years. This results from an expansion in the extent to which academic work is monitored and audited, with expanded reporting requirements for academics, from changes in technology, and from a shifting of functions (such as marketing) previously performed by general staff onto academics.

**Para 19** - The problem is that practically all academics are overworked, so as a manager it is very difficult to give a greater allowance for one staff member, because then you would have to do the same for others, and you are constrained by a limited budget. You are required to work within budget. This is closely monitored by the university central administration, and particularly by the finance department. Even within the first few months of the year if I had started to exceed the staffing budget for my Faculty, I would be rapped over the knuckles. This places a constraint over the extent to which a Dean can make allowance for workload problems.

**Para 19** - Intensification of work across the year, for example through addition of extra teaching periods. ... In a competitive funding environment, this expansion of the proportion of the year in which teaching is done contributes to the viability of the institutions, but at the moment it is at the expense of increased working hours for both academic and general staff.

**Para 31** - New technologies have increased workloads.

#### **Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q,NTEU R**

**NTEU Q, Paras 1-4**

**Para 5.** University aims to further increase its rankings and research outputs.

#### **NTEU P**

**Para 15** - Workload pressures in Chemistry at Monash have increased significantly in the past five years. This results from a number of factors, including a large increase in student numbers while the number of teaching and research academic staff has fallen, growing and changing pressures to generate research output, and a range of smaller things such as changes to the weighting of promotion criteria, and the way the Tertiary Education Quality Standards Authority, TEQSA, approaches the auditing of subjects.

In the past five years, Chemistry has had around a 40% increase in undergraduate student numbers. The pipeline effect of this has also led to increased postgraduate enrolments. As a result, we now deliver more lectures and tutorials, run more laboratory classes, undertake more supervision and student contact, and do more assessment and student consultation. We now run five teaching streams instead of two for first year (this means that lectures are repeated five times instead of just two, in order to manage the fact that more students are enrolled than can fit in the lecture theatre at any one time). All of this extra work is being done with a slightly reduced number of teaching and research staff in the School. Almost every member of non-casual academic staff has had an increase in their teaching workload.

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**Para 19** - Even staff appointed to "research-only" positions are generally now required to do as much as 12 lectures per year. Although the ARC does expect research-funded staff to do some teaching, this has traditionally been in the nature of guest or specialist contributions to courses taught by others. Due to the pressures created by the growth in student numbers, Research-only staff are increasingly being asked to take on core teaching functions. We try to limit teaching allocation to research only staff to 20% of their workload.

#### Para 20-21

**Para 22 – 24** - For many years, partly in response to changes in the policy and funding settings imposed by governments and funding agencies and partly due to the priority Monash places on being a high-performing research university, there have been increasing pressures on academic staff to generate research income and produce research publications which will be counted in relevant national and international metrics. As these metrics change, the character of the research deemed most valuable by the university also changes. As a result, I and my colleagues have experienced changing demands both in relation to the quantum of research performed, and in relation to the character of that research.

Academic staff are now required to meet minimum research performance expectations and in practice are expected to exceed those minima. Monash's Performance Standard Indicators set both minimum and aspirational targets. Chemistry is quite a research-intensive school, and is ranked high on the league tables, so there is a large amount of pressure from the University and the Faculty for people to perform well in the research space in order to maintain our School's reputation. In addition to these generic expectations, there is now a constant narrative within Monash about the need for staff to keep the university competitive by achieving higher research output, and particularly pressure to obtain Category 3 (Industry) research grant funding.

As the number of publications required of academic staff has increased – and to cope with the substantial number of journal articles now coming out of China, there has been a huge expansion in the number of journals in the discipline, and in the total number of articles being published. Most academic publishing houses and discipline associations have increased the range and number of academic journals they produce. This has two consequences for academic staff. The first is that, while expectations that we will generate a certain number of publications have remained high, the emphasis in employer evaluation of our research work has shifted from simply the number of publications to placing much greater importance on the status of the journals in which we publish, and the "impact" of our published research, as measured by things such as how often it is cited by other researchers. The second is that there is now a much larger volume of published research to read in order to keep up with developments in our disciplines. While the development of electronic search engines has made it easier to find relevant articles, the sheer volume of published information means that it is impossible to keep up with it all, let alone find time to read it and digest it.

**Para 28** – Increased TEQSA requirements have also increased workload.

#### Professor Stephen Garton - Witness Exhibit Go8 - 9

**PN 4684** - There has been a significant increase in student to teaching staff ratio since 1993.

#### Andrew Picouleau Witness Statement – Exhibit Go8 12

**PN6640** - There is now a much higher level of accountability for what academics do with their non-teaching time, isn't there?--Yes.

#### Professor Marnie Hughes-Warrington Witness Statement, Exhibit - Go8 10

**PN4946** - Research outputs have continued to rise.

#### Professor Peter Coaldrake - Witness Statement, Exhibit AHEIA 10

**Para 14** -. Universities now have clearer expectations about the outputs they expect from academics. In particular, there is an increased expectation in relation to research outputs. This has been reflected in world research rankings, in which Australia is now achieving better outcomes. My observation would be that the hours per week worked by academics have likely increased over the past 20 years. However, my view is that a competent academic should be able to complete their work within an indicative average of 5 days per week across 46 weeks per year, as set out in QUT's University-wide Framework for Academic Workload Allocation.

**Para 20** - We [QUT] are now able to measure at least some aspects of academic work usefully. In particular, research, publications and related activity can be benchmarked nationally.

Internal benchmarking is meaningless in an institution that is ambitious and seeking to advance against national and international standards. Nor should we apologise that the standards used for promotion are higher than they were. The

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*standards set in 2016 are certainly higher than they were three to five years ago, and one would hardly expect otherwise.*

**PN5622-5628** – Research outputs have increased considerably at QUT.

#### **Dr John Kenny - Witness Statements, Exhibits NTEU AB, NTEU AC, NTEU AF**

**MFI# 31, 32, 33, 34**

##### **Exhibit AB, para 11**

*... There are increasing administrative loads being put onto academics through the adoption of online learning and management systems, reductions in support staff and centralisation of services and external and internal quality assurance demands. Increasingly the self-directed time for academic research is being eroded.*

#### **Professor Andrew Vann - Witness Statement AHEIA 10**

**PN5331- 5333** - And you also say that research productivity has tripled. How do you say that research productivity is measured?---That's based on looking at HERTZE(?) points per academic staff member.

*So that HERTZE points are a measure of output, is that right?---They're one measure of output, yes.*

*So you're saying that productivity for research is measured by output per staff member?---It's one measure of research productivity. It's not the only measure but it's one measure. And I think much of that increase in productivity in that case has been driven by technology because, you know, when I did my PhD it took some months to do a literature search, whereas now it's something that you can accomplish from your desktop in about 20 seconds, so some of that is technology driven and that's apparently flattened out over the last, probably five, six years.*

**PN5341-** Now at the end of paragraph 4 you look back to the 1950's and '60's and say that being an academic in the '50's and '60's could be quite a leisurely life. Are you saying then that it is no longer a leisurely life?---No, I don't think it is a leisurely life and as I mentioned in the statement, my sense is that productivity expectations have increased in all sections of society over the last well, over my lifetime and but of course, I wasn't an academic in either the 1950's or the '60's but when you read what is written about the nature of academic work now and the contrasts that are often drawn, I think are back to a much smaller system and I guess the point I was trying to make is that expectations have changed in higher education but I think that they've changed for the whole of society.

**PN5477 - 5481** - Would you accept that in that 20-year period, they have moved from being something which is confidential to the academic to being something which is used in performance assessment?---Well, what I would say is that there is more general usage of that, so I perhaps grew up unusually in an academic sense in that my original department in Bristol, because it did work around earthquake qualification, was heavily into quality assurance from a formal point of view, so had peer-review and student evaluation as relatively public things even then. But it has become - I mean, for institutions. There has been an increasing focus on things like the course experience questionnaire and - so there is an assumption that that has a more important part in assessing institutional performance than it used to.

*Okay. There has been an increase in the requirements for reporting and accountability measures?---Yes, I think that's fair. I mean, universities are being held more accountable. We are a larger sector. We consume more public funding than we used to, so we are being held more accountable and that's getting through to staff. But I think as we talked about before lunch, all industries have become more scrutinised and more accountable than they were some decades back.*

*There has been an increase in research expectations, both on the institutions and on individual academics?---Yes. I think that is probably fair to say, yes.*

*That there has been an increase in the formal requirement to articulate learning outcomes and curriculum objectives?---Yes, I think that's fair to say.*

*And that there has been an expansion of the use of annual performance reviews?---Across institutions, yes. As I said, it was my experience as an academic in the early nineties that that was part of standard practice, but perhaps that wasn't the case everywhere.*

#### **Professor Glenda Strachan - Witness Statement , Exhibit NTEU Z**

**"Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities" (2012 Report, Attachment 4 to Exhibit #Z)**

##### **Section 3: Academics (non-casual)**

**Table 86:** 54% of respondents felt that expectations in relation to research outputs had gone up in the last two years.

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**It is possible and practical to make a fair assessment of how much time it would take a competent academic to complete a given total academic workload (including research allocation) to a professional standard. University academic supervisors already do so.**

A51. Some witnesses representing both sides acknowledged the difficulties of measuring the time a particular research task will take. Nevertheless the balance of the evidence from both employer and employer witnesses supported this contention.

**Professor Michael Hamel-Green - Witness Statement, NTEU AD**

**Para 18** - As an experienced academic administrator, I am aware of the many variables that come into play when considering how much time an academic might reasonably spend doing the work that is allocated to them. It depends on the discipline, the nature and level of the courses taught, the academic's individual research commitments, their teaching experience, the size and characteristics of the student cohort, and a number of other factors. Nevertheless, it is possible as a manager to take these factors into account, and to make a fair assessment of how much time it would take a competent academic to complete a given academic workload to a professional standard. Experienced educators can judge this fairly accurately.

**Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

**PN3249-3253**

**Professor Stephen Garton Witness Statement, Exhibit Go8 - 9**

**PN4723 - 4724** - And it would be a pretty idle exercise, wouldn't it, to say - to say to somebody, "I want you to publish a book and I can tell you how many hours that that's going to take. That would be a fairly pointless exercise, wouldn't it? - -- Yes,  
But nevertheless, it must follow from our earlier discussion that the University has to form the view that those minimum research expectations can be met within the 690 hours that's allocated for research. That's correct, isn't it? --- That would be the expectation, yes.

**Andrew Picouleau - Witness Statement, Exhibit 12**

**PN6676** - So in that very local discussion, the head of school has to have an idea of how much time is fair to allow that person to do research? --- Yes.  
**PN6677** - And that has to take account of how much is expected of them in terms of other workload outputs as well? --- Yes, certainly.

**Professor Dawn Freshwater - Witness Statement, Exhibit Go8 13**

**PN6847-6851** - Limitation of 1725 hours' workload in EBA applies to research-only staff and is given effect to by employee discussions.

**Professor Marie Herberstein - Witness Statement, AHEIA**

**Para 15-19** - I am aware that in other departments, individual staff will contribute to multiple units and teach in both semesters. This is entirely up to the Departments to decide, and is not at any stage dictated by the Faculty or the University. When talking to my colleagues from these other Departments, they seem very content with that model and it seems their preferred model of operation.

*It is possible to achieve the minimum expectations in regard to teaching allocation, research/scholarship and contributions to the University and community, as set out in the Discipline Profile for my Department (**Attachment 4**)*

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*within the requirements set out in Clause 4.3.29 of the EA Clause, that is 1575 working hours per year (45 weeks at 35 nominal hours per week) for a full-time staff member. This includes the work that will enable the academic to be promoted from one academic level to the next. From my own experience, for example, I started at the University at Level B and was promoted to Level C in 2004. During that period I taught a 200 level unit and published 12 papers (3 per year). This is consistent with what is expected of a Level B under the Discipline Profile for the Department. Being able to achieve consistent research outputs while teaching does require strategic management of research and teaching. For example, if the staff member chooses to collect all data and write every paper themselves, the workload is huge but building a research network and having students publish with them lessens the load. It is the responsibility of the academic, with help from their mentors, to hone their work strategy.*

*There is no question that being able to complete work in an average of 35 hours per week requires good time management. It is the case that some staff work more efficiently than others. However, as a manager, I would certainly never explicitly ask a staff member to work more than 35 hours a week, but help them manage their workload.*

*As Head of Department, all I actually "ask" or "direct" is for academics to take responsibility for one teaching unit (or in some cases two smaller units). The rest of the work they undertake is quite autonomous. The academic's decision about what work they choose to undertake can result in them working more than 35 hours per week. For example, an academic may choose to publish more papers than the number set out as being expected for their level in the guidelines set out in the Department Profile. A staff member may choose to sit on a number of external boards. Academic work is so autonomous by nature that a staff member may, for example, decide to participate (in an unpaid capacity) in a 4 week field trip with another university. While this might be an interesting experience, it can't be traded in against fulfilling the teaching commitment for their own University.*

*It is often that the choices made by the academic result in "blow out" of hours. As a manager, I would not direct an academic not to undertake the extra work that they choose to do that might result in them working hours greater than 35 per week as it is their freedom to do so. I do, however, need to balance the Department's need to conduct its business. For example, it is not feasible to "trade off" external service such as sitting on external boards against the necessity of having staff sit on internal University committees.*

**PN6904** - [Re 4.3.20 of MQ EBA, which reads. "An annual written workload allocation will be developed by the Head of Department for each Staff Member following Consultation between the Head of Department and the Staff Member. The written allocation will specify the workload that the Staff Member will undertake in the coming academic year, including the proportions of each workload component."]

*Can you just give me a general description based on your knowledge of how that is specified. It says it's written, so what is written down? ---*

*Yes. We work with spreadsheets and the spreadsheets allocate tasks or staff members can nominate tasks that they wish to engage in during the year. The three major areas are teaching tasks, research tasks and service tasks, both internal service - service for the university - but also service for the scientific community. It's a pre-formatted spreadsheet that I hope makes it easier for the staff member to list their activities, but I don't pre fill it in. Usually staff members, by their history, know the kind of units that they're teaching in. I send out an empty spreadsheet and then the staff members fill it in, in terms of what they want to do, in terms of the lectures that they want to give, guest lectures in other units, practical teaching, the kind of research activities they want to do, how many students they want to take on and the kind of service they want to do. When they complete filling in the form, then we have a meeting - a face to face meeting - and I discuss their plans with them and go through it, and there is sort of a mutual moderation of their plans.*

#### **Dr John Kenny Witness Statements, Exhibits NTEU AB, NTEU AC and NTEU AF MFI# 31, 32, 33, 34**

##### **Exhibit AB, paragraph 24 and Attachment JK-4**

The University of Tasmania Research Performance Expectations for an academic with a 40% (2 days a week) research time allocation are set out in detail by classification level and discipline.

##### **Exhibit AC, paragraphs 7 – 13**

Describes the work involved at University of Tasmania in developing fair assessments of the time required for a variety of teaching and administrative tasks, including an estimate of the time and resources required of the University in order to do so.

##### **Exhibit AC, paragraphs 14 – 18**

Describes how the measurement of research time allocations was done at the University of Tasmania.

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**Exhibit AC, paragraphs 19**

Gives uncontested evidence that once such reasonable estimates are established, the task of revising and updating them from time to time will be significantly less time-consuming than their initial development.

**Exhibit AC, paragraphs 20 and 21, attachment JK-14 and Exhibit AF**

Point to preliminary research into the time required to perform many common elements of research work, and demonstrates that the diversity in such work does not necessarily exceed the diversity in the time taken to perform teaching and administrative duties which universities already purport to allocate on the basis of a reasonable estimate of the time involved.

**Professor Andrew Vann - Witness Statement, AHEIA 10**

*PN5442 - So when an academic staff member is working part time, employed as a fractional employee, whether that's a new appointment or a variation in their existing appointment, what metrics or assumptions are brought to bear to work out what fraction they will be employed at?--So, I'm somewhat removed from the daily practice of this, but as I understand it, it's mediated through the academic workloads mechanisms and whatever the fraction of employment is, the workload that is assigned to the academic would be appropriate to that fraction.*

*PN5443 - Okay?--And conversely, I guess, in discussions of either employing someone part-time or varying someone's contract to go from full-time to part-time, the reference would be to the relevant school's workload policy in considering that.*

*PN5444 - Okay. And that would be a fraction across all aspects of that person's workload allocation?--Well, there's obviously some flexibility in our enterprise agreement around what portions of time are devoted to various thing and they vary by staff member, by semester. So you wouldn't necessarily - you wouldn't necessarily pro rata a standard down. There might be some discussion about, you know, the proportions changing somewhat, but broadly speaking, yes.*

**Workload (and thereby working hours) limitation would help to eliminate or reduce discrimination in the workplace.**

A52. Although this contention should go without saying, there was some evidence about it.

No one gave evidence to contradict it.

**Professor Michael Hamel-Green Witness Statement –NTEU AD**

*Para 27 - Breaks in service associated with childbirth and parental leave have a well-documented impact on career progress for women academics. This problem is exacerbated for women, and some men, with young children (or other family members who require time and energy). Teaching work cannot be avoided, so it is usually an academic's research output and their capacity to take on responsible roles (such as coordination) which suffers when they are unable to work long hours. This is damaging to their career prospects, as meeting or preferably exceeding research expectations and demonstrating the capacity to undertake significant responsibilities are important for probation, promotion and contract renewal. If an academic already has a gap in their research record as a result of taking parental leave, then returning to work part time or being constrained in how much time she can invest in her academic work out-of-hours can compound and permanently entrench this damage to her career.*

**Professor Marie Herberstein Witness Statement, Exhibit AHEIA**

**Para 23**

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**By and large University employers either turn a blind eye to the working of long hours by academic staff, or consider it of no consequence.**

A53. This issue in part goes to the need for, or relevance of working hours to the safety net.

**Professor Michael Hamel-Green - Witness Statement, NTEU AD**

**Para 44** - No attempt to examine OHS impact of long hours.

**Professor Philip Andrews - Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R**

**NTEU P**

**Para 30** - *Higher degrees supervision is an area that is chronically under-counted in the workload model. The model allows 2 hours of teaching time per week per student for PhD supervision. The Monash Institute for Graduate Research considered this allocation a few years ago and recommended to Academic Board that the amount be increased to 5 hours per week. This proposal was rejected, not because it was unrealistic, but because it was deemed unmanageable: to accurately reflect the work involved would have blown a hole in the facade of work allocations. An academic with 8 PhD students would have 40 hours a week teaching allocation, and would have no time left to do anything else. Hiding the remainder of time spent in PhD supervision as research time makes the allocation for research look better, but in fact has the effect of reducing the time available to complete the academic's own research. An increasing proportion of research time is spent simply getting PhD students through the administrative process as well as coaching them through the research project.*

**Para 59-60, 63-64** – Management avoids the measurement or regulation of workload in order to remain competitive.

**Professor Dawn Freshwater - Witness Statement, Exhibit Go8 13**

**PN6870** - UWA has no data on the actual hours of work performed by academic staff.

**Dr John Kenny - Witness Statements, Exhibits NTEU AB, NTEU AC and NTEU AF**

**MFI# 31, 32, 33, 34**

**Exhibit AB, para 25**

**Exhibit AB, paragraphs 44 – 48**

*Employer responses to the issue of academic working hours*

**44.** I have never been instructed or advised by my employer not to take on additional duties or not to work very long hours.

**45.** Scheduling of work in my workplace sometimes imposes long working days, as well as long hours when averaged over a year. For example, in addition to the very long hours expected of academic staff to complete marking within prescribed deadlines, I am aware of instances where staff have had 6 consecutive hours of teaching scheduled back to back with no break.

**46.** UTAS does not instruct academic staff to work on weekends (except in relation to occasional specific instances such as Open Days) or evenings. It is an assumed part of professional control over our work that we are entitled to decide when and where much of our work will be performed, and many staff choose to take work home. However current workload volume is such that, rather than a choice, for many of us it is a requirement of the job if we are to meet deadlines and perform our duties to the standard required of us by our employer.

**47.** To my knowledge, despite concerns about the impact of long working hours and high workload pressures on staff having been raised both in enterprise bargaining and at Academic Senate, UTAS has not conducted any health and safety audits in relation to the working of long hours by academic staff.

**48.** UTAS has, in my experience, resisted any meaningful quantification of academic work. Several of my research articles outline the history of workload allocation and performance management discussions at UTAS. The NTEU has had to take UTAS to the Fair Work Commission on two occasions and instigate formal grievances to force some action. In the absence of realistic and transparent workload measures and performance procedures, the employer can rely on subtle pressure or direct coercion to force unreasonable work demands on individuals.

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**While academic staff enjoy the benefits of some flexibility about when work is performed, this flexibility and availability also favours the employer, and it does not of itself affect total work requirements or time.**

A54. The mutual flexibility which exists around the times and places at which work is performed is undoubtedly a benefit to both parties, and constitutes a “swings-and-roundabouts” situation of mutual advantage. However, it was implicitly contended by many of the witnesses for the employers that the *flexibility around the time at which work is performed* (a mutual benefit) can be traded against an *increase in overall working hours* (a benefit only to the employer).

#### Professor Philip Andrews Witness Statements, Exhibits NTEU P, NTEU Q, NTEU R

##### NTEU R

**Paras 2-6 - This flexibility should be acknowledged, and in my experience most academic employees do see this as one of the attractions of the academic job. However, while this benefit is real, I would also wish the Commission to be aware of two things based on my extensive experience and observation:**

*The first is that in my work area there is an expectation, which has increased over the years, that academic staff will be at their office (or in their laboratory) during working hours. Certainly, one's absence from the workplace is noted. It is not the case that academic staff can just turn up for scheduled activities and otherwise come and go as they please. The second is that, across my university and the higher education sector, flexibility in the times and locations at which academic work is performed by no means only favours the employee. Considerably flexibility in working hours is also required of academic staff in order to deal with peaks in workloads, such as, for example, marking periods and research grant application deadlines. Academic staff are expected to put in whatever hours are necessary to get the work done. For example, it is not uncommon for employees to perform substantial work during their annual leave in order to meet required performance standards, especially in relation to research. This is all flexibility in the employers' favour. While the ability, for example, to take a morning off to attend a child's school event, and like flexibilities are appreciated, the main beneficiary of working hours flexibility is the employer. Moreover, while there is some flexibility around when most work is performed, this is offset considerably by the rigid inflexibility which usually applies to allocated teaching work. Nearly all academics rightly put a high priority on being able to deliver their allocated classes, and the taking of sick leave when classes are scheduled is usually limited to completely debilitating illness.*

#### Professor Michael Hamel-Green Witness Statement – Exhibit NTEU AD

**Para 28 - Academics have flexibility in when and where work is done, which benefits the universities as well as employees, but high workloads mean infringement of work into personal time is often or usually not a matter of employee choice.**

*... Unfortunately, the requirement that work extend into people's private time is now treated as an employer expectation rather than an employee choice.*

## Detailed consideration of the terms of the clause

A55. As stated above, the NTEU's proposed clause 22 is the Union's proposed solution to the demonstrable inadequacy of the safety net. The Commission will need to decide in principle whether there is a problem that needs to be addressed, and then consider the

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extent to which the NTEU's proposal would itself constitute a fair and relevant safety net having regard to the statutory scheme and the modern award objective.

A56. NTEU will address the relevant statutory scheme. However, first the terms of the proposed clause will be examined briefly to explain the merit of the individual components of the Clause. This will be done, where possible, sub-clause by sub-clause.

### **22.1 Definitions and Application**

*For the purposes of this clause:*

- a. The relevant period of account shall mean each calendar year or such other period as is agreed in writing between the employer and the employee (not exceeding two years), or in the case of a fixed term contract engagement of less than eighteen months, the period of that engagement; or otherwise where the employment or part of the employment covers only part of a year, that part of the year. The period of account shall exclude any periods during which leave or public holidays are taken.*

A57. *The relevant period of account* establishes the capacity of the employer to ensure that workload can be measured not week by week, as in most conventional hours-of-work clauses, but by the year (as a default) with other arrangements for employees on fixed term contracts, and the capacity of an employer and employee to agree on some other period up to two years. Although NTEU is not wedded to the two-year maximum, there are reasons why a longer period might give rise to problems of unfairness for example in the case of death, resignation or dismissal, especially if the workload were heavily loaded towards the beginning or the end of the period of account.

- b. Required work shall mean:*

- i. The specific duties and work allocated to an employee; and*
- ii. To the extent these are not covered by i), any work necessary to meet performance standards expected of the employee.*

A58. Required work has been the subject of much discussion. While the definition may not be strictly necessary, as is shown by relevant enterprise agreements which simply speak of undefined “required duties” or “allocated work” without any apparent problems, the

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union considered this definition to be a safeguard to employers as it clearly distinguished required work from work which was “over and above”. Given the deletion of earlier proposed text distinguishing “*other productive self-directed work which is not required work*”, the need for the definition is reduced. Nevertheless, NTEU believes on balance that the definition makes for clarity.

- c. *Ordinary-hours workload for an employee shall mean that amount of required work such that employees at the relevant academic level and discipline or group of disciplines could with confidence be expected to perform that work in a competent and professional manner within an average 38 hours per week, as determined prospectively in respect of the relevant period of account. In respect of part time employees, all specifications in this clause in relation to hours of work will be calculated pro rata to the fraction of employment.*

A59. This definition gives effect to the principles set out at the beginning of this part, namely, as Principle 5 says: If the employee is paid only the minimum award wage the amount of work required or directed by an employer of an academic (the workload) should be such that the employee can be expected to be able to complete that workload to a professional standard within a standard working week, averaged over an appropriate period, and having regard to objective considerations relating to the academic, such as discipline and level of appointment, rather than individual or subjective considerations such as the relative competence or efficiency of the employee.

- 22.2 *The maximum ordinary hours of work of an academic employee shall be an average of 38 hours per week over the relevant period of account. For this purpose, in addition to any required work performed on those days, each public holiday and each day of leave shall count as 7.6 hours of work.*
- 22.3 *Where the employee's actual hours of work are not set by the employer and recorded, maximum ordinary hours of work shall be deemed not to have been exceeded if the amount of required work does not exceed ordinary-hours workload, or exceeds it by less than 1/19th part.*
- 22.4 *This sub-clause applies in circumstances where the employee's actual hours of work are set by the employer, are recorded and exceed an average of 38 over the period of account. In this case, the employee shall be entitled to be paid overtime at the ordinary hourly rate of pay for the first 5 additional*

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*hours per week (averaged over the period of account), and at 150% of the ordinary hourly rate of pay thereafter, provided that the rate of overtime loading for hours in excess of 5 per week shall be capped at 150% of the ordinary rate applicable to the sixth step of Level C.*

A60. It is necessary for the Award, in its present form, to specify ordinary hours of work, rather than just, as it currently does, specify ordinary hours of work “for the purpose of the NES”. Without this change, the existing terms of Sub-clause 11.2 make no sense. This sub-clause provides protection for part-time employees by providing a basis for calculating the appropriate rate of pay for them, as follows:

***11.2. Part-time employment means employment for less than the normal weekly ordinary hours specified for a full-time employee, for which all award entitlements are paid on a pro rata basis calculated by reference to the time worked.*** (emphasis added)

A61. An ordinary hours of work clause is arguably also required so that Sub-clause 14.1 (a) can operate in a practical way.

A62. However, there are some complex issues around the NTEU’s proposed sub-clauses 22.2-22.4, to which the Commission needs to give attention. As stated in evidence by Mr McAlpine, the union has proposed that despite the general architecture of its proposed scheme, it had assumed that the employers may want to retain the capacity, which they currently have, to employ an academic staff member for a fixed number of hours per week or year, as would be the case for general staff. The Full Bench directed a number of questions to Mr McAlpine about why the union had proposed this, and there has been no indication from the employers that they want that option. The union remains of the view that, despite our own policy position that this means of employing is not appropriate, the requirement for flexible work arrangements dictates that such

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employment should be provided for. Therefore we have retained the option set out in 22.4. – set hours of employment.

A63. If the Commission does not agree with NTEU about that, then the following changes could be made to the draft provisions:

- Sub-clause 22.4 could be deleted as the option of set hours would not be provided for, and consequently 22.3 could also be deleted.
- Consequently, sub-clause 22.2 could be deleted, as the principle or yardstick of 38 hours would be embedded in the proposed sub-clause 22.1.c (ordinary hours workload).
- In sub-clause 22.5, the words “*the actual hours are not set by the employer, and where*” would be deleted, and in sub-clause 22.8, the words “*with respect to employees whose actual hours are not set by the employer,*” as these words would now be otiose.
- In existing sub-clause 11.2, the first sentence would read as follows: “*Part-time employment means employment for less than the ordinary hours workload specified for a full-time employee, for which all award entitlements are paid on a pro rata basis calculated by reference to the fraction of ordinary hours workload.*”. A similar amendment would be made to 14.2 (a). This would bring 11.2 and 14.2(a) into line with actual practice.
- A statement that for the purpose of the NES ordinary hours are 38 per week, could be retained.

A64. If the employers formally indicate that they would prefer this type of outcome, we would endorse this approach.

**22.5** *This sub-clause applies where the actual hours are not set and recorded by the employer, and where the required work exceeds ordinary-hours' workload. In this case, the employee shall be paid an overtime loading calculated as follows:*

- a. *The number of hours per week within which employees at the relevant academic level and discipline or group of disciplines could with confidence be expected to perform the required work, as allocated to the employee, at a competent and professional level, as averaged across the period of account, shall be ascertained in hours per week (“ascertained hours”);*
- b. *Where the number of ascertained hours under a) is less than 40, no overtime loading shall be paid;*
- c. *Where the number of ascertained hours under a) is at least 40 and less than 44, the overtime loading shall be equal to 1/38<sup>th</sup> of the minimum salary applicable to the employee for each whole hour by which the number of those ascertained hours exceeds 38;*
- d. *Where the number of ascertained hours under a) is at least 44, the overtime loading shall be equal to 5/38ths of the minimum salary applicable to the*

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*employee, plus 3.947% for each whole additional hour in excess of 43, provided that the rate of overtime loading in respect of hours in excess of 43 shall be capped at the rate applicable to the sixth step of Level C.*

A65. This proposed sub-clause has attracted the greatest controversy and misrepresentation.

The drafting of arithmetically-based clauses is always infelicitous. However there are important principles which underlay this clause.

A66. First, the reality is in this industry that some employees are going to have working requirements set by their employer which exceed what might reasonably be expected to take 38 hours. In this situation, a genuine safety net can only respond fairly in one of two ways:

- First, it could impose an inflexible cap, and say that the setting of work requirements above “38 hours” is an award breach. NTEU is not aware of any award that in effect, prohibits overtime work. It is inflexible and while it might be bargained for, it is not appropriate for a safety net award.
- The second option is to say that, within reason and health and safety requirements, work requirements can exceed “38 hours” but that this must be accompanied by additional remuneration.

A67. The other option, which is to say that working hours can be whatever the employer sets but the rate of pay is not adjusted, is manifestly not consistent with the basic principles of fairness, or with the idea of fair minimum wages.

A68. If NTEU is right about this, then a sub-clause needs to provide for the calculation of the additional remuneration, which is the purpose of this. NTEU’s proposed sub-clause may be criticised, but only for its very moderate terms. These mean:

- (a) No overtime loading is payable unless the ordinary hours workload is exceeded by 2 hours, and totals 40 hours per week. In the sense of a strict safety net, this *de facto* means the ordinary average working week can be up to 40 hours, well above community standards. This recognises that the process of estimating

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workload is not a precise science, and allows the employer a 5% margin of error – notionally up to 90 hours per year.

- (b) The employee receives, in effect, a lower rate of total remuneration for the first five hours of overtime each week than for the employee's ordinary hours. The ordinary hours attract various leave accumulations, which this additional workload does not. These other accumulations are worth in the order of 20% of salary.
- (c) The regime of additional remuneration takes no account of additional workload being heavily concentrated in many cases, with employees required, for example by marking deadlines, to work 60 or 70 hour weeks in some periods of the year. This would normally attract "double time" workload plus such additional benefits as required rest periods. In formulating the claims, some within the NTEU felt that the annualisation of workload and "overtime" let the employer off the hook, and that some penalty should attach on a weekly or fortnightly basis to very long hours. Despite the merit of this position, the Union has decided only to claim "overtime" when total (typically) annual *ordinary hours workload* is exceeded.
- (d) The overtime loading applies in bands. For an academic whose period of account is one year, the overtime loading increases, in steps, for approximately each 46 hours (the number of working weeks in a year) by which the *ascertained hours* increases. This avoids the requirement to calculate pay to the exact hour, which would not be practical. Moreover, payment is only made for each additional whole hour of *ascertained hours*, which further reduces the value of the overtime loading.

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- (e) Lastly, the value of the any overtime loading is capped at the salary applicable to the top salary of Level C.

A69. As a question of safety net entitlements, under the NTEU's proposed scheme, most academics would be slightly worse off per-notional-hour-worked when required to work additional workload above *ordinary hours workload*. However, they would at least not be capable of falling below the adult minimum wage per hour worked, in the way which was demonstrated Ultimately, there is no "right answer" to the question of what penalties should apply, or where any cap on entitlements should apply. However, the principle that in a safety net award, a person who is only being paid the minimum award rate should be entitled to additional remuneration if required to work long hours, is unanswerable.

**22.6** *An error made in good faith by an employer in ascertaining the number of hours per week, as required under 22.5 a), does not constitute a breach of this Award, provided the employer has a fair and rigorous system for ascertaining those hours. This sub-clause does not limit the entitlement of employees to any overtime loading.*

A70. NTEU was questioned in opening submissions about whether it could cite a similar provision in another Award, and such a provision has not been located. However, the former *Industrial Relations Act 1988* had a provision which was conceptually similar. For example, Sections 170DB and 170DE respectively gave employees entitlements to notice of termination and prescribed that an employer must not dismiss an employee unless there is a valid reason. While these Sections conferred entitlements on employees, and gave them remedies (Section 170EE), Section 170EG stated that an employer breaching these provisions has not committed an offence, and would therefore not be subject to a penalty.

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A71. Given the evidence of a number of employer and union witnesses about how collegial decisions are made about such matters as workload models, and while the employer must ultimately be vicariously liable for the consequences of those decisions, NTEU sees no reason why the university employer as a corporation should suffer a penalty in circumstances where, properly, decisions about workload are made in a highly decentralised way, provided the systems it has established are fair and rigorous. It would be mischievous to suggest that this sub-clause *requires* the employer to have a fair and rigorous system. Obviously it does no such thing.

A72. This clause may not be considered “essential” for the operation of the NTEU scheme. That is true. It is a matter for the Commission to decide whether such a clause is appropriate or necessary.

**22.7** *The employer must advise the employee before the period of account, or for a new employee within 14 days of the commencement of the period of account, whether any overtime loading is payable, and if so the basis and amount of the loading. An employee is not entitled to an overtime loading in respect of periods of leave. Overtime loading may be averaged over the period of account and any periods of leave or public holidays, and may be paid, or part paid, at the end of a period of account. The employer shall be entitled to reduce or withdraw overtime loading where required work in fact does not justify the overtime loading as advised to the employee, and must increase the overtime loading in accordance with this clause if the employer increases the amount of required work beyond that which was advised to the employee. No procedural requirement of Sub-clause 22.5 or this sub-clause need be complied with by any employer if the actual salary paid to the employee at all relevant times exceeds the sum of the minimum salary applicable under this Award and any overtime loading which would otherwise be payable.*

A73. The first two sentences of the clause set out the administrative requirements for payment, and are designed to minimise the regulatory burden. If the principle of *ordinary hours workload* is accepted, then the adjustment of payments of overtime loading for additional or reduced workload requirements logically follows. It is

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designed to leave the employer the maximum scope to determine how it wants to administer the arrangements.

A74. The last sentence is of course of the greatest importance. Provided the employer can estimate that the employee's actual annual salary is more than the employee would be entitled to under this clause, there is absolutely nothing the employer has to do. Even if all enterprise agreements were cancelled tomorrow, given that nearly all employees at Level C, D and E are actually paid 50% more than the minimum annual salary, it would only be in extraordinary circumstances that they would even have to do anything whatever as a result of any part of this clause in respect of these employees. This will, in practice, also be the case for many employees at lower levels, unless their workload requirements are quite onerous. Unless employers propose to significantly reduce rates of pay, or actually are imposing very heavy workloads, they have no basis for concern about the clause.

**22.8** *To avoid doubt, with respect to employees whose actual hours of work are not set by the employer, no employer shall be held to be in breach of this clause merely by virtue of the fact that an employee is actually working any number of hours.*

A75. This clause clarifies and puts beyond doubt the distinction, well accepted in the evidence, between “required work” and all work. An employee is not entitled to additional remuneration simply because they have worked a particular number of hours.

**22.9** *This clause does not apply to **casual employees**, except that where a casual employee is engaged for more than 76 hours in any two-week period, then the payments for hours worked in excess of 76 shall be 150% of the rate otherwise payable.*

A76. This in our submission provides a fairly comparable “overtime” arrangement for casual employees. Engagement of a casual for more than 76 hours in a fortnight is rare, but if and when it occurs, it should attract an overtime loading. Given the relatively low rates

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attaching to casual employees, NTEU submits that the 150% overtime rate should apply to all overtime, but acknowledges that the clause should provide that the 50% loading should be paid on the base hourly rate exclusive of the casual loading, and therefore should read as follows:

**22.9** *This clause does not apply to casual employees, except that where a casual employee is engaged for more than 76 hours in any two-week period, then the payments for hours worked in excess of 76 shall be 150% of the base hourly rate (exclusive of the 25% casual loading).*

## **How the NTEU’s proposal would operate in practice with enterprise agreements**

A77. Asked by Mr Pill whether the NTEU would seek to flow new claimed award provisions into agreements, Mr McAlpine said “*For example, the academic staff overtime claim I would be quite surprised if we tried to roll that out in bargaining. That is not our purpose.*”

A78. The reason for that evidence should be clear. The NTEU’s position is that enterprise agreements should be compared against a fair safety net. In some other industries, enterprise agreements provide for all-up rates which are explicitly stated to be in lieu of all overtime entitlements. Such agreements typically provide for a significantly higher rate of pay than the minimum award wages, expressed as an annual salary. In these circumstances the additional wages above the award rate are, in whole or part balanced against the absence of overtime pay, rather than counted simply as a “bonus” which could then be counted against the loss of other award entitlements as well – for example the cashing out of annual leave.

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A79. However, for academics, any salaries above the award rate are simply counted as *icing on the cake*, which can be counted entirely as an adequate offset for any other loss of award conditions.

A80. Moreover, if XYZ University’s enterprise agreement said *All academics will work not more than 45 hours per week*, this could be argued as a benefit to be counted in favour of academics under the BOOT test. Whereas under the *award* they have no entitlement to a limit on working hours, under the *agreement* they have a limit of 45 hours, so they are manifestly “better off” under the agreement than the award. The Academic award only says that “*for the purpose of the NES*”, ordinary hours are 38, so there is no basis for those 38 hours being relevant for the BOOT Test.

A81. Although the modern award objective does not explicitly say so, a purpose of awards is intended to be as a fair and relevant floor for bargaining. NTEU currently has to bargain for a safety net, not from a safety net, and the bizarre consequences for the BOOT Test are obvious.

A82. NTEU does not resile from the fact that it will continue to seek improvements in workload clauses in agreements, and will continue to seek to improve the way they are currently applied. However, while the large salary gap between the safety net and the actual rates subsists, it would be preposterous to think that the award clause would automatically flow into agreements. That is not its purpose.

## **The statutory scheme and what it means for the case**

A83. NTEU will now address the statutory scheme, in light of the contents of what the union is claiming and the evidence.

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- A84. The terms proposed to be included in the Award by the union must be about one of the matters listed in 130(1). They must also be necessary to meet the modern award objective.
- A85. First, each of the sub-provisions from Section 139 (1) (a) to (g) will be addressed to the extent that it is relevant.
- A86. **139 (1) (a):** The proposed Clause 22 (“the claim”) is incidental to *minimum wages* as it makes the minimum wages provision operate in a practical way. The concept of minimum wages applies to ordinary hours. There are no ordinary hours under the award.
- A87. **139 (1) (b):** The proposed clause is incidental to *part time employment* (especially in the way it operates with Clause 11.2 of the Award). The claim makes clear what the actual basis of part-time employment is. To the extent that part-time employment is a *flexible working arrangement for employees with family responsibilities*, it is also therefore about that.
- A88. **139 (1) (c):** The claim is about *arrangements for when work is performed, hours of work, and changes to working hours*. However it can also be characterised as incidental to each of these things, and necessary for these provisions to operate in a practical way having regards to the needs and norms of the industry.
- A89. **139 (1) (d):** The claim is manifestly about *overtime rates*, being payment for additional hours necessarily worked.
- A90. **139 (1) (e):** No relevance
- A91. **139 (1) (f):** The proposed sub-clause 22.8 makes clear that provided the annual salary is paid and is high enough to cover anything else which the claim provides for, then no other action is required, and no separate payment needs to be made for overtime

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loading. However, taken as a whole, the claim also includes sufficient safeguards. The claim is about annualised salary arrangements of the type described in the sub-section.

A92. **139 (1) (g):** The claim may be about allowances for additional responsibilities, but we put no argument here on that basis.

A93. The claim is therefore manifestly about matters that can be included in a Modern Award.

A94. NTEU now turns to the *modern award objective*. At the outset, NTEU would like to make a general point.

A95. Within constitutional limitations, until the advent of the Workplace Relations Act 1996, the Commission largely had the responsibility of *settling disputes*, within a series of constitutional and statutory limitations, such as having regard to the state of the national economy, etc.

A96. The modern award objective is a different statutory scheme. The Commission is commanded to ensure that Awards operate as a fair and relevant minimum of terms and conditions of employment. In meeting this obligation, it has to *have regard to* a number of matters, as for example are listed in Section 134 of the *Fair Work Act 2009*.

A97. The matters listed there will generally influence the form of regulation to be imposed. However, none of those matters listed in Section 134 gives the Commission any discretion about *whether* there needs to be a fair and relevant safety net. The Commission cannot decide not to establish a fair safety net because the issue is too hard or too complicated. The Act does not ask the Commission to establish a safety net *if it thinks it is a good idea or if it thinks that the safety net is not too complicated, or even if it thinks it is suited to the needs of a particular industry*. The matters listed in Section 134 allow no such course of action.

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A98. Moreover, the safety net is not to be established on the basis of current practices by employers. The Commission has to establish a fair wage. If a work-value claim were made out for increased award wages, the Commission could not decline to grant it because all employees were currently getting more than the minimum. To do so would be to make the same error “in reverse” that unions sometimes make when they argue that the safety net should be increased *only* because everyone is getting much more than the award rate. The safety net to some extent, therefore, has to be set abstracted from current practices and pay rates. That is its character.

A99. Therefore, in the circumstances of this claim, the Commission has to consider the employee offered employment, or employed *on the award rate*. To make a judgement about what the hours-of-work safety net should be, and to do so assuming that all employees are getting 20% more than the award rate, would be a grave error of principle. The safety net is a single thing, made up of all the minimum award conditions and the NES.

A100. The employers therefore need to establish that an employee who is appointed to work at Level A Step 1 of the Award (\$48,280), whose letter of appointment says “*The ordinary hours are 45 per week*”, or who is given work that can only be performed satisfactorily in a 45-hour week, has a fair safety net of pay and conditions. If they cannot, then the Award does not operate as a fair safety net, and the Act commands the Commission to establish such a safety net.

A101. As was deduced from the Table presented in opening submissions;

37. *For employees working 45 hours per week, with no implied penalty rate for hours above 38 (column 4), the actual hourly rate of pay at Lecturer Level A Step 1 (nearly always with a relevant 4 year degree) is, at \$20.15, the same as the C10 trade rate in the Manufacturing Award. If an overtime rate of only 150% is included for the hours between 38 and 45, without any increase in the annual salary paid, (column 7) the implied hourly rate of \$18.69 is only 93% of the trades’ rate.*

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38. *For employees working 55 hours per week, with no implied penalty rate for overtime hours in excess of 38 (column 16), the hourly rate at the first two steps of Level A is below the adult minimum wage. For an employee with a PhD (Level A, Step 6), with an overtime rate of only 150% included for the hours between 38 and 55 (column 19), the implied hourly rate of \$16.85 is well below the adult minimum wage (\$17.29). A Level C, Step 1 employee (for example the academic responsible for coordinating the whole undergraduate Law Programme at a University) in the same circumstances, is getting 8% less per hour than a four year graduate with no experience under the Manufacturing Award.*

A102. It is no use the employer saying that such employees can rely on Section 62 of the Act (part of the NES) as regards reasonable hours of work. This provides the employee with no additional remuneration entitlement at all.

A103. Therefore turning to the general requirements of Section 134 (1) of the Act, that *FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*, the issue of fairness has been dealt with extensively above.

A104. As to relevance, this has several possible meanings. However, in the NTEU's submission, the evidence showed without any doubt that employees have both very strong subjective (perceived) and very real objective concerns about working hours and workloads. Given working hours and their relationship to rates of pay, for the safety net of terms and conditions of academic staff in 2017 not to have anything to say about working hours would mean that it is not a *relevant* safety net.

A105. The specific listed sub-sections of Section 134(1) will now be addressed to the extent that they are relevant:

A106. **134(1)(d):** The NTEU claim promotes this objective by encouraging (but not requiring) that the employee and employer are clear about work requirements affecting working time, and it encourages employers to provide for the most efficient method of performing the work required. As such, it is promoting modern, efficient and

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productive practices. The current award has a logical tendency to allow for and indeed encourages inefficient and unproductive work, by allowing the working time required to endlessly expand at no cost to the employer.

A107. **134(1)(da):** The need to provide *additional remuneration for employees working overtime* is highly relevant, and a new provision which requires the Award to be considered afresh in light of this. In the context of the provision, “overtime” can only be a generic reference to additional hours, not to paid additional hours, otherwise the sub-clause would have no work to do. The addition of this section makes it even clearer that the NES is not alone intended to provide the safety net. This section implicitly accepts the idea that employees will work overtime, but seeks to ensure that there is internal equity within the safety net, in that an employee required to work (say) 45 hours is entitled to more than one who is only required to work 38 hours. As stated in opening submissions, NTEU does not base its claim upon unsociable hours, unpredictable hours etc.

A108. **134(1)(f):** For the reasons given above, the proposed clause is likely to significantly improve *productivity* as compared to the existing award provision. NTEU concedes that if the employees were employed on only the minimum award wages in higher education, there would probably be a significant *employment cost*, though the evidence does not disclose its extent. However, in our submission, EBA rates in part de facto operate as all-up rates , and these rates are universally or almost universally significantly higher (30-60% higher) than the award rates. Any actual cost would be a result of what happened to rates and what provisions were negotiated in EBAs. As regards the regulatory burden, for the same reason, and due to the operation of EBAs (or even in the absence of EBAs the going rates and the operation of proposed clause 22.7) the regulatory burden is likely to be low, except in circumstances where the

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employer has imposed fairly onerous workload requirements. If we are considering a future circumstance where there is no EBA and employees are being paid at or much closer to the award minima, there is without doubt a regulatory burden. However, these are large employers with large technological and management capacity, used to measuring and accounting for most aspects of work systems. The regulatory burden is not excessive given the other relevant factors.

A109. **134(1)(g):** The proposed provision is relatively easy to understand, and is broadly similar in principle to schemes that operate under enterprise agreements. It is readily conceded that the proposed clause could be made simpler and easier to understand if concessions to employer interests and concerns were removed.

A110. The Commission is also required to have regard to the objects of the Act set out in Section 3. NTEU submits that there is little to consider in Section 3 which is not otherwise covered by Section 134.

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## **Part B: [AM2014/229, Item 13, Payment for casual academics]**

### Payment for Policy Familiarisation and Professional and Discipline Currency

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#### **The NTEU Claim**

- B1. The NTEU's claim is that the *Higher Education Industry – Academic Staff – Award 2010* provide for certain categories of casual academic staff, in certain circumstances, an entitlement to all-up payments to compensate them for work inherent to, or necessary for, the performance of their teaching work, being familiarisation with employer policies, and the maintenance of academic and pedagogical currency in the employee's academic discipline.
- B2. The proposed payments are clearly a matter capable of being included in a modern award, either as minimum wages - 139(1) (a), or hours of work - 139(1)(c), or, if the proposed provision were formulated in a different way, they could (as an allowance) be about responsibilities or skills that are not taken into account in the rates of pay – 139(1)(g)(ii).
- B3. The group of employees who would be eligible for the payment is as follows:
- a) **Payment for Policy Familiarisation:** those who are employed on a casual basis to deliver a series of 6 or more related lectures or tutorials in an academic unit of study, payable only once for any length of employment with a single employer, unless the break between engagements is greater than 12 months;
  - b) **Payment for discipline and pedagogical currency:** those who are employed on a casual basis to deliver a series of 6 or more related lectures or tutorials in an academic unit of study, unless their primary paid employment is in a profession

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or occupation to which that teaching directly relates, or they have received payment in the same year for the same discipline or pedagogical currency work from another university.

- B4. The policy familiarisation payment claimed is a single one-off payment of ten hours from which can be deducted any payment made for induction.
- B5. The discipline and pedagogical currency payment claimed is one hour's pay per four hours of delivery of tutorials or lectures, up to a maximum payment of 40 hours in any calendar year, minus any payment made for time spent in professional development activities.
- B6. These amounts are put forward as a fair-minimum-average estimate of the time actually worked by casual academic staff on these activities. In the unusual circumstances that an employer might expressly direct an employee to spend more than these number of hours in either policy familiarisation or discipline or pedagogical currency work, then the employer should not be able to rely on these payments to avoid paying for that additional directed time. Therefore the clause prescribes that in such circumstances, employees will be paid for all the time they are directed to work.
- B7. The resulting clause proposed to give effect to these propositions is:

### ***13.3 Payment for Policy Familiarisation and Professional and Discipline Currency***

*Any academic staff employed on a casual basis to deliver a series of 6 or more related lectures or tutorials in an academic unit of study (an “eligible employee”) will, in addition to any other payment, be paid:*

***(a) Policy Familiarisation***

*10 hours' pay at the relevant rate of pay for “Other required academic activity” as specified in clause 18.2 for the employee’s work in becoming informed of relevant workplace policies, procedures and academic obligations applicable to the employee’s duties. Provided that:*

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- (i) *Where an eligible employee is re-engaged by the same employer, no fresh entitlement to this payment will arise unless the break between engagements was longer than twelve months; and*
- (ii) *Where the employer provides paid formal induction the payment under this sub-clause will be reduced by the number of hours' paid to that employee for formal induction; and*
- (iii) *Where the employer expressly directs an employee to undertake more than the hours of work, for which payments are provided by this sub-clause, on work in becoming informed of relevant workplace policies, procedures and academic obligations applicable to the employee's duties, the employee will be paid for all the time so directed. Otherwise, the employer shall have no liability for payment beyond the requirements of this sub-clause in respect of such work.*

**(b) Professional and Discipline Currency**

*In each calendar year of employment, one hour's pay at the relevant rate of pay for "Other required academic activity" as specified in clause 18.2 for each four hours' delivery of lectures or tutorials performed in that year, for the employee's work in maintaining currency in the employee's discipline and relevant pedagogy, and remaining informed of workplace policies, procedures and academic obligations. Provided that:*

- (i) *The maximum payable under this sub-clause to an employee in any calendar year shall be 40 hours' pay; and*
- (ii) *Where the employer has paid the employee to attend staff development, academic or professional conferences or like activities, the allowance payable under this sub-clause will be reduced by the number of hours' paid to the employee for attending those activities; and*
- (iii) *Payment in accordance with this sub-clause will not apply in respect of the delivery of tutorials or lectures which relate directly to the practice of a profession in which the employee is engaged as their primary employment or occupation; and*
- (iv) *Payment in accordance with this sub-clause will not apply to the extent that a payment has been made to the employee under this sub-clause by another employer in respect of that discipline or a cognate discipline (An employer may ask an employee to substantiate that they have not already received payment in accordance with this sub-clause from another employer.)*
- (v) *Where the employer expressly directs an employee to undertake more than the hours of work, for which payments are provided by this Sub-clause, on work in maintaining currency in the employee's discipline and relevant pedagogy, and remaining informed of workplace policies,*

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*procedures and academic obligations, the employee will be paid for all the time so directed. Otherwise, the employer shall have no liability for payment beyond the requirements of this sub-clause in respect of such work.*

## **Arguments of merit and principle in support of the claim**

B8. If the evidence discloses that the relevant casual academic staff are required to and do undertake work of the type described, then any fair and relevant safety net of wages must ensure that they are entitled to payment for the work performed.

## **Who are casual academics and how many of them tutor and lecture?**

B9. Attachment C to Exhibit G (the first witness statement of Ken McAlpine) at pp. 418 – 419 provides the numbers of casual employees (in equivalent full time ‘EFT’ terms) as reported by universities to the federal government in 2014. That table shows that in that year there were 10,822 EFT teaching-only casual employees, 1271 EFT research-only casual employees, 223 EFT teaching-and-research casual employees, and 7994 EFT casual employees with other duties (which would primarily be general staff casuals). Mr McAlpine gave uncontested evidence at paragraph 10 of Exhibit G that “While these data are not current, it is highly unlikely that any dramatic changes in proportions of staff in various categories has occurred.”

B10. It is only teaching-only and teaching-and-research casual staff (total: 11045 EFT) who could meet the eligibility requirements for the Policy Familiarisation and Professional and Discipline Currency Payments claim, which only applies to those who perform lecturing and tutoring.

B11. Some staff reported as teaching-only or as teaching-and-research in the national data will not perform lecturing or tutoring. This would include those employed *only* to

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perform other modes of teaching duties, such as laboratory demonstrating, clinical supervision, field trips, marking and so forth. In addition, some of those reported who do perform tutoring or lecturing will be occasional guest specialists who do not meet the criteria of delivering a series of six or more related lectures or tutorials. Therefore it is a reasonable estimate to say that something less than 9,000 EFT – perhaps 37-40,000 people – are employed to lecture or tutor for a series of six or more related classes.

- B12. Lecturing and Tutoring are well-understood categories of work for which there are identified rates of pay in the modern award and in every enterprise agreement applicable to academic staff. Employers can easily identify such staff, and the quantum of lecturing or tutoring they are employed to deliver from examining their payroll system, which will identify how many hours of the lecturing and/or tutoring rate has been paid to each casual employee.
- B13. Of those, a significant proportion will be professionals with primary employment elsewhere. While eligible for the Policy Familiarisation Payment, these employees would not be eligible for the Professional and Discipline Currency Payment. A significant proportion will be employed at the same University for more than one semester, sometimes for many years in a row. While eligible for the Professional and Discipline Currency Payment, they would not be eligible for a Policy Familiarisation payment after their first engagement, unless there was a break in employment of more than twelve months
- B14. The evidence of Strachan (based on a mid-semester sample date that would tend to catch very few staff employed only for marking) in NTEU Z was that 38% of casual academic respondents to their survey had worked at their current university for less than one year while 45% had worked there for 3 years or more (Table 129), that 21%

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worked concurrently at more than one university or TAFE (Table 131), that 91% had employment contracts for ten weeks or longer (Table 135).

**Professor Glenda Strachan - Witness Statement, Exhibit NTEU Z**

**Who are sessional academics?**

"Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities" (2012 Report, Attachment 4 to Exhibit #Z))

Section 4: Casual/Sessional Academics

Data on demographics, including age, qualifications, years as a sessional, working at more than one uni, hours per week, weeks per year, length of contract, can all be found in Tables 127 - 135

**Dr Robyn May - Witness Statement, Exhibit NTEU L**

**Who are sessional academics?**

Para 13 – 20

Table 1: Demographic characteristics of survey respondents

Shows that 54% of respondents were studying for a qualification, including the 38% who were studying for a PhD.

Table 3: Reported gross weekly earnings

Table 4: Main sources of income and casual earnings per week, and Figure 1: Sources of income by sex (%)

Shows that for 36% of respondents their casual employment was their primary source of income, while only 18% had employment outside the sector, which would include both industry professionals and people who earn more from waiting tables than they do from their sessional teaching.

Table 5: Respondents working at more than one institution by sex

Shows that 80% of respondents did not work at more than one tertiary institution concurrently.

Table 6: Type of casual work undertaken by sex

Shows that at least 70% of respondents worked in lecturing and/or tutoring

Table 7: Total usual weekly hours of all face-to-face teaching by sex

B15. Junor's data on the demographic characteristics of the casual academic population is more dated than that of Strachan and May, but is broadly consistent with the findings of the more recent research, and her typology of casual academic employment indicates that close to 25% of sessional academics were also elsewhere employed either in industry or the teaching profession. These would not generally be eligible for the Professional and Discipline Currency Allowance.

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**Associate Professor Anne Junor - Witness Statement, Exhibit NTEU O**

**Who are sessional academics?**

Para 10 – 17 : 2002 data

Table 2 Typology of Casual Academics  
18.5% were outside industry experts or practitioners. 6.2% held full-time teaching or academic jobs elsewhere. 27.2% were enrolled in a postgraduate degree.

Table 5 Typology of casual academics – demographic features, employment mode preferences and preferred hours

Table 6 Estimates of casual academics' earnings from their casual work per semester, 2002, indexed to 2011 prices

Table 7 shows that a significant minority of casuals (29%) identified the concern that it might put their employment at risk if they were to refuse demands seen as unreasonable.

Table 8 reports that 33% of casuals attend conferences and seminars (whether paid or not)

Para 18 - : 2012 update

B16. The evidence supports the conclusion that only a small proportion of academic employees paid by-the-hour are casuals in any genuine sense. Most casuals are engaged in core ongoing functions and not to meet short term ad hoc or occasional needs. Most casual academic engagements involve a specific commitment to work specified hours of teaching work at specified times, over a semester or a whole year. Many or most academic “casuals” are in fact career academics or at least expect to be employed for a number of years.

## Should casual academics be paid for the work involved in policy familiarisation?

B17. It was common ground between the parties that casual academics are required to be familiar with and to comply with employer policies.

B18. It was also common ground that, outside paid induction programs, they are not currently paid for this work. Indeed, when the question was put to Mr Picouleau, the best he could do was to suggest that it was not impossible that the work of referring to a university policy *might* occasionally come up in the course of preparing for a lecture or

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tutorial: “*I mean, it might be that in preparing for a tutorial or lecture that it might incidentally arise that there was a need to look at a particular relevant policy to, you know, some aspect of the lecture or tutorial. I don't see that as impossible.*” – PN6735.

Other than pointing to the prevalence of brief paid induction programs which cover a range of matters including a brief introduction to some policies, the employer parties did not offer a single instance of a payment *ever* having been made to a casual academic for time spent consulting university policies - whether in writing or via seeking advice from other staff, whether online or in hard copy, whether at the commencement of a period of employment or when an issue arose in the course of semester.

B19. There was disagreement between the parties about how much time casual academics are required to spend in familiarising themselves with policy. The evidence supports the conclusion that the claim for payment of ten hours put forward by the NTEU is a modest claim, representing an underestimate of the real time likely to be required. In particular:

- a. Casual academics are required as a formal contractual obligation to know and comply with university policies. Attachment G to Exhibit G contains examples of the contracts used for the engagement of casual academic staff.
  - i. The second page of the **Deakin University** contract at p.1676 states “*I acknowledge that the provisions of the current (EA) apply to my employment. I agree to comply with all relevant University policies, procedures, statutes and regulations in force from time to time, which are available on the University's website at [www.deakin.edu.au](http://www.deakin.edu.au). I acknowledge that the EA, policies, procedures, statutes and regulations are not incorporated into any contract of employment.*”

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- ii. The **Federation University** contract at page 1688 states “*15. Casual staff are required to comply with all University policies and procedures including and not limited to copyright, OHS and any regulations, legislation and associated required training such as induction, EEO, bullying and harassment, et cetera and other requirements relevant to any qualifications needed for the work they are required to perform. Policies and procedures are available on the University website at <http://policy.Federation.edu.au/>.*
- iii. The **Monash University** contract at page 1693 states, under the heading STANDARD TERMS AND CONDITIONS FOR SESSIONAL STAFF AT THE UNIVERSITY, “*10. You must familiarise yourself with and abide by all relevant legislative requirements and University policies and procedures, including but not limited to, equal opportunity and occupation health and safety policies and procedures. See <http://www.adm.monash.edu.au/workplace-policy/>.*” This is replicated at point 9 on page 1700.
- iv. The **University of Sydney** contract at page 1707 states “*(b) By accepting this engagement you agree to comply with:*
- *the University’s Code of Conduct – Staff and Affiliates and Research Code of Conduct 2013 (Codes of Conduct);*
  - *all lawful directions of the University;*
  - *all laws and professional standards applicable to your engagement, including laws in relation to health and safety; and*

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- *University policies and rules, as introduced, varied or replaced by the University from time to time, including policies on discrimination and harassment, public comment, reporting wrongdoing, external interests, privacy, information and communication technology and work health and safety and the University of Sydney (Intellectual Property) Rule 2002.*

*Copies of the Codes of Conduct, policies and rules are available at policy register”. At page 1714 is the form on which a casual employee is required to acknowledge that they have read, understood and will comply with the codes of conduct and policies and procedures.*

- v. The **UNSW** contract at page 1739, under the heading computer surveillance, asks casual employees to “*Please read and familiarise yourself with [the Acceptable Use of UNSW ICT Resoruces] Policy and Procedure before you commence work.*” The checklist on the next page identifies seven “important” policies and procedures, including the UNSW Code of Conduct.
  - vi. The **University of Newcastle** contract at page 1752 states “*Policy and Procedure: You are required to comply with the policies, rules and procedures of the University as amended from time to time.*
- Amendments are published in the online Policy Library.*
- <http://newcastle.edu.au/policy/> The terms of such policies, rules and procedures, however, do not form part of this offer of employment.” It goes on to state that acceptance of the contract “will be deemed as your*

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*agreement to comply with the Code of Conduct” and to require compliance with workplace health and safety policies, procedures and reporting system.*

- vii. The **University of South Australia** contract at page 1818 states under the heading Terms and Conditions of Casual Employment, “*the party agrees to abide by all policies, guidelines and codes (as amended or replaced) of the University of South Australia.”*
- viii. The **UTS** contract states at page 1831”*15. The Employee will comply at all times with the UTS Code fo Conduct and other policies and instruments which UTS may adopt, from time to time, in relation to its operation and governance.”*
- ix. The **UWS** (now WSU) contract at page 1840 states “*CONDITIONS OF EMPLOYMENT – Your conditions of employment are governed by the Universities Academic Staff Agreement and relevant policies, procedures and statutory requirements.*”
- x. The **Victoria University** contract at page 1859, under Section C – Applicant Signature and Approval, contains the “Staff Member Declaration”, “*I will take responsibility to abide by the statutes, regulations, policies and procedures of Victoria University.*” and at page 1869 states “*UNIVERSITY STATUTE, REGULATION AND POLICY You are required to comply with University Statute, Regulation and Policy as amended and varied from time to time. The University requires you to be familiar and comply with all University Policies, in addition to the Policies already referenced in this contract.*”

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- b. In addition universities generally have Codes of Conduct which apply to all staff, including casual staff. These Codes themselves refer to and invoke a wide variety of University policies, procedures and statutes. A number of these and their obligations on casual staff are described by Dr Nurka in NTEU AR at para 11.
- c. University policies, procedures, guidelines and regulations are extensive. There were examples of the volume of policies maintained by universities (see for example: Dix, NTEU AU, para 52 and Attachment 1; Hamel-Green, NTEU AD, para 41; Andrews NTEU Q, para 6; Nurka, NTEU AR, paras 5-7, 9, 11; Picouleau PN6727; MFI#s 17, 18, 39, 45; Ward, PN9191 – PN921).
- d. Leaving aside the express words in contracts and codes of conduct which impose higher requirements, even if the Commission accepts the evidence of some employer witnesses that casual staff are only required to know and comply with those policies that directly impact on their employment, then that still leaves a long list, that includes at least:
- i. The university code of conduct;
  - ii. All policies about teaching and assessment;
  - iii. All policies about reporting and responding to plagiarism;
  - iv. All policies to do with anti-discrimination, cultural sensitivity, bullying and harassment;
  - v. Student conduct policies;
  - vi. Policies and procedures for dealing with students at risk;
  - vii. Policies and procedures about information technology access and use;
  - viii. Policies and procedures about intellectual property;

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- ix. Policies relating to their own employment conditions, making expenditure claims, lodging pay claims, etc;
  - x. Relevant health and safety policies and emergency procedures.
- e. Witness evidence from those who have worked as teaching academics (both casual and ongoing) supports the conclusion that the number of policies relevant to teaching casual employment is extensive.

(See for example: Hamel-Green, NTEU AD, paras 42-43, where an experienced academic and academic administrator who has worked as a Dean, gives evidence that:

*“42 ... For sessional academics at VU, I would expect them to at least be familiar with the policies on:*

- *Assessment*
  - *Equity*
  - *Academic progress*
  - *Plagiarism*
  - *Health and safety (particularly in laboratories and pracs, but also when working alone)*
  - *Communication and Social Media policies*
  - *Disputes and Grievance procedures*
  - *Emergency procedures*
  - *Cultural Diversity*
  - *Indigenous policies*
- and many more.*

*43. In addition, they need to be aware of the range of student support services that are available, and of what to do in circumstances of student misbehaviour or mental health problems.*

See also Dann, NTEU AO, para 27; Dix, NTEU AU, paras 53 – 57; Kenny, Exhibit AB, para 43; May, Exhibit NTEU L, pg 25 – “... *the requirement to read and understand university policies and procedures has grown considerably*”; Nurka, NTEU AR, para 8-9.)

- f. The evidence of casual academics was that the NTEU claim understates the actual time spent in this work. (See for example Dann, NTEU AO, at para 28,

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who estimates that as an academic who has worked at Monash for eight years, she still spends at least eight hours a year refreshing her knowledge of university policies; Dix, NTEU AU, at para 60 – “*I did not keep a detailed track of the time spent doing this work of ongoing familiarisation with SUT policies and procedures while I was a casual, but I estimate it would not have been less than twenty (unpaid) hours in any full year.*”; Nurka, NTEU AR, para 13)

- g. Dr Nurka also gave evidence that in some policy areas it is not simply a matter of reading a policy once, but of needing to refer to it again as and when circumstances arise which give rise to a need to apply the policy.

B20. The employer witnesses who spoke about policies did not give any evidence from direct experience of casual employment, but spoke in general terms about what they expect would happen. Mr Picouleau, Ms Thomas and Mr Ward were not personally familiar with the administration of casual staff in relation to teaching and the management of students. The evidence of those with direct experience of casual academic employment should be preferred.

## **Why prefer a Policy Familiarisation Payment to simply paying for all hours worked?**

B21. The NTEU proposal of a one-off payment is designed to impose minimum regulatory burden on the employer, while providing a fair safety net of entitlement to employees. It is similar in character to many other aspects of the casual academic rates of pay. For example, for lecturing or tutoring work, academic staff are not paid for all hours worked, but are paid a rate calculated on the presumption that for each contact hour delivered, there is an assumed standard amount of preparation and student consultation

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time worked. This approach, which necessarily disadvantages those who work longer than the assumed time (and advantages those who work less), reflects the individual and largely unobserved nature of much academic work.

B22. It would be difficult for the employer to effectively monitor how much time a member of academic staff spends in policy familiarisation activities, and a system of paying for hours claimed could result either in employers being exposed to excessive claims or employees having reasonable claims rejected, on the basis of disputes about exactly how much time was really involved. This is particularly so for casual academic employment, where so much work is performed away from the workplace. This is why the NTEU has proposed a payment modelled on the other casual academic rates of pay – a reasonable minimum rate of payment to recognise and compensate for work actually done.

## **Should casual academics be paid for the work involved in maintaining professional and discipline currency?**

B23. Maintaining currency in the discipline and maintaining professional currency are inherent requirements of academic teaching work. Academic staff, including casuals, are selected for appointment on the basis that they are up to date in their field and demonstrate the sort of intellectual curiosity which is required for the job. After appointment, casual and non-casual academic staff alike are expected to maintain and develop their knowledge of developments in their discipline, maintain and develop any relevant professional registration and currency, and maintain and develop their knowledge of teaching theory and methods. (See for example, Schroeder, NTEU M, para 30; Leach, NTEU AE, para 12; Kirkman, NTEU AQ, paras 34-35, 41; Dix, NTEU AU, paras 50-51; Hamel-Green, NTEU AD, paras 21, 38-40; Andrews, NTEU P, para

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35; Nurka, NTEU AR, para 18 and Attachment 4 clause 4, and paras 26, 27, 37; Junor, NTEU O, paras 3-4; Kenny, NTEU AB, para 43; Chegwidden, PN9490-9492 and MFI# 48.)

B24. The University of Sydney Code of Conduct (MFI# 25) expressly requires all staff to

*“maintain and develop knowledge and understanding of their area of expertise or professional field”* (see section 4, Personal and Professional Behaviour). Professor Garton confirmed at PN474-5 that this obligation applies to casual academic staff.

B25. The University of Wollongong Code of Conduct (pp 78 – 91 of MFI# 18) at section

3.3 imposes an obligation on all staff, including casual academics, to *“remain informed about, act within the spirit of, and comply with the University’s policies and directions, as well as any regulatory requirements of their discipline or profession, and relevant legislation.”*

B26. It was common ground, whether or not there is an express policy statement to that

effect, that all academics including casual teaching academics are expected to keep up to date with their discipline and with relevant professional standards applicable to their discipline. (This conclusion is also consistent with Commonwealth Government requirement on Australian Universities cited in the NTEU’s opening submissions that they ensure that *“The higher education provider’s academic staff are active in scholarship that informs their teaching, and are active in research when engaged in research student supervision.”* [Exhibit NTEU B, Part B, paras 20-25])

B27. What remained in dispute was

- a. Whether doing so was encompassed within the existing assumed time for preparation;
- b. Whether in the case of casual academics this obligation fell outside periods of employment, such that while they needed to be current at the commencement

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of each engagement (and would not be re-engaged if they failed to do so), they did not need to do work to *stay* current during each engagement; and

- c. Whether this was something people did in pursuit of a personal passion for their discipline, and therefore should not be considered work.

B28. The evidence showed an iterative relationship between discipline currency and preparation for teaching. Being current in one's discipline and profession informs ones teaching. Reading the materials set for students in preparation for classes assists in maintaining currency in the discipline. However the evidence also showed that the discipline currency goes well beyond what is required and encompassed within the concept of preparation time associated with particular hours of delivery. Both casual academic witnesses and those who have been responsible for employing casual academics gave evidence that this work is distinct from merely preparing for particular lectures or tutorials.

**Professor Michael Leach - Witness Statement, Exhibit NTEU AE**

**Para 12** - *This [scholarship] is sometimes described as maintaining currency in one's discipline, and is distinct from the specific preparation of a lecture or tutorial.*

**Dr Caron Dann - Witness Statements, Exhibit NTEU AO and Exhibit NTEU AP**

**Exhibit AO – Para 22**

**Dr Michael Dix - Witness Statement NTEU AU**

**Para 50 -51**

**Dr Camille Nurka Witness Statement Exhibit NTEU AR**

**Para 31** - *The knowledge that I cultivate in the course of engaging with my academic peers by reading, attending conferences and publishing is distinct from the reading I do in the allotted preparation time for tutorials, which is specifically directed to the set reading in the unit I am teaching. Yet it is a crucial component of my academic competency as a tutor and lecturer.*

**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**PN6735** - *At paragraph 45 you refer to the fact that the existing rates for tutorial and lecture incorporated not only the hour of delivery, but some time for additional preparation time and associated activities. Do you say that that payment is a payment in any way for policy familiarisation or discipline currency activities?--Not for discipline currency. I mean, it might be that in preparing for a tutorial or lecture that it might incidentally arise that there was a need to look at a particular relevant policy to, you know, some aspect of the lecture or tutorial. I don't see that as impossible.*

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B29. Nor did the employer representatives present evidence of any instance in which a casual academic has been paid additional hours at the ‘other academic duties’ rate for time spent in maintaining professional or discipline currency. Indeed, when the question was put to Mr Picouleau as to whether Monash University would pay for the time spent in maintaining professional currency, his answer was unequivocal:

**Andrew Picouleau - Transcript**

**PN6736**

*But if, for example, a sessional academic was required to undertake some professional development activities offered by a professional organisation in order to maintain their registration, say, as a nurse or as an accountant or as a lawyer that would not be encompassed, would it, by the preparation time?---No.*

**PN6737**

*Do you suggest that that sort of activity is paid for using the other required academic activity rate?---Engaging in professional development, as you have just described?*

**PN6738**

*Yes?---No, certainly not.*

B30. The proposition that employers could abrogate responsibility for their casual employees’ work in maintaining discipline currency, professional currency and pedagogical expertise is both disingenuous and absurd. It is undeniably true that employees who maintain their work-related skills gain some personal benefit from that, both in terms of personal satisfaction and in terms of employability. Nevertheless, it is work performed in the course of employment, it is work which the employer accepts and from which the employer benefits. The safety net should ensure that that work is paid for.

B31. The evidence supports the conclusions that:

- a. A significant proportion of casual academic workers are employed for more than a single engagement. In many cases, they are employed for a number of years at the same university. (See B14 above; Dann, NTEU AO para 2; Dix, NTEU AU paras 2- 31; Picouleau PN6732-6734, who estimated that only in the order of 30-40% of Monash casual academics are not engaged for more than one semester; MFI# 34 s.19.10 wherein the University of Tasmania

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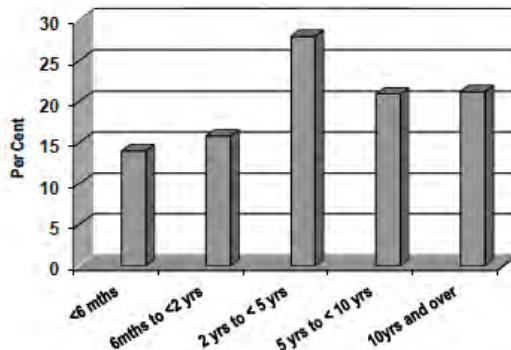
Agreement contains a provision aimed at reducing the adverse impact of semester breaks on those casual academics who work in consecutive semesters;

This is not a new phenomenon, but one with which university managements are quite familiar. The evidence of Associate Professor Junor was that as far back as 2002, a significant proportion of casual academic staff had long durations of employment:

**Associate Prof Anne Junor Witness Statement, Exhibit - NTEU O**

**Page 14 -** *The assumption that short-term duration is a defining feature of 'genuine' casual employment was tested through the research. The findings are set out in Figure 2. This shows that overall, approximately 20% of casual academics had been working in this way at their current university for over six years, and 40% for more than 3 years.*

Figure 3 sets out survey respondents' patterns of employment duration in the university sector overall. It indicates a depth of experience that appears at odds with remuneration (Table 6). Long-term employment duration may also be an indicator of the need for professional currency maintenance.



**Figure 3 Casual academic survey respondents – overall employment duration in the university sector (n=1337)**

The employment of such staff takes the form of repeated casual engagements, but it is sophistry to suggest that the employee should undertake the work of maintaining the professional and discipline currency the employer admits to requiring as a condition of re-engagement only between engagements, and not during them.

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- b. As a question of fact, much discipline and professional currency work occurs during the course of casual academic engagements.
- c. The time spent in this work may be difficult to predict or determine with precision, and may vary as between disciplines and professional fields, but would rarely if ever be less than the hours payment sought by the NTEU claim. (See Dix, NTEU AU, paras 44-48; Nurka, NTEU AR, paras 28-30 and the following extracts:)

**Dr Caron Dann - Witness Statements Exhibits, Exhibit NTEU AO and Exhibit NTEU AP**

**Exhibit AO Para 28** - *I estimate that each year, I would read at least 1200 media reports, at least 4 academic books, 20 further single chapters and approximately 50 journal articles in my field, in addition to those I read in the course of preparation work. I estimate that I spend at least 200 hours a year in such reading. I estimate that I spend at least 20 hours a year in developing my technical skills with new media and platforms. I estimate that I spend at least 20 hours a year in discussion with colleagues about developments and controversies in the discipline.*

As qualified and elaborated on at **PN 8475-8504**.

**Professor Michael Hamel-Green - Witness Statement – Exhibit NTEU AD**

**Para 40** - ... *In my experience, most sessional academic staff would spend at least one hour a week during the course of their engagement, as well as probably as much time again during their unpaid weeks between engagements, in keeping up to date with their field. I do not think it would be possible for them to do their job properly if they did not.*

**Associate Prof Anne Junor - Witness Statement, Exhibit NTEU O**

**Page 20, Type 4** - *I work at least 20 hours per week extra on my subject and get paid for 1.5 hours contact time (2002)*

*At present the pay I receive is laughable for the huge number of hours spent researching, sourcing, preparing and marking. If work is not carried out adequately, lecturers are open to immense criticism from students who are encouraged to complain and criticise (2002)*

**Dr Robyn May - Witness Statement , Exhibit NTEU L**

**Page 24**

*My academic discipline is Industrial Relations and in order to teach in that field I draw upon broad workplace experience together with continual self-motivated learning and professional development such as reading key journals and books, attending lectures conducted by visiting academics (generally outside of work hours) attending my discipline conference often at my own expense (AIRAANZ which is held annually in February) and maintaining a wide network of academic and professional contacts from who I can draw ideas and expertise.*

- d. University employers provide only limited paid staff development opportunities to casual academic staff in the area of professional and discipline currency, and when they do, it is more likely to be in the form of the payment

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of registration costs than the payment of wages for time spent attending. (See, for example, Dann, NTEU AP, Para 13; Hamel Green, NTEU AD, para 40; May, NTEU L pg 22 Table 8; Strachan, NTEU Z, Attachment 4, Table 148.)

- e. Some paid support is provided to casual academics in the area of developing pedagogical skills. To the extent that this occurs, it would be deductible from the payment for Professional and Discipline Currency Allowance claimed by the NTEU.

B32. In what the Sir Richard Kirby Archives describes as the *2000 Casuals Case* [Print T4991, 29 December 2000] a Full Bench of the Commission determined by arbitration a number of matters concerning casual employment in the benchmark *Metal Trades Award*.

B33. There are two important points of principle which should be drawn from the Commission's Decision in that case.

***Casual work should not be cheaper nor more expensive than non-casual***

B34. In considering what the percentage amount of the casual loading should be, the Commission set out a principle which, at a minimum, we think is appropriate in the present case:

*[159] Perhaps more important in the context of the relevance of employer cost is the potential impact of the loading on it. The Commonwealth submitted that the loading should be so calculated as to make the choice between casual and "permanent" employees broadly cost neutral. In our view some of the Commonwealth's later submissions contradicted the consistent application of the principle proposed. However, we consider that the proposition does crystallise what should be an important objective in calculating and fixing the loading. A logical and proper consequence of providing for casual employment with the incidents currently attached to it is that, so far as the award provides, it should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment.* [T4991] (emphasis added)

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B35. There was plenty of evidence in the current proceedings from both employer and union witnesses that academic staff are required to maintain discipline currency. The most obvious example of this is expressly stated by the Australian Catholic University, whose Workload Policy **MFI#48** is given legal force by the *Australian Catholic University Staff Enterprise Agreement 2013-2017 MFI#47*. The Policy, at 5.1.1, states that Teaching and Scholarship of Teaching may include *scholarly activity to maintain professional currency in the discipline area*. However, beyond this, at Table 1 – Item A18 of the policy, there is an indication of the time allocated annually to full-time staff as *Annual time allowance to support scholarship of teaching and scholarly activity to maintain professional currency in the discipline area for staff with a teaching load*.

A18.	<p>Annual time allowance to support scholarship of teaching and scholarly activity to maintain professional currency in the discipline area for staff with a teaching load</p>	<p><b>Teaching-focussed staff</b> Up to 168 hours face-to-face or equivalent contact time – 100 hours per year</p> <p>169 – 336 hours face-to-face or equivalent contact time – 140 hours per year</p> <p>337 – 480 hours face-to-face or equivalent contact time – 159 hours per year</p> <p><b>Teaching and Research staff</b> 169 – 336 hours face-to-face or equivalent contact time – 35 hours per year</p> <p>337 – 480 hours face-to-face or equivalent contact time – 70 hours per year</p>
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- B36. This allocation for discipline currency is, of course, very much higher for Teaching-focussed staff (100-159 hours p.a.) than it is for Teaching-and Research Staff (35-70 hours p.a.), recognising that the latter group to a far greater extent get opportunities to maintain currency through their research.
- B37. These allowances are expressly separate from time for preparation and consultation, which is embodied in Item A1 of Table 1 as follows:

A1.	Time for 1 hour lecture – including preparation, delivery, with all resources uploaded and available, and associated in-class/online feedback)	2.50 hours
A2.	Time for first time taught unit (existing staff member)	1 hour per 1 hour lecture
A3.	Time for 1 hour repeat lecture	1.25 hour
A4.	Time for first 1 hour tutorial – including preparation, delivery, with all resources uploaded and available, and associated in-class/online feedback	2.50 hours
A5.	Time for 1 hour repeat lecture	1.25 hour
A6.	Student Consultation – time per student enrolled at each Semester Census date	0.25 hour
A7.	Assessment - time per student per unit	1 hour
A1.	Time for 1 hour lecture – including preparation, delivery, with all resources uploaded and available, and associated in-class/online feedback)	2.50 hours

- B38. The Australian Catholic University provisions merely crystallise the fact that, as the union and employer witnesses indicated, full-time academics are *at work and getting paid* for maintaining their discipline currency. Casual staff are generally paid only to teach, and are therefore analogous to *Teaching focussed staff* as described in Item A18. The Teaching focussed staff receive as an *absolute minimum*, one hour's allowance for discipline currency activities for each two and a half hours of teaching

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time, but generally far more than this – for example an employee with 168 hours of teaching in a year (more like the average casual) gets 100 hours' time for discipline currency – a ratio that is two and a half times more generous than that proposed by the NTEU for casual employees.

B39. What this analysis shows is that;

- Full-time academics get paid for professional and discipline currency work;
- This work is necessary to teaching and identifiable – ACU include it in their workload model;
- This work is identifiably separate from the preparation and consultation and marking associated with presenting a class;
- Casual academic teachers do not currently get paid anything for doing this work.

B40. The current practices, as applied through the Award, mean that it is cheaper (by a lot) to employ casual teaching staff than to employ a corresponding full-time staff member because the casual does not get paid for all their work, whereas the full-time employee does.

B41. The Award on this basis manifestly fails the test which the Full Bench in the *2000 Casuals Case* found was appropriate.

B42. Two points have to be acknowledged about this. First, one may wish to quibble with the ACU's estimates of how much work is involved in discipline currency. Second, some of the employer witnesses said that the scope of some casual teaching work was more narrow than for the corresponding full-time staff, though the direct evidence of NTEU witnesses was not consistent with this, and the employers provided no first-hand evidence.

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B43. However, even if both points are conceded, the comparatively very miserly basis on which the NTEU's proposed formula works more than compensates for these factors:

- NTEU's formula is based on a *one-for-four* ratio of payment for discipline currency hours to teaching hours, for most purposes a one-to-twelve implied ratio of time spent in teaching and directly associated duties, which is significantly lower than the time allowed by ACU for non-casual staff;
- NTEU's formula is subject to a maximum payment in a calendar year of 40 hours, whereas it is recognised that a teaching-focussed academic at ACU may need to spend up to 159 hours of paid time per year on maintaining discipline currency;
- NTEU's formula does not provide a base-level of payment, which means that a staff member who has only (say) 60 hours of teaching contact time, and therefore only gets a 15-hour discipline currency payment is likely seriously missing out (as compared to the actual time spent), whereas at ACU there is a 100-hour *minimum* allowance for discipline currency.

B44. For all these reasons, NTEU says that its proposal errs heavily on the side of minimising cost to the employer, and will leave many casuals inadequately paid. Nevertheless, the fact remains that without these proposed payments (for work for which full-timers are paid) employers are getting free labour.

### ***Swings and roundabouts and the safety net***

B45. Another extract from the *2000 Casuals Case* is also important to consider in relation to the nature of casual employment in this industry:

**[10]** The primary type of employment now provided for under the Award is *full-time employment*. In substance, full-time employment is the lineal descendant of weekly hire employment under the predecessor awards. Paragraph 4.2.2 describes or defines it to be the type of employment

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comprehending all employees except those specifically engaged as a casual, or part-time employee, or otherwise excluded by the Award. The incidents of some categories of employment are provided for *seriatim* throughout the Award. Thus, full-time employment and unapprenticed junior employment are categories for which the incidents or terms of employment provided by the Award are not expressed in subclause 4.2. Other provisions of the Award apply to those categories expressly, or by construction in the absence of a contrary intention. The incidents of other types of employment, part-time employment in particular, are more fully or generally expressed in subclause 4.2.

**[11] The manifest incidents of casual employment that appear from a reading together of paragraphs 4.2.2 and 4.2.3 in their present form are:**

- the employee must be specifically engaged as a casual employee;
- employment is by the hour;
- ordinary time work shall be one thirty eighth of the weekly rate prescribed for the classification in which employed, plus a casual loading of 20%, to be part of the *all-purpose rate*. [T4991] (emphasis added)

- B46. That casual employment is *by the hour*, and that an employee gets 1/38<sup>th</sup> part of the weekly wage (plus loading) for *all time worked*, is an almost definitional characteristic of casual employment across the whole system of modern awards.
- B47. However, in this industry, casual award rates have never reflected actual time worked for the great majority of the work – lecturing and tutoring. Instead, the Award has provided for a system of swings-and-roundabouts payments, where irrespective of the actual time worked, a set payment is made – for example three hours' pay for a tutorial of one hour's duration.
- B48. This is of immense value to the employers, because it means the work (which constitutes more than half of all undergraduate teaching) does not need to be closely supervised. NTEU has never accepted the appropriateness of the rates but understands the rationale, and the great benefit it presents to the industry.

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B49. This arrangement is commonly called a *swings-and-roundabouts* system of payment which, when introduced by the *Academic Salaries Tribunal* in the 1980s, fully recognised that;

- Some employees may be “overpaid” compared to the time actually required to (say) prepare and present a lecture and consult with students – for example an experienced retired academic teaching in their field of lifelong expertise; whereas
- Some other employees, to use the vernacular, may be seriously “ripped off”, having to spend eight hours per lecture presenting a new unit in which they had not taught before, for which they receive only three hours pay.

B50. NTEU contends that the advent of the modern award objective means that a new balance has to be struck. The prime concern of the Commission has to be that there is a fair *minimum safety net*. This means the Commission has to be more concerned with the underpayment to the “ripped off” group, as individuals, and cannot, except to a limited extent, rely on the fact that some others are being “overpaid”. This is the consequence of the loss of *collective dispute settlement* and its replacement with a minimum safety net.

B51. NTEU is not in these proceedings seeking to upset the very unusual “*swings and roundabouts*” basis of payments that already exist. Rather the relevance of these submissions is to the current claim for discipline currency and policy familiarisation. Whereas, NTEU may have erred on the side of parsimony in the quantification of its claims, the Commission, in establishing a minimum safety net for a very diverse group should be concerned to satisfy itself at least that a large majority are not in the “ripped off” group.

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## Cost of the claim

B52. The employer estimates of the cost impacts of the NTEU claim cannot be relied upon.

The estimates presented by Mr Picouleau and Mr Ward are based on inflated assumptions about how many staff might be eligible for the payments, and to what extent they would be eligible. They do not take account of the exemptions and reductions built in to the architecture of the claim. See, for example Ward at PN9236 – PN9241:

### ***PN9236***

*Did you instruct Ms Tsagouris to exclude a proportion of the casual academic workforce to take account of those who held previous engagement with UNSW, that is people who have been employed in previous years?---No, I don't recall instructing her to do that.*

### ***PN9237***

*Did you instruct her to discount the figures that she calculated by the number of hours already paid for attending induction programs?---No.*

### ***PN9238***

*In relation to the "Discipline currency claim", did you instruct her to exclude a proportion of casual academic staff to take account of those who are industry practitioners currently practising in their professional area?---No, because we don't know the proportion of those.*

### ***PN9239***

*Did you instruct her to exclude a proportion of casual staff on the basis that some of your casual employees will work at more than one university?---No, because again we don't know those numbers.*

### ***PN9240***

*Did you instruct her to discount the total by the amount currently paid to casual staff for participating in staff development or attending conferences?---Sorry, you just broke up there right at the end.*

### ***PN9241***

*I'm sorry. Did you instruct Ms Tsagouris to discount the total by the amount that UNSW has paid to casual staff for participating in staff development or attending conferences?---No, I didn't.*

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It is evident from the face of the document that the estimates found at paragraphs 46-49 and Attachment AP-3 to Mr Picouleau's statement (Exhibit 12) suffer from similar methodological flaws and as a result significantly overstate the real potential cost.

B53. The nature of academic work is such that maintenance of professional and discipline currency is both essential for the proper performance of the work, and necessarily primarily determined by the individual academic themselves. It is clear that an academic needs to keep up to date with developments in the literature, but only the academic themselves can judge which articles, research reports and conference papers they should read, whether they will pursue a line of tribunal decisions on questions of jurisdiction, or spend their time reading case reports on developments in the field of implied terms of contracts, whether they should attend a professional development course on new techniques in diagnosis of asthma or one on the impact of long working hours on cardiovascular health. The evidence of employer witnesses confirmed this aspect of academic work:

**Professor Stephen Garton - Exhibit Go8 9**

**Para 19 - . . .The nature of academic work and academic culture requires autonomy and flexibility.**

**Professor Marnie Hughes Warrington - Exhibit Go8 10**

**Para 58 - Academic staff determine how they will competently achieve expectations. The suggestion that a record of activities will need to be kept will be seen as an impost on time and an erosion of rights to self-direction and self-management. It is also likely to be seen as a sign of distrust.**

B54. This necessary degree of individual academic autonomy in determining the precise nature and extent of their professional and discipline currency activities is true for casual academics as well as for others. There may be some specific activities which the employer will require or encourage – particularly in relation to the development of pedagogical skills – and colleagues and supervisors may well suggest or encourage particular directions of scholarly activity – but in the final analysis, it is each casual

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academic who is responsible for their own professional and discipline currency activities.

B55. In addition, it is difficult to predict the volume or speed of such activities. In some discipline areas, the body of knowledge may be well established and the theoretical framework subject to relatively infrequent developments. Professor Vann suggested this may be the case in his field of solid mechanics (PN5375). In others, such as Professor Andrews' field of Chemistry, the number of new journal articles is vast. In still others, it is necessary to keep up to date with developments in case law or current affairs, as well as the academic literature. Drs Nurka and Dann and Professors Leach and Hamel-Green all gave examples of such disciplines.

B56. The consequence of this is that it is difficult for the employer to determine in advance exactly what time any individual casual academic will spend in professional and discipline currency work. It is a better approach, combining simplicity with fairness, to provide for a standard payment in the manner proposed by the NTEU.

B57. The threshold the NTEU proposes for eligibility for either of the allowances is a reasonable level. A requirement for a minimum of six or more related lectures or tutorials serves the purpose of restricting eligibility for the allowance to those who are not ad hoc or occasional lecturers, but are employed on a “sessional” basis. This eases the regulatory burden on the employer by eliminating any need to administer the allowances for genuinely occasional employees, and is analogous to the superannuation guarantee threshold.

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## The Modern Awards Objective

- B58. There is a requirement on full-time and part-time academic employees to maintain their professional and discipline currency and to be aware of relevant university policies. Such employees are paid wages for discharging these obligations.
- B59. The existing award is not a *fair or relevant safety net*, to the extent that casual hourly-paid employees are required by the nature of the work they perform (and directly or indirectly by requirements of their employer) to perform such work and yet are *not* paid for its performance.
- B60. Casual academic staff include a significant number of low-income workers. Some have other sources of income, but many are primarily or exclusively reliant on their casual academic employment as a source of income (Strachan, Exhibit Z, Attachment 4, Table 168: 37% reliant on sessional employment as their main source of income). 60% of respondents in Strachan's research earned less than \$26,000 p.a. (Table 167). May examined the relationship between primary source of income and income levels more closely, and her findings are set out in Table 4 on page 18 of Exhibit L:

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Table 4: Main sources of income and casual earnings per week

Main source of income	Earning < \$499pw %	\$500-\$999 %	\$1000-\$1499 %	\$1500+ %	Total	Total (n)	Proportion of sample %
My casual employment	40.8	39.9	14.8	4.5	100.0	952	36.4
University/other scholarship	84.2	14.2	1.0	0.5	100.0	703	26.9
Employment outside the sector	59.3	23.4	12.8	8.2	100.0	462	17.7
My family	73.6	20.4	5.6	0.4	100.0	231	8.8
Employment in another non-academic university position	52.6	30.0	12.8	4.6	100.0	133	5.1
Pension/income support I am retired	62.0	30.0	8.0	0	100.0	100	3.8
Other	94.3	5.8	0	0	100.0	35	1.3
<b>TOTAL</b>	<b>60.7</b>	<b>27.0</b>	<b>8.7</b>	<b>3.6</b>	<b>100.0</b>	<b>2616</b>	<b>100</b>

Source: WCAU Casual Academic Staff Survey 2011

This demonstrates that a significant proportion of the very large casual academic workforce is both low income and dependent on their casual academic work (or a combination of their casual academic work and a postgraduate stipend or scholarship) as their primary source of income.

- B61. The considerations relevant to the establishment of a fair safety net in this case are
- It is manifestly unfair that employees be required, explicitly or implicitly, to perform work for which they receive no wages;
  - The relative living standards of this group of low income workers weigh in favour of making the changes proposed.

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- c. The relative vulnerability of workers employed on an hourly-paid casual basis makes it a question of fairness that their entitlements be enforceable and not left to the realm of bargaining.
- d. The NTEU proposal promotes the *efficient and productive performance of work* by providing encouragement to employees to do what is manifestly necessary in relation to discipline currency and policy familiarisation.
- e. It also promotes the *efficient and productive performance of work* by providing employers with a definite incentive to provide induction sessions and staff development opportunities to employees.
- f. It provides for a modern flexible work practice by ensuring that instead of each employee and supervisor having to argue or negotiate how much time might be necessary for these activities, the award provides a swings-and-roundabouts rate, which allows the employee to exercise genuine flexible judgement in each circumstance.
- g. The *employment cost* would be low. It is extremely small as a proportion of overall labour costs (and at the absolute and merely theoretical maximum, would increase employment costs in respect of casual staff by 8%)
- h. The *regulatory burden* consists of an annual payment, which can be processed through existing (mostly automated) payment systems.
- i. The proposal is simple and easy to understand, and is more so than a system based on actual hours worked, given the requirement of Award Clause 14.1 (c):

*14.1 Upon engagement, the employer must provide to the employee an instrument of appointment which stipulates the type of employment and informs the employee of the terms of engagement at the time of the appointment in relation to: . . .*

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(c) *for casual employees, the duties required, the number of hours required, the rate of pay for each class of duty required and a statement that any additional duties required during the term will be paid for; (emphasis added)*

B62. The evidence discloses that the work is required (sometimes as a contractual obligation), is being performed and is not being paid for. An award variation is necessary to give effect to the modern award objective.

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## **Part C – [AM2014/229 Item 11, Academic Salaries, Promotion and the MSAL]**

That unless there is access to academic promotion, academics should have access to reclassification

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### **The change proposed:**

- C1. The NTEU seeks a change to Clause 18 of the Higher Education Academic Staff Award 2010, to provide for access to classification based on work value and a skill-based career path for academic staff, other than casual staff, who do not have access to traditional university academic promotion.
- C2. The change to the Award is as follows, with the words proposed to be added at the end of the third paragraph of Clause 18 indicated in **bold text**.

#### **18. Classification of academic staff**

*Minimum standards for levels of academic staff, other than a casual, are set out in Schedule A – Minimum Standards for Academic Levels (MSAL). The levels are differentiated by level of complexity, degree of autonomy, leadership requirements of the position and level of achievement of the academic. The responsibilities of academic staff may vary according to the specific requirements of the employer to meet its objectives, to different discipline requirements and/or to individual staff development.*

*An academic appointed to a particular level may be assigned and may be expected to undertake responsibilities and functions of any level up to and including the level to which the academic is appointed or promoted. In addition, an academic may undertake elements of the work of a higher level in order to gain experience and expertise consistent with the requirements of an institution's promotion processes.*

*MSAL will not be used as a basis for claims for reclassification by an employee, provided that the employer regularly operates a bona fide academic promotion system based on academic merit which is broadly consistent with the MSAL, to which the employee has access, and by which the employee's classification under this Award can be advanced. Where an employee is entitled to make a claim for reclassification, the employee shall be classified at that classification for which the MSAL best describes the work of the employee.*

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## Arguments of merit and principle in support of the claim

### The existing modern award fail to provide a fair and relevant safety net of terms and conditions

- C3. The current award provision fails to provide a fair, relevant and enforceable safety net with respect to salaries and classifications for academic staff. While the award includes a salary scale and a set of descriptors which are akin to classification standards as found in other awards, the award expressly provides that employees may not use those descriptors (the MSAL) as a basis for claims for reclassification.
- C4. It is clear from the schema of the current provision that promotion in accordance with the university promotion system is key to identifying the classification level at which employees may be required to work – that is, that the link between the salary scale and the MSALs is established through the system of academic promotion.
- C5. However this fails to provide an enforceable safety net in relation to wages for two central reasons.
- C6. First, the quality, transparency and fairness of the promotion scheme is left entirely in the gift of the employer. The award does not require that such a system operate, or even that it exist. For example, it would be possible for a university to suspend the operation of its promotion system indefinitely, thus preventing its staff from obtaining recognition through promotion for the level at which they are working, and consequently preventing them from being paid at a wage level that properly reflects their work value level.
- C7. If the safety net is to be fair and enforceable, then a system of work value assessment that is expressly built upon a promotion system and excludes employees from the more usual path of seeking reclassification requires as a corollary *that there be an*

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*appropriate promotion system in place.* While as a question of fact all Australian universities currently operate a system of academic promotion to which the majority of academic staff have access, the evidence of increased funding pressures on universities raises the possibility that this could be unilaterally changed by an employer seeking to restrict their wages expenditure. Any university employer could decide, in response to funding pressures, to institute a “promotions freeze” or a “promotions quota”. In the current legislative context, in the absence of an award provision, there is no enforcement mechanism available to unions or employees to address such a problem.

- C8. Second, the evidence shows that not all academic staff have access to promotion systems. For these staff, there is no way to enforce classification or payment at an academic level that properly reflects the work value of their role. They have no access to a promotion system which would allow their work to be assessed by their peers and recognised by their employer. Yet the award expressly prevents them from seeking to have their classification level reviewed through an application for reclassification.
- C9. The result of these two factors is that, after the point of initial engagement, the academic level at which someone is employed and paid is entirely at the discretion of the employer, and is not constrained in any enforceable way by the existence of the award classification structure based on work value or relativity.
- C10. It is hard to imagine a more fundamental feature of a fair and enforceable safety net than that an employee be entitled to payment in accordance with the classification which corresponds to the work they perform for the employer. Any system which allows an employer unilaterally to limit the classification and remuneration level of an employee irrespective of the nature of the work, the levels of skills or responsibility involved, is manifestly not a fair and enforceable safety net. Therefore, the current award is deficient.

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C11. The Modern Award operates as a safety net in a legislative context relevantly different to that prevailing when the award provision was first made in 2002.

- a) In 2002 the AIRC retained a general capacity to deal with industrial disputes *per se*, under Section 89A of the *Workplace Relations Act 1996*. In particular, Section 89A (2) gave the Commission a general power to deal with an industrial dispute *inter alia* about ‘*classifications of employees and skill-based career paths*’ (89A (2) (a)).
- b) In 2002, although the certified agreements then in force did not generally deal with how employees were to be classified or promoted, such agreements did not operate to the exclusion of Awards. Section 170LY of the Act stated:

***170LY Effect of a certified agreement in relation to awards and other certified agreements***

- (1) *While a certified agreement is in operation:*
  - (a) *subject to this section, it prevails over an award or order of the Commission, to the extent of any inconsistency with the award or order; and*

Thus, the award provision relating to academic classification operated in the context of the general capacity of the Commission to deal with disputes. Had a university decided to abandon access to promotion, the Commission could have varied the Award or issued an order. Employers knew that if they attempted to deviate from the industry standard of a bona fide academic promotion system based on academic merit broadly consistent with the MSAL, they faced the real prospect of such an award variation or order preventing them from doing so.

C12. It was in the context of the 2002 legislative framework that the current award provision was deemed satisfactory. The framework has changed. The terms of the Award as it currently stands - *MSAL will not be used as a basis for claims for reclassification by an employee* – effectively close off access to any dispute settling procedures, even in

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circumstances where an employer fails to operate a promotion system consistent with the MSAL.

C13. It is clear on the face of the Award that while an employee has a right to be initially appointed at an appropriate work value level, thereafter they have no recourse to any *enforceable right* to be classified, and therefore paid, at a level commensurate with their work value. Access to movement via promotion – including frequency of promotion “rounds”, whether the promotion system applies work value standards commensurate with the MSAL, and the exclusion of some categories of staff from promotion altogether - is entirely within the control of the employer and not capable of being disputed or enforced.

C14. Nor can the BOOT test operate effectively if employees are not entitled to an enforceable rate of pay determinable by reference to work value. An enterprise agreement which replicated the Award, provided for \$1/week more than the Award, but stated that “*There will be a promotion freeze during the operation of this Agreement*” would pass the BOOT test, because “under the Award” there is no entitlement to promotion (and employees rarely have any contractual entitlement to promotion).

### **The term may be included in a modern award**

C15. The words proposed to be added to the Award by NTEU are clearly encompassed by s.139(1)(a). The provision relates to minimum wages, and in particular to the relationship between minimum wages and skill-based classifications and career structures. To the extent that it might be described as incidental to those matters, the NTEU proposal is essential for the reasons set out above to make the minimum wages and MSAL operate in a practical way (s.142(1)(b)).

### **The modern awards objective, the minimum wages objective, and the objects of the Act**

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- C16. The award provides a salary scale applying to an occupation, with different wage classifications established corresponding to different work value levels. To ensure this operates to provide a fair safety net of minimum wages, there must be a connection between the wages and the classifications such that an employer and an employee can ascertain the appropriate minimum wage applicable to the performance of work on the basis of objective factors related to the employee and the work, rather than this being an arbitrary decision of the employer.
- C17. The Act sets out certain circumstances where employees can have a lower minimum wage for performing the same work – for example based on age. However, these are exceptions to the general requirement of fairness and the principle of equal remuneration for work of equal or comparable value. By contrast, in the context of a safety-net of minimum award wages, factors such as the source of funding for a particular employee's employment, or a lack of job security, could have no part in establishing a fair minimum rate of pay.
- C18. At the very least, to the extent that any employee is denied access to promotion, the current provision is inconsistent with *protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes* (s.3(e)), in that it bars the employee from disputing or raising a grievance about a matter (his or her classification) which would otherwise be disputable under the dispute-settling provisions of the Award.

**Goes no further (and introduces no greater complexity) than is necessary to achieve the modern awards objective and the minimum wages objective**

- C19. In the particular circumstance of academic employment, the work value classification structure is “*differentiated by level of complexity, degree of autonomy, leadership requirements of the position and level of achievement of the academic*”, and assessment

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of the appropriate work value level is, as a matter of custom and practice rather than regulation, largely done through a system of academic promotion. These characteristics make this award unique. But neither of these characteristics obviates the need for a modern award to provide a safety net of fair minimum wages. In the absence of access to such a system of academic promotion, the bar on seeking reclassification means the safety net is not fair.

C20. The NTEU's preference is to retain the unique characteristics of academic promotion. The system of academic promotion is not prescribed by the Award, and we do not seek that it be so. Instead, NTEU submits that the Award need only address the circumstance where access to a promotion system is not available (either because an employer decides to suspend or abolish its promotion system, or because some categories of academic staff are excluded from such access), and ensure that in that circumstance employees have access to a mechanism for challenging an inappropriate classification decision by an employer.

C21. Therefore the NTEU proposal seeks to achieve the requisite safety net for all academic employees without disturbing the presumption that providing academic staff with regular access to a bona fide promotion system based on academic merit and consistent with the MSAL is the preferred default mechanism for reviewing academic work value for classification purposes. Where such access exists, there would continue to be no capacity for an employee to use the MSAL as the basis for seeking reclassification. It is only in the absence of such access, that the question arises – how can an employee contest an incorrect classification decision by their employer? The answer cannot be that they are barred from doing so because some other academic staff have access to a promotion system.

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### **Evidence supporting the proposed variation.**

C22. NTEU formally relies on all the witness and other evidence presented. However, set out below is a series of factual contentions which NTEU submits the Commission should find, and under each listed contention some of the more important evidence adduced which supports that contention.

[Note about the Table: Reference to “**Para**” is a reference to witness statement numbered paragraphs. Reference to “**PN**” is a reference to the paragraph number of the transcript. Text in *italic script* indicates a quote from a witness statement or transcript. Other text is a paraphrasing of what the evidence discloses.]

C23. The five-level (Level A to Level E) work value career structure set out in the MSAL in the Award is common to all Australian universities and is widely replicated in enterprise agreements. Academic staff are employed and classified according to that structure. This is evident from the terms of the several agreements which were produced in evidence, and is corroborated, for example, by the evidence of Professor Hughes Warrington.

#### **Professor Marnie Hughes Warrington - Witness Statement, Exhibit 10**

##### **Para 30 – 31**

30. *As noted in the Minimum Standards for Academic Levels (MSALs) set out in Schedule 4 of the Australian National University Enterprise Agreement 2013 - 2016 (ANU EA) the MSALs provide guidelines for the nature of duties to be undertaken by an academic staff member. The Levels range from Level A to E (inclusive) for teaching and academic staff as well as for research academic staff (which includes creative disciplines). A copy of Schedule 4 of the ANU EA is attached to this statement and marked “MHW-2”.*

31. *An academic appointed to a particular level may be assigned and may be expected to undertake responsibilities and functions of any level up to and including the level to which the academic is appointed or promoted. For example, a Level E may be engaged in tutorials but is probably less likely to do so. A Level B or C may teach honours student seminars but is generally less likely to do so than at Levels D and E. Institutional practice will also vary.*

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C24. All employers covered by this Award have systems of academic promotion based on broadly defined academic merit, and consistent in general terms with the Minimum Standards for Academic Levels, which are set out in the Award as Schedule A. See Attachment A to the statement of Ken McAlpine (Exhibit G, pp 9 – 247) for examples of University promotion policies. This was acknowledged by the Go8 at paragraph 144 of Exhibit 5, and by the AHEIA at paragraph 94 of AHEIA 4. The only two mechanisms available for academic staff to move from one classification to another are by application for and appointment to an advertised position at a higher level, or by academic promotion. Neither under the Award nor under EBAs or employer policies do academics have access to any system of classification review.

C25. The system of academic promotion is supported as the dominant means of progression within the Award-based career structure. Academic promotion based on academic merit represents the preferred manner of judging work value for academic staff, provided it is rigorous and has appropriate elements of peer review. This preference is shared by the industrial parties. The determinations made in the promotion process about the academic standing of the employee's teaching, service and research (academic merit) require real academic judgement of the work actually being performed by the employee, rather than the "duties" of a particular "position".

C26. This is apparent from the terms of the promotion policies set out in Attachment A to Exhibit G. For example, the Australian Catholic University Academic Promotions Policy (pp 10 – 14) states in its preamble (pg 12) that "*Academic Staff will have the opportunity to apply for promotion on the basis of their demonstrable achievements in relation to selection criteria which are aligned to Academic Career Pathways.*" The Charles Sturt University policy (pp 33 – 36) states at paragraph 2 (p. 33) that "*The purpose of academic staff promotion is to recognise the achievements and professional*

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*development of academic staff and their demonstrated capacity to contribute to the University’s mission by undertaking duties at a higher level than their current appointment.” The Deakin University policy (pp 43 – 47) states as criteria for promotion (at paragraphs 10 – 12, pp 44-45):*

- “10. Promotion is sought on the basis of sustained achievement relative to opportunity in terms of the demonstrated quality and impact of outcomes in the following academic fields:*
  - a) Learning and Teaching*
  - b) Research and Scholarship*
  - c) Service.*
  
- 11. Applicants must weight their case for promotion using either of the following two options:*
  - a) Option A: Sustained contribution at the level of promotion sought in **two** of the academic fields and a sustained contribution at the current level of the applicant in the **third**; or*
  - b) Option B: Sustained contribution that is exceptional for the level of promotion sought in **one** academic field, and a sustained contribution at the current academic level of the applicant in the other **two**.*
  
- 12. The Minimum Standards and Typical Duties for Academic Levels are located on the Academic Promotion website.”*

These statements are typical of university promotion policies, which look to the academic merit of the applicant, who, if successful, will continue in their current position but be classified and paid at a higher work value level.

C27. In this sense, the great majority of academic staff do not have a “position” that is identified in reference to a particular classification. Academics who apply for promotion are not applying for a different job, but for appropriate recognition (in the Award sense) of the work already being performed by the employee. This means that academic promotion is fundamentally different to conventional promotion as it is understood in other industries, where the employee applies for and obtains a higher classified position.

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C28. The Go8 concurred with this in their submissions at paragraph 148 of Exhibit 5.

AHEIA concurred with this in their submissions at paragraph 94 of AHEIA 4.

C29. The data reported by Professor Glenda Strachan about the expectations and experience of academic staff in relation to career movements supports the conclusion that many academics move to a higher classification level after their initial appointment via promotion.

#### **Professor Glenda Strachan - Witness Statement: Exhibit Z, Attachment 4**

“Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities” (2012 Report, Attachment 4 to Exhibit #Z))

Section 3: Academics (non-casual)

Table 69: *All* respondents reported obtaining their current substantive level of appointment either through appointment or promotion.

Table 87: 55% of respondents want, and 40% expect, to be working at a higher academic level at the same university in five years time.

Table 90: 90% of non-casual academics were first appointed at Level A or Level B.

Table 91: Shows the high incidence of academic staff having previously worked at lower academic levels than that they currently hold.

Table 95: Shows that 41% of respondents have made at least one application for promotion in the last 5 years, of whom 85% have been successful at least once.

C30. The University of Queensland *Annual Workforce Profile Report 2015* (Attachment L to Exhibit H) states at page 3 of that report that “*in 2014, 4.7% of UQ academics were successfully promoted compared to the Australian Universities average of 5.2%*.” Table 45 in that report (pg 41 of 60) sets out the promotion rates at each academic level over five years, comparing university of Queensland, the Go8 universities and with all Australian universities. This table shows a steady progression through the skill-based classification structure via the mechanism of academic promotion.

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C31. Similarly, the Edith Cowan University *Universities HR Benchmarking Program 2013* document (Attachment M to Exhibit H) sets out at page 9 of 97 the academic promotion rate for that university at 3.32% in 2012, compared with 7.06% in 2008.

C32. The evidence showed that some employer promotion policies exclude some classes of employees from promotion, on a variety of grounds. See for example, the following elements of the promotion policies found at Attachment A to Exhibit G:

- **Australian Catholic University** at p. 12 (of the consolidated numbering of Exhibit G): Eligibility excludes fixed term employees unless their contract is of at least three years duration.
- **Curtin University** at p. 37: Eligibility excludes Scholarly Teaching Fellows and Ongoing Sessional Fellows.
- **Edith Cowan University** at p. 50: S.5.1.3(b) excludes persons against whom the University has initiated a formal disciplinary procedure.
- **Flinders University** at p. 56: C1 3.2 excludes fixed term employees with a cumulative term of employment of less than three years.
- **Griffith University** promotion policy for research-only academics at p.68: Eligibility excludes staff who have an appointment of less than three years duration, and staff whose position is funded from an external source unless the funding body or the relevant academic group agrees to the promotion and confirms that funds are available to cover it.
- **Monash University** at p. 103: Research-only staff will not be eligible unless the head of unit confirms that there is funding available for the promotion and identifies the source of funding.

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- **Murdoch University** at p. 104-5: Excludes staff who have served in their current appointment for less than three years prior to application.
- **University of Newcastle** at p.12: 2.3.2 Excludes part time and fixed term employees on appointments of less than three years, (although 3.2.4 and 3.2.5 allow exceptions to be made for “compelling reasons”).
- **University of Sydney** at p. 155: 8(3) Grant funded staff eligibility is dependent on funding and grant conditions.
- **University of Queensland** at p. 210: Research-only staff eligibility is dependent on funding and grant conditions.
- **University of Technology, Sydney** at p. 226-7: 4.3(b) Eligibility of employees on external grant funding is subject to availability of funding. 4.3(e) employees against whom formal disciplinary action is taken are excluded.

C33. Professor Vann at PN5490-97 gave evidence in relation to the eligibility criteria in the Charles Sturt University promotion policy (MFI# 30, pp 3-4) to the effect that there is restricted eligibility for promotion at that University for staff on externally funded appointments and staff on joint appointments.

C34. It is common ground that academic promotion is not prescribed by awards or enterprise agreements, except to the extent that the existence of employer promotion policies is referred to in those instruments. This is confirmed by the AHEIA at paragraph 95 of AHEIA 4.

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Part D – [AM2014/224 and AM2014/229 Item 1, Drafting errors re casual Academic rates of pay]

### Correcting characterisation of PhD point and descriptions of some rates.

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## Outcomes of Exposure Draft process

- D1. In relation to the **Educational Services (Post-Secondary Education) Award 2010**, the NTEU does not pursue any further changes than those already agreed between the parties during the Exposure Draft process.
- D2. In relation to the **Higher Education – Academic Staff – Award 2010**, some aspects of the NTEU claim have been addressed in the exposure draft process. Others remain unresolved.
- D3. The key elements of the NTEU claim were:
  - a) *Clarification of the points in the salary structure at which relevant doctoral qualifications and full subject coordination duties become relevant to determining the rate of pay.* In relation to this, the NTEU does not pursue any further changes than those already agreed during the Exposure Draft process;
  - b) *Providing definition of the terms “lecture”, “tutorial”, “repeat lecture”, “repeat tutorial”, and “associated working time”.* In relation to this, the NTEU presses the proposition that in the absence of any definitions, the modern award fails to provide a fair safety net of wages.

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## The Modern Award principle

### ***The existing modern award fails to provide a fair and relevant safety net***

- D4. The rates of pay for lecturing and tutoring, and the concept of associated working time for these and several other categories of casual academic work, are key elements of the structure of the casual rates of pay in the modern award. The evidence of Professor Strachan, Associate Professor Junor and Dr May showed that delivering lectures and tutorials is a very large part of the work for which academic staff are employed.
- D5. It is fundamental to a fair safety net that employers and employees be able to determine which rates of pay attach to which work. The pre-reform regulation of these rates was characterised by clear statements limiting the circumstances in which the different rates applied. The modern award fails to do so.
- D6. The casual rates schema in this award is, by longstanding consent between the industrial parties, built on two conceptually distinct methods of measuring and paying for work.
- a) First, for lecturing, tutoring, undergraduate clinical nurse education and musical accompanying, it is accepted that in addition to the easily ascertained duration of the actual educational delivery period (the lecture, tutorial, clinical class, etc) there will be an amount of time spent in preparation, marking and student consultation around that delivery time, that is difficult to predict, prescribe or measure. For these forms of work, the rate of pay builds in an assumed amount of time for such other duties directly related to but performed outside the actual educational delivery time. Thus these duties are paid for

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*time actually worked* in delivering a class and *time assumed to have been worked* to make that delivery possible or directly arising out of the delivery.

- b) Second, for all other academic duties, work is simply paid by the hour for *time actually worked*, in the same manner as for other employees.

- D7. This distinction can only make sense if there is a quite unambiguous boundary between the two types of work. This is achieved by making very clear what work is associated with the hour of delivery (e.g. of a lecture) and what is not. Unless this is clear, there will be disputes about whether, for example, a lecturer having a discussion with a student about their study project falls within the hours deemed to be associated with a lecture, or whether it is “other academic duties” and therefore separately payable, or about whether a particular lecture should be paid as a lecture or as a repeat lecture.
- D8. This was solved in the *Higher Education Academic Salaries Award 2002* (the pre-reform award) by the inclusion of a clear parameters for what work is directly associated with the hour of class contact time, and by implication, what is not.
- D9. The definitions also reflect the clear delineations of associated work which have been the subject of industrial contest and arbitration over many years. While it is accepted, for example, that student consultation directly contemporaneous with the lecture or tutorial is encompassed, if student consultation occurs at some other time, it should be separately paid for. It is only ‘directly related’ associated work that is encompassed in the hourly rates for casual teaching work. The current award formulation does not make this clear, and leaves casual staff open to having other work imposed on them without appropriate separate payment.

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***The NTEU proposal is a term that may be included in a modern award***

D10. Definition of the terminology used in the casual rates of pay table is clearly a term that may be included in a modern award. It either directly regulates rates of pay (s.139(1)(a)), or it is incidental to that regulation and essential for it to operate in a practical way (s.142(1)).

***The modern awards objective***

D11. The provision of definition of the casual rates not only contributes to the establishment of a fair and relevant minimum safety net by ensuring clarity as to the operation of the award terms, it reduces the regulatory burden on employers and ensures the award provisions are easy to understand. (s. 134(1)(f) and (g), and s. 284(1))

***Goes no further (and introduces no greater complexity) than is necessary***

D12. The words now proposed by the NTEU significantly pare back the more extensive definitional provisions which existed in the pre-reform awards. NTEU submits that the definitions proposed retain the core elements of those definitions without importing excessive detail or complexity.

***Evidence supporting the proposed variation***

D13. NTEU relies upon the analysis of the award history provided in earlier submissions.

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## The Provision Proposed

- D14. In light of the changes to the award agreed in the exposure draft process, NTEU now submits that the best way to address the need for definitions of the terms identified in D3 (b) above is to include them either in a new 9.4 (c) or as additions to the list of definitions at Schedule E.
- D15. Therefore NTEU proposes that the following definitions be included in an appropriate location in the modern award:
- a) *“lecture” means any education delivery described as a lecture in a course or unit outline, or in an official timetable issued by the University (including equivalent delivery through other than face-to-face teaching mode).*
  - b) *“tutorial” means any education delivery described as a tutorial in a course or unit outline, or in an official timetable issued by the University (including equivalent delivery through other than face-to-face teaching mode).*
  - c) *“repeat lecture” or “repeat tutorial” means a second or subsequent delivery of substantially the same lecture or tutorial in the same subject matter within a period of seven days of the original delivery.*
  - d) *“associated working time” means time providing duties directly associated with the hour of delivery, being duties in the nature of preparation and reasonably contemporaneous marking and student consultation.*

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## **Part E – [AM2014/230 Item 11 General Staff working hours and overtime]**

That employers be obliged to take active steps to prevent the working of uncompensated additional hours

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### **The changes to the Award which the Union is seeking**

E1. The variations sought are as follows, with the **bold and underlined** words indicating new words proposed:

At the commencement of clause 21:

#### **21. Ordinary hours and spread of ordinary hours**

**The maximum ordinary hours of work, and the spread of hours during which (other than for shift workers) ordinary hours can be worked, shall be as set out in the following table, provided that** ordinary hours may be worked in a manner agreed over a four week cycle.

At clause 23:

#### **23. Overtime**

**23.1** An employee will be paid overtime for all authorised work performed outside of, or in excess of, the ordinary or rostered hours as follows:

<b>Time worked</b>	<b>Overtime rate</b>
Monday—Saturday	150% of the ordinary rate of pay for the first two hours (first three hours for PACCT staff); and 200% of the ordinary rate of pay thereafter
Sunday	200% of the ordinary rate of pay
Public holidays	250% of the ordinary rate of pay

**23.2 The employer must take reasonable steps to ensure that employees are not performing work in excess of the ordinary hours of work or outside the ordinary spread of hours as specified in clauses 21 and 27,**

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**except where such work has been authorised and compensated in accordance with clauses 23, 24 or 26.**

**23.3 An employee at Level 6 or above who responds to or uses email or phone messaging beyond or outside the ordinary hours of work for brief periods, and only occasionally, to meet the needs of the employer, will not be deemed to be performing work beyond or outside the ordinary hours of work, provided that the sending or responding to such email messages at that time is not part of their assigned duties, contract or conditions of employment, has not been directed and is in all other senses voluntary.**

E2. The proposed change to the opening sentence of Clause 21 is intended to make the text more clearly consistent with the existing purpose and intention, so that it can be more readily understood by the lay reader. The NTEU does not rely on any specific evidence as such to support this proposal. NTEU understands the employers either have no position on this proposed variation or in the case of the Go8 universities considers it to be unnecessary. In the NTEU's submission, ordinary hours should be expressed as a maximum, and the "spread of hours" (a term of jargon) is not explained and is not used in the clause about overtime. What we have proposed remedies that defect so that the ordinary reader understands what the Clause means.

E3. The proposed addition of new text in Sub-clause 23.2 would retain the requirement that overtime be authorised, and that an entitlement to overtime attaches not merely to the *performance* of additional productive, or even necessary work outside the span of hours or in excess of the maximum ordinary hours of work. However, the *quid pro quo* for this requirement is added in the new Clause 23.2. This would require the employer to take *reasonable steps* to ensure that unauthorised (and therefore uncompensated) overtime is not being performed by employees. The new Sub-clause creates no

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entitlement to be paid for unauthorised overtime, nor does it make the performance of unauthorised overtime by the *employee* in any particular instance a breach of the Award by the *employer*.

- E4. Nevertheless, it is the intention of the proposed sub-clause that while the *reasonable steps* which are required are to be determined by the employer and judged objectively, their purpose is to *ensure* that additional work is not being performed. The word “*ensure*” is deliberately chosen, meaning “*to make secure or certain to come*” (Macquarie Dictionary). In proposing this formulation, NTEU intends not that the test is whether *no* uncompensated work is occurring. Rather, the test is to be whether reasonable steps are being taken to make sure that such work is not being done. This variation is opposed by the employers.

- E5. The NTEU also seeks the insertion of a new Sub-clause 23.3, to qualify and limit entitlements to overtime:

*23.3 An employee at Level 6 or above who responds to or uses email or phone messaging beyond or outside the ordinary hours of work for brief periods, and only occasionally, to meet the needs of the employer, will not be deemed to be performing work beyond or outside the ordinary hours of work, provided that the sending or responding to such email messages at that time is not part of their assigned duties, contract or conditions of employment, has not been directed and is in all other senses voluntary.*

- E6. NTEU hopes that the effect of the changes to the previous Sub-clause considered (23.2) will be to largely eliminate the practice of unauthorised overtime. However, there are current widespread practices of employees using information and communication technology systems such as phone messaging, email and remote access to email university computer systems, to get small amounts of work done from home or elsewhere outside the normal span of hours. The purpose of this sub-clause is to complement that by ensuring that certain limited classes of out-of-hours’ work undertaken by middle-level and senior employees neither require the payment of

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overtime under Clause 24 (which involves two hours minimum payment), nor need to be eliminated by virtue of the proposed new Sub-clause 23.2. Surprisingly, this sub-clause is opposed by the employers.

## **Introduction**

- E7. The arguments of merit around this claim remain largely unaffected by the evidence, which NTEU contends, nevertheless supports the merit case, as presented in the Union's Outline of Submissions of 11 march 2016 (NTEU Exhibit B). The evidence tended to support all the arguments of merit put at that time. NTEU considers these proposals to be relatively unexceptional, and is genuinely astonished at the lengths to which the employers have gone to oppose the claim about employers taking reasonable steps to ensure employees do not work unpaid or uncompensated overtime, and these submissions will concentrate on the evidence and arguments relevant to that proposal.
- E8. These submissions will review the witness and other evidence, and then briefly address the legislative scheme to which the Commission has to have regard in conjunction with the principles we say are relevant.

## **What the evidence disclosed**

- E9. Although not strictly evidence, the following, which was included in the NTEU's Outline of Submissions (NTEU B) was, as far as NTEU could find, not contested and set out some basic facts about the employees and industry which are relevant to the proposed variations. We submit that the Commission is entitled to rely on these submissions, and on the witness evidence given about the financial size of the sector in the Attachment E to Ken McAlpine's witness statement (NTEU G).

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- a. In addition to the perhaps 30,000 hourly paid employees, there are approximately 68,000 employees employed full-time or part time as general staff within the coverage of this Award. A large majority of these employees are full time, but a significant minority is part time. The average fraction of all general staff in public universities is close to 0.85 FTE. Approximately 30% of general staff (excluding casuals) are employed in precarious employment, in the form of a fixed-term contract. Around 65% of employees are women.
- b. In excess of 95% of employees are employed in the 37 public universities or the Bachelor Institute of Indigenous Tertiary Education (a public institution). There are also employees at University of Notre Dame Australia, Bond University, and a number of small private institutions, as well as student unions.
- c. The Award classifies all employees in one or other of ten levels as set out in the Award. The approximate distribution of employees between the classifications (in public universities) is as follows:

Classification	% of all general staff
HEW 1	0.3%
HEW 2	1%
HEW 3	4.7%
HEW 4	13.1%
HEW 5	21.9%
HEW 6	20.2%
HEW 7	16.6%
HEW 8	12.2%
HEW 9	6.2%
HEW 10	3.6%

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- d. The great majority of employees are described as professional, administrative, clerical, computing or technical staff. According to traditional labels, the largest group of staff would be described as clerical/administrative, but there is a large proportion in professional occupations (e.g. Librarians, Accountants, and Lawyers) as well as a large number of managerial, technical, scientific and information technology staff. There is a small number of staff employed in trades, services and physical grades (e.g. gardeners, parking attendants, security staff). There are around three thousand general staff who are classified as research-only staff.
- e. Only a small minority of employees are employed as shift workers, and a big majority of staff are engaged in areas which can best be described as five-day (Monday to Friday) operations.
- f. Payment of money for *overtime* worked, in many work areas, is not the most common practice. Where compensation is given for *overtime*, the granting of *time-off-in-lieu of paid overtime*, is more common.
- g. The nature of much general staff work is specialised or geographically or organisationally isolated. For a large proportion of employees, the work is not performed in close proximity to, or in some cases even at the same time, as the employee's supervisor, and work or working time is not closely monitored

E10. NTEU now turns to the witness and other evidence presented. NTEU formally relies on all the witness and other evidence presented. However, set out below is a series of factual contentions which NTEU submits the Commission can find. Under each contention is a general commentary about the evidence and the contention, and its relevance. Then is listed some of the more important evidence adduced which supports that contention.

[**Note about the Tables:** Reference to “**Para**” is a reference to witness statement numbered paragraphs. Reference to “**PN**” is a reference to the paragraph number of the transcript. Text in *italic script* indicates a quote from a witness statement or transcript. Other text is a paraphrasing of what the evidence discloses]

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**Many or some employers have no systems or procedures or practices to prevent or discourage the performance of unauthorised overtime.**

E11. Certainly the evidence tended to show this. While all employers pointed to the undoubtedly fact that employees had the legal right to claim paid overtime or TOIL as applicable, they were unable to point to any employer who had any systems to prevent the performance of unpaid overtime. There were certainly no “best practice” examples – not even any written policies or instructions to staff.

**Andrea Brown Witness Statement – Exhibit NTEU Y**  
**PN 3896-3897**

**Andrew Giles Witness Statement – Exhibit NTEU AG**  
**Para 19**

**Clark Holloway Witness Statement – Exhibit NTEU W**  
**Supplementary Statement Exhibit NTEU X**

**PN3704**

*Mr Holloway, were you ever advised by a supervisor or anyone else to claim overtime?--- No, I was not.*

**Professor Michael Hamel-Green Witness Statement – Exhibit NTEU AD**

**Paras 44-46** - No attempt to investigate OHS impact of long working hours.

*45. ... I have never received, nor issued, an instruction to limit or prevent the working of unpaid overtime by general staff, or otherwise to encourage people to limit their working hours. In practice, the university relies on that unpaid work being performed.*

**Steve Adams Witness Statement – Exhibit NTEU N**

**Para 22-** *The University human resource and payroll system, Themis is the staff ‘hub’. Staff must record everything from leave, recruitment information, pay, personal development and procurement.*

*There is a specific tag in the system within “Timecard” titled “record overtime” but this is only applicable to authorised overtime. For unpaid overtime the University informs staff to make local arrangements with their line manager.*

**Para 33** - *I have never been directed not to perform uncompensated overtime.*

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#### **Sue Thomas Witness Statement, Exhibit AHEIA 8**

**PN4196** - Now your online system for people to enter their flex time doesn't track how many hours are actually forfeited by staff in that way, does it?---No, it doesn't. They are expected to manage and to talk to their supervisors about those sorts of things.

**PN4197** - So there was nothing flagged to HR that there might be a problem worth addressing there?---That's correct.

**Some employers have systems which discourage or prevent the recording or claiming of some overtime.**

E12. There was little evidence that staff were even required to write down or advise their employer when they had worked additional hours. In fact, computer systems or administrative and management systems seemed consistent with a design aimed at making it difficult for staff to register or claim for their hours of work.

E13. Two active union members - Ford and Holloway - (a bargaining team member and NTEU Branch President) were not familiar with the way that the university claims the flex time and overtime provisions intersect, nor did they make claims for overtime payment. If the system operated to confuse or discourage claims from them, then what chance did ordinary general staff have?

#### **Andrea Brown Witness Statement – Exhibit NTEU Y**

#### **Para 18**

#### **Andrew Giles Witness Statement – Exhibit NTEU AG**

#### **Para 21**

#### **Clark Holloway Witness Statement – Exhibit NTEU W Supplementary Statement Exhibit NTEU X**

**Para 11, Ex W** - Sets out features in University of Wollongong time record system which prevent the recording of some hours worked.

**Para 12, Ex W** - These are deliberate design features, which result from the specifications that IT was provided with by HR.

**Paras 3, 4, 5, Ex X**

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#### **Karen Ford Witness Statement, Exhibit NTEU V**

**Para 13 -** *The Flexible Working Hours Arrangement policy only allows a staff member to accrue 10 hours at any time- anything over 10 hours is forfeited.*

**Para 14 -** *... in 2015 I lost 20 days of flexitime as I was unable to carry more than 10 hours of the accumulated time forward into the next timekeeping period. ...*

#### **Attachment 5**

#### **Steve Adams Witness Statement – Exhibit NTEU N**

**Para 52-54 –** *I identify three scenarios which impact on overtime arising from the restructure. The first*

*scenario is that of the 550 general and professional staff who left the University, few would have received any compensation for accrued TOIL. Where the TOIL was officially recorded it would have been paid-out, but otherwise the University has benefited from large amounts of 'free' work from its staff.*

*53. The second scenario applies to staff who applied for another job within the University and moved departments as a result of the restructure. Their accrued TOIL, which is supposedly subject to local arrangements is most likely lost? I cannot imagine that staff take any accrued TOIL with them to the new area. If staff do not have a record of their TOIL and are merely used to some flexibility in taking time off via a deal with their supervisor, any 'accrued' time would be lost as they move. Staff would not be able to account for or prove their accrued TOIL. In this scenario a number of NTEU members told me that they just didn't bother with their accrued time when they moved areas. Some said they would not feel comfortable raising this on moving and also did not know when they would ever take the time upon transferring to a new area.*

*54. The third scenario is where staff stayed in their job (eg: technical staff) but they obtained a new supervisor as a result of the restructure. I know this was the case in Engineering where a few managers lost their jobs. Staff did not know the new manager's approach to overtime and TOIL or whether the new manager would ensure that staff are adequately compensated for the extra work that they do.*

**Generally speaking (as under the Higher Education General Staff Award) enterprise agreements require the authorisation of compensated overtime, not merely the authorisation of the performance of the work.**

E14. This was made out, and is apparent from a perusal of some of the agreements tendered or referred to. This was not contested.

#### **Andrea Brown Witness Statement – Exhibit NTEU Y**

#### **Para 18**

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#### Karen Ford Witness Statement, Exhibit NTEU V

##### Attachment 1 to Ex #V

**See paragraphs 11 – 12 - 11.** *The maximum credit that can be carried over at the end of each 4 weekly accounting period is 10 hours.*

**12.** *Where a member of staff has a credit in excess of 10 hours at the conclusion of the account period the excess above 10 hours will be forfeited unless such hours have been approved in advance as overtime or, for part-time staff, additional time. (see Overtime)*

**Also paras 25 and 28 - 25.** *Additional hours worked within the bandwidth time are automatically part of a staff member's flexi-time credit. If however a staff member has hours in excess of his/her regular hours of work (as defined under - Accounting Period) to credit at the end of an accounting period and such hours have been approved in advance as overtime, they should be deducted from the flexitime total and paid as overtime by the submission of an overtime claim form....*

**28.** *Note: All hours worked outside the bandwidth are automatically overtime, if prior approval has been given for the working of such hours.)*

#### Professor Michael Hamel-Green Witness Statement – Exhibit NTEU AD

**Para 35 - ...** *There is a clear rule at VU that overtime will only be paid (or TOIL authorised) if the additional hours were approved in advance. I am aware of at least one instance where a claim for overtime for time worked was refused on the basis that the time had not been approved in advance.*

#### Andrew Picouleau Witness Statement – Exhibit Go8 12

**Exhibit #12, Attachment AP-1 at 75.1 -** *"...all authorised time worked in excess of or outside of the ordinary hours of duty..."*

**Exhibit #12, Attachment AP-4 at 2.1 -** *Only "Authorised overtime worked" and "authorised recall overtime" is to be recorded and paid for or counted as TOIL*

**The keeping of time records of actual time worked is not widespread in universities for general staff.**

E15. This was not contested.

#### Andrew Giles Witness Statement – Exhibit NTEU AG

##### Para 26

#### Steve Adams Witness Statement – Exhibit NTEU N

**Para 17 -** *So during semester for the last 10 years or so, the nature of my work is that I would perform an average of 5-10 extra hours work per week. Neither I nor my supervisor record these hours but generally if I have a family commitment or appointment, I can let my supervisor know and take the extra time.*

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**Para 19 -** *The University does not have a central procedure or process in place for recording extra time worked. Ten years ago, when we were still supervised by academics, we were asked to keep a log of time worked. Now, the University says to make ‘local arrangements’ in other words, negotiate with your direct supervisor. In my area of Engineering, there is no process for recording extra time.*

#### **Andrew Picouleau Witness Statement – Exhibit Go8 12**

PN6757

*Does it collect data on the actual hours worked by its general professional staff?---Well, when you say collects data, it would certainly - it has a payroll system that includes information about the work that is paid for and so it assumes a model of ordinary hours and it records work done outside the ordinary span of hours. So in that sense it has data on its professional staff working hours.*

PN6758

*It has data on the hours that have been authorised, effectively?---Yes.*

PN6759

*But no data on how much other time professional staff might do that they haven't claimed for?---No.*

**Some employees work necessary overtime, without making claims for overtime, either because of work pressures or because of perceived concerns that they should not do so.**

E16. NTEU witness evidence supported this contention. Professor Strachan's evidence was that 67% of general staff respondents indicated that they received *no compensation* for working additional hours above their set hours, including about one-third of staff in the lower classifications. This was somewhat more rigorous sample and study than the NTEU Survey **Attachment I to NTEU Exhibit G (at page 2553 of the documents)** which found related figures to be only 17% for “*I am supposed to get TOIL but in fact I lose some or all of this*” and 21% for “*There is no arrangement to compensate me for extra time worked*”. In any case, even if Professor Strachan's figure (67%) overstates the real situation by a factor of four, which is highly unlikely, this would mean there would be a very serious hole in the safety net. The employer cross-examination primarily sought to establish that there were means by which employees *could* claim

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overtime or TOIL, which the union, except in some cases, does not contest, and is not relevant to this contention.

E17. Moreover, in Attachment I to Exhibit G, at page 2558 (of the consolidated page numbering of Attachment G) there are 286 comments from general staff in response to a question “If you answered for the previous question that you work additional “uncompensated” hours of work, which of the following best describes your reasons for working these hours?” Despite obviously not being a representative sample (and by no means as bleak as the academic comments about workloads), the comments are quite instructive about the issues, and the reasons why general staff may work uncompensated additional hours.

E18. The Climate Survey conducted by University of Wollongong, is not direct evidence about uncompensated hours of general staff. The Survey showed levels of satisfaction with a range of factors at the university (MFI# 23 & 24). As employer witness Sue Thomas acknowledged in evidence, while there were many factors about which staff were quite satisfied, workload was an area which stood out amongst general staff as giving low satisfaction (with only 49% agreeing or strongly agreeing on average with 3 propositions, indicating satisfaction with workload, as put on page 11 of MFI#23, and this average shown for general staff is at page 1 of MFI#24). Even more informative (though not disaggregated for academic and general staff) is the information, also at page 11 of MFI#24, which compares satisfaction at the University of Wollongong with “Other Australian and NZ Universities” and with “Other Industries”. This indicates that the low satisfaction with workloads at Wollongong matches the average of other Australian and New Zealand universities, which gives us something of a national picture. It also shows that university staff as a whole are significantly dissatisfied on the key workload question “*My workload is manageable*” with 44% of Australian

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university staff agreeing or strongly agreeing, 17% less than for the survey results for “All industries”. This gives us an important glimpse into the state of satisfaction of university staff with workloads.

#### **Andrea Brown Witness Statement – Exhibit NTEU Y**

**Para 18, 21** - *As stated above, at HEW 8 I was not eligible for paid overtime but accrual of TOIL on a time for time basis in accordance with the Collective Agreement. However, approval to accrue TOIL was never provided. In comparison to my first job at VU in the 1990s where approval to accrue TOIL was provided (even though I was actually entitled to paid overtime but it was never approved), by the early to mid-2000s, I witnessed a change in organisational practice, where the entitlement to accrue TOIL was effectively removed. Such practice and change occurred despite entitlement to these forms of compensation for working additional hours in accordance with the collective agreement. While my employer and I knew I was entitled to accrue TOIL at a HEW 8 level for working additional hours, one of the ways in which my manager effectively achieved this change in practice was to insist on prior approval to work additional hours and accrue TOIL on that basis.*

**Para 23** - *During my employment at VU, I witnessed many other colleagues regularly working additional hours. I can categorically say that whilst I was in this role for 14 years, both in the Equity area and under HR, to my knowledge none of my colleagues in these organisational areas received paid overtime. In the latter years, they were also unable to accrue TOIL for additional hours worked, despite the entitlement in our collective agreement. The one exception to this was when staff were expected to work once a year on a Sunday for the University annual Open Day . . .*

#### **Para 25**

**PN 3895** [Witness had flexibility due to family responsibilities but this did not mean total work requirements were reduced.]

#### **Andrew Giles Witness Statement – Exhibit NTEU AG**

#### **Para 3 and 25**

#### **Karen Ford Witness Statement, Exhibit NTEU V**

**Para 16** - *I feel like I am constantly ‘catching-up’ with my workload and I therefore can’t afford to take time off.*

#### **Steve Adams Witness Statement – Exhibit NTEU N**

**Para 13** - *In Engineering, the last 10-15 years has seen an increase in student numbers in Undergraduate degrees. Working excess hours or outside of hours has increased during this time as technical/Laboratory based Staff are required to support a jam-packed teaching timetable. I am eligible for time off in lieu of overtime (TOIL) but I would not have even taken half of the time owed to me.*

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#### Professor Michael Leach Witness Statement, Exhibit NTEU AE

**Para 29** - *Particularly in the last year or two, there has been an occasional but increasing tendency for general staff within my general work area to contact me by email well into the evening, about work matters. It is apparent in most of these cases, by virtue of the fact that I have been sent spreadsheets or other extensive written work that these general staff have been putting in substantial time outside their paid working hours. This work is not the subject of any prior authorisation, and therefore would not qualify as overtime. I am aware that these employees, like their academic colleagues are under considerable workload pressures and often face rigid deadlines.*

#### Anthony Wilkes Witness Statement – Exhibit NTEU F

**Para 18** - *In my experience, it was part of the working culture at Roseworthy to "get the job done". The school has expanded significantly since I started in 2008. I no longer know everyone's name or what they do, so it's hard to comment on whether this culture still remains, but I think for the most part, everyone will do whatever is needed to keep the place running efficiently and to a high standard. Like many university departments, there is a requirement to do more work than we are funded for, and in our start-up phase, the only way to achieve that was for staff to work hours that we did not claim for. Many general staff in my area contributed longer hours than were paid for. ....*

#### Professor Glenda Strachan Witness Statement , Exhibits NTEU Z

**PN4301** - *I'll wait until we're all on the same page. There are six questions there, E1 to E6, and E5 is, "When you work more hours than your set weekly hours, how are you compensated"?---Yes.*

**PN4302** - *Could you tell us what your findings were in relation to that question?---Right. Well, we'd already asked a couple of questions about how long people [general staff] had worked in E1 to E4, so in E5, we asked when you work more than your set weekly hours, how are you compensated and there were there options and the possibility for adding some comments. So the first option was overtime payment, the second option was time off in lieu of overtime, and the third option was no compensation. The fourth box was "Other" if people wanted to write some different things in. Well over 95 per cent ticked boxes 1, 2 or 3, and of that, 17 per cent said they received overtime payment and I think 12 per cent received time off in lieu of overtime and 67 per cent said they received no compensation for their weekly hours, for hours worked over their weekly hours. Set hours.*

**PN4421** - *Did you seek to exclude HEW 8, 9 and 10 from your survey question or qualify it in any way?---No. We asked everybody all of those questions. I have, however, data we've worked out by their answers by level there, and so it - I have it in my bag. I can't remember it all in my head, but we have done the cross-tabulation between level and compensation.*

**PN4422** - *Yes?---So I can provide you with that precise detail actually. I know from memory that, was it, 32 or 34 per cent, around that, of levels 1, 2, 3 and 4 said they received no compensation and being the lowest group of - like, lowest-paid employees, they are definitely entitled to that, so it was just in excess of 30 per cent of that group said that they had no entitlement - they had - did not receive any compensation for work in excess - of excess set hours.*

#### Sue Thomas - Witness Statement, AHEIA 8

**MFI#23, MFI#24, Climate Survey**

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**Job insecurity for many non-casual employees has the effect of increasing power imbalances and consequently limiting the willingness of employees to claim overtime when it is worked.**

E19. Increasing job insecurity is one important reason why general staff may, in the absence of clear encouragement to do so, many general staff may not report or seek authorisation for additional hours worked.

#### **Andrea Brown Witness Statement – Exhibit NTEU Y**

##### **PN3842**

*Yes?---But I would add more importantly that the expectation in relation to the way in which this worked in the institution, and certainly in that workplace area of the institution, the expectation was that you would not seek TOIL for hours worked. That it was a requirement or an expectation if you like that you would manage your workload within working hours. Secondly, as part of that expectation there certainly was an implication that you wouldn't ask for TOIL or seek approval for TOIL. It was seen as you were a trouble maker, if you like. That you were putting yourself out on a limb to seek that and it was a risk that you may take. That was certainly a strong and pervasive sense in terms of how I felt at the time and how my colleagues felt in relation to the same matter. And in particular I think it was risky to put yourself out on a limb in that way in terms of either being in an organisational change plan or pending organisational change.*

##### **PN 3843-3844**

*PN 3850 . . . So effectively from my experience, seeking approval to work additional hours prior to working them was quite a barrier. Because you would be put through such a level of scrutiny in relation to your work that I didn't then continue to have those discussions with my supervisor. It was clear to me that it was too difficult, it was too hard, and there was also at the same time a sense of risk if you were to continue to pursue TOIL, there was an expectation that you would just manage your workload within standard hours and you didn't put yourself out on a limb to request or seek anything else. It was too risky and as more change plans and more organisational change consistently was the case at Vic Uni, you didn't do that within a change plan environment. You kept your head down.*

##### **PN 3855-3860**

**A widespread culture of working long hours without claiming overtime or toil exists, and for this to change, positive action by employers would be required.**

E20. There was evidence in support of this contention.

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#### Andrew Giles Witness Statement – Exhibit NTEU AG

**Para 26** - ... the culture of the University is to encourage staff to undertake the work for the “good of the University”, without ever any intention of allowing staff to take TOIL or pay for overtime.

**PN6597**

... Staff knew that you manage your workloads as best you can and really to raise that with some managers is not acceptable and you are sticking your neck out.

#### Professor Michael Hamel-Green Witness Statement – Exhibit NTEU AD

**Para 34** - ... At the time I did not take any steps to ensure that they were claiming Time Off In Lieu or paid overtime. One reason that this did not occur to me was that it was established custom and practice. Another is that, as an academic, I was in the same boat: we all contributed extra, uncompensated hours of work and worked in the evenings and on weekends. As a result, I did not think sufficiently about the impact of the same expectations on other categories of staff. General staff were also committed to the students, and to the success of the faculty. The culture of long working hours that is endemic to academic work was shared by our general staff colleagues and obscured the importance of ensuring that general staff overtime was authorised and compensated. I do not recall any staff at HEW 7-9 requesting payment for overtime while I was Dean. Nevertheless, I was aware that they were working long hours and took no steps to address the issue myself. In retrospect, I recognise that I was delinquent in addressing this issue as their manager.

**PN6252** - Now that you have the benefit of hindsight, if you had your time again would you take more active steps to talk to them about the hours that they're working?---Yes, I would. I was keenly aware that - well, in terms of junior - less senior, below HEW 7, you know, HEW 6 and below, I'm reasonably confident that they were compensated for any work over and above the normal 9 to 5 hours or the flexi hours that are allocated. In the case of more senior staff I was well aware that they were working well and truly beyond the call of duty and I do in retrospect agree that I didn't adequately pursue that and ensure that they were correctly compensated, yes.

#### Steve Adams Witness Statement – Exhibit NTEU N

**Para 24** - It has long been entrenched in the School of Engineering that we do what needs to be done to have the required work completed, despite the fact that our ordinary hours do not align with the school timetable. In my experience, the ledger is very much working in management's favour; though I may take an hour or two every now and then to attend to a private matter, I never apply for a whole day off as “time off in lieu” and nor do the three staff working under me. We would all have many hours owed to us in uncompensated overtime.

**Para 27** - With my own staff, I am flexible with their TOIL and remind them to take it. However they tend to be worried about being ‘visible’ at work as this is so entrenched in the culture.

**Para 55** - I've been contemplating what we can do at the University to fix the uncompensated overtime problem and I worry that it is so out of control. I've also been wondering why staff have been more or less complicit in this scenario occurring as the culture has become one of ‘working for free’. In my view the majority of general staff working in a University really care about their work. NTEU members tell me they work hard for the students and the academics. I have observed that the type of people who work for a University are often those who enjoy a ‘not for profit’ environment and want to contribute to the success of the community and, in our case, the

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*University. In my case, if I worked in a private sector laboratory I am sure I would just be paid for overtime worked, and I would expect to be.*

**There are reasonable steps that employers could take to ensure that employees are not working uncompensated overtime without imposing an unreasonable administrative burden.**

E21. There was evidence of this contention. The evidence as a whole in these proceedings showed that, as one would expect for a large research-based corporation, universities have a seemingly boundless capacity for recording complex and detailed data about research outputs and publications for individual staff, payroll and complex teaching timetables. It is manifestly obvious that they could, at relatively low cost, require all general staff to record their working hours. Alternatively, given they have mountains of policy documents covering almost every conceivable eventuality, they could have a policy which says work in excess of, or outside standard hours must be reported to the supervisor, who must ensure either that the employee claims for TOIL or payment (as prescribed or allowed) or the employee is counselled that the university does not accept the performance of unauthorised work. The witness evidence tended to indicate that this had never occurred to the employers.

**Andrew Giles Witness Statement – Exhibit NTEU AG**  
**PN6555-56**

**Steve Adams Witness Statement – Exhibit NTEU N**

**Para 23 and Attachment 1- On August 20th 2015 myself and other NTEU representatives (Gia Underwood and Corey Rabaut) met with Senior HR representatives and requested that the University make allowances for time in lieu to be recorded in Themis. The University's representatives were Sean Hogan, Director Workplace Relations and Diversity and Virginia Jay, Associate Director Employee**

**Relations. The response was that it would be too difficult and that the University did not see why this was necessary. The official response from Sean Hogan is at **Attachment 1****

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#### Diana Chegwidden Witness Statement, Exhibit AHEIA 11

**PN9518 & 9520** - No, no, that's right. What I'm suggesting is that as an employer, it's fair to say that either you're compensated, either by for example time off in lieu, flexitime, paid overtime, whatever it is, and the overtime is authorised, or you don't do the work. Is that a fair thing? You shouldn't be doing the work if you're not receiving the compensation?---That's a fair statement.

....

But what I'm suggesting to you is it would be a good idea as a question of good management practice and fairness for the university to have a policy, for example, that said employees need to report the facts to their supervisor, if they're working outside the span of hours. I'm suggesting that's a good management practice. Would you agree with that?---I would agree with that and it's covered in our enterprise agreement.

#### Andrew Picouleau Witness Statement – Exhibit Go8 12

**PN6633 - PN6636**

#### Prof Marnie Hughes Warrington Witness Statement, Exhibit - Go8 10

**PN4968-4975** As a question of principle, witness agreed that if unauthorised overtime is being worked, work should either be compensated or not done, and it was the supervisor's responsibility to so instruct.

#### Prof Simon Biggs Witness Statement, Exhibit Go8 11

**PN5210-5218** - General staff employees working unauthorised overtime outside normal working hours would be a serious management issue should be told either not to do the work or to claim overtime.

#### Prof Andrew Vann Witness Statement AHEIA 10

**PN5357-5358** - ---. . . So we pursue quite a number of strategies to ensure that people are, you know, well briefed, that they understand their entitlements and that they can take appropriate action if they feel that they are you know, if they have issues with their workload.

*Can you give us any examples of the things that you do those efforts that you take, just, you know, the practicalities of that? What does it involve doing?---Well, there are various as I said, we've had a very strong focus on wellness. It was one of the issues that was raised in the previous work survey at Charles Sturt Universities. There was a particular emphasis from HR on initiatives around wellness. We've run wellness expo's around the university, encouraging people to be mindful of self-care, but in common rule(?) institutions we seek to ensure that our managers and our staff are appropriately trained and understand the provisions of the enterprise agreement.*

#### Sue Thomas Witness Statement, Exhibit AHEIA 8

**PN4212**

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**Many or some general staff face workload pressures which encourage the working of hours above ordinary hours.**

E22. There was evidence to support this contention.

**Andrea Brown Witness Statement – Exhibit NTEU Y**

**Paras 10, 16-17, 19-20 -** *In summary, the workload of the EEO Officer was not manageable within ordinary hours of work (36.75) and I recall regularly (weekly) working in excess of ordinary hours. I recall working on a regular basis around a 9 hour day (up to a 45 hour week). For example it would not be uncommon for me to start work at 9 or 9.30am, and work through to 6.30 or 7.30 pm in the evening. I remember during this time regularly feeling that if I did not regularly work additional hours, I would feel a greater level of stress because, a/. I felt more behind in my work and more overwhelmed and b/. I felt a lower level of control over my work. I had no power or authority to influence the demands of the role or the workload, but total responsibility for getting my work done.*

**Paras 22-24**

**Andrew Giles Witness Statement – Exhibit NTEU AG**

**Para3-11**

**PN6521, PN 6523, PN6552, PN6568**

**Clark Holloway Witness Statement – Exhibit NTEU W**

**Supplementary Statement Exhibit NTEU X**

**Para 13, Ex W -** *In IMTS, staff often work long hours and are required to perform duties on a weekend in order to keep the University's IT systems working, to deal with problems as they arise, and to implement backups, upgrades and other maintenance procedures at times that are least inconvenient to other staff. ...*

**Professor Michael Hamel-Green Witness Statement – Exhibit NTEU AD**

**Para 34 -** *As Dean, I worked closely with the more senior general staff in the Faculty, including the Faculty manager and School managers. I am aware that the workload pressures on such staff have also increased in recent years, as a result of staffing cutbacks and a significant increase in the number of reports and detailed policy evaluations required by central administration. This put enormous pressure on staff at HEW7-9 who I worked with. They regularly worked on weekends and evenings to get reports done. I would commonly receive documents by email that had been sent by general staff at times well beyond their recorded working hours. There were occasional staff who did not work back, but the conscientious general staff, who were the majority, were definitely working well beyond their 9 to 5 hours, without any compensation. ...*

**Anthony Wilkes Witness Statement – Exhibit NTEU F**

**Paras 8 – 13 -** Mr Wilkes' evidence shows that the University of Adelaide Anatomy and Necropsy Departments have instituted sensible measures to eliminate an earlier culture or practice of failing to record or claim for long hours worked, and to better manage staffing levels and the use of time to reduce the necessity for working long hours.

**PN836**

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### Professor Michael Leach Witness Statement, Exhibit NTEU AE

#### Para 29

### Professor Philip Andrews - Witness Statements, NTEU P,NTEU Q, NTEU R

#### NTEU P

**Para 67** – Extension of Laboratory hours means staff must prepare before morning work commences or in the evening.

### Steve Adams Witness Statement – Exhibit NTEU N

**Para 11-14** - *My ordinary hours of work are 8.45am – 5.00pm Monday to Friday. However, as my work during teaching semesters revolves around the teaching timetable, I cannot complete required tasks without working outside of these hours.*

*12. Thirty years in the one area – the Engineering Faculty – and my time as an NTEU activist across the University, have led me to observe changes in workloads, overtime and compensation for overtime over this period.*

*In Engineering, the last 10-15 years has seen an increase in student numbers in Undergraduate degrees. Working excess hours or outside of hours has increased during this time as Technical/Laboratory based Staff are required to support a jam-packed teaching timetable. For example, I work back after 5.00pm, come in early before 8.45 to set up the lab or work through lunch. This is because the central timetabling unit now schedules lab classes at any time between 8.15 am – 6.15 pm throughout the semester. This is contrast to say, 20 years ago when lab classes were scheduled between 2.00pm -5.00pm. The opening up of the timetable and its impact on workloads was never addressed. It is now just considered part of the normal workload. I don't 'ask' my manager for permission to do this, nor is it discussed, -it is just expected. If a laboratory, equipment or experiment weren't adequately set up and to the required health and safe standards, students and academics would suffer; teaching and demonstrations would not work to plan. It is not negotiable that this work must be done.*

**Para 28-35, 40-49** Detailed and extensive evidence about staff cuts combined with increased student number and class demands, with no management review or adequate response. (Subject to discussion at PN2545-2549)

## Is the term requiring ‘reasonable steps’ reasonable?

- E23. There was some attack on the union's proposal that the employer take “reasonable steps” to ensure that employees are not working uncompensated overtime, either that it is vague and uncertain, and would lead to disputes, or that it is too onerous. The phrase ‘reasonable steps’ is found in a number of Modern Awards. For example;
- a. The *Higher Education Industry - General Staff - Award 2010*, itself already uses the term “reasonable steps” in a very similar circumstance. Casual general staff have a right to apply for conversion to non-casual employment.

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In order to ensure that they are genuinely able to exercise this right, there is a requirement at Sub-clause 12.3 (a) that “*The employer must also take reasonable steps from time to time to inform casual employees of the conversion provisions of this award*”.

- b. There is a fairly standard term in the Supported Wage Schedules to many Modern awards which requires “An employer wishing to employ a person under the provisions of this schedule must take **reasonable steps** to make changes in the workplace to enhance the employee’s capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.
- c. At least two awards, the *Contract Call Centre Award 2010* (at Sub-clause 20.5 (d)) and the *Telecommunication Service Award 2010* have a term which provides for the extension of certain relocation allowances where an employee can demonstrate that he or she has taken “all reasonable steps” to find appropriate accommodation after being required to relocate.

E24. To the NTEU’s knowledge none of these “reasonable steps” provisions has led to an outbreak of disputes or complex prosecution. NTEU has considered a number of drafting solutions to the problem which obviously exists. The requirement, in a general sense, to take reasonable steps is designed to achieve the desired outcome with a minimal and almost cost-free regulatory burden for employers of this type.

## **The statutory scheme and how it relates to the merits**

E25. It is submitted that the proposed redrafting of Clause 21 for clarification, and the proposed new limitation on payment of overtime in proposed Sub-clause 23.3 are manifestly matters which can be included in an award, and meet the modern award

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objective relating either to simplicity of expression or modern and efficient work practices.

E26. Therefore, the following submissions relate only to the NTEU's proposals to add a new sub-clause 23.2, to require the employer to take reasonable steps to ensure uncompensated overtime is not being worked.

E27. The terms proposed to be included in the Award by the union must be about one of the matters listed in 130(1). They must also be necessary to meet the modern award objective.

E28. First, each of the sub-provisions from Section 139 (1) will be addressed to the extent that it is relevant.

E29. Section 139(1) (c): The term is *about* arrangements for when work is performed. Work should not be performed when it is not being paid for.

E30. Section 139(1) (d): The term sought is *about* overtime rates, in that they have the effect of requiring authorisation (the pre-requisite for what is “overtime”) in an effective way, or they have the effect of making overtime rates applicable to all excess work actually performed rather than just some of it.

E31. In relation to Section 142(1), (*matters incidental and essential to the practical operation of the Award*), even if it were not *about* Section 139(1)(c) and (d), the proposed term would be incidental to and manifestly essential, given what the evidence discloses, for the overtime terms themselves to operate in a practical way by ensuring that overtime rates are actually being paid for overtime work.

E32. Turning now to the *modern award objective*, which is found in Section 134(1), NTEU submits that the award safety net is not fair if the employer can benefit at the expense of the employee by either;

- being aware that uncompensated hours are being worked, *or*

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- wilfully or negligently remaining ignorant of whether additional hours of work are being worked, *and*
- taking no action about this, to *either*;
- pay for that work in accordance with the award *or*
- take steps to stop the performance of that work.

This is precisely what the Award allows, and it occurs to a greater or lesser extent in this industry.

E33. Moreover, a safety net is not fully *relevant* if its intended provisions never come into effect because of the velleity of the employer. A provision for overtime payments (or TOIL) can be avoided simply by knowing that certain tasks need to be performed, but taking no action to authorise overtime.

E34. In relation to the sub-sections of Section 134(1), NTEU says as follows:

- a. 134(1)(c): To the extent that the award facilitates the working of unpaid overtime it facilitates staff cuts, or facilitates the non-employment of sufficient staff, and therefore has the effect of social exclusion.
- b. 134(1)(d): Working of unpaid overtime in general is not a modern work practice, nor does it encourage the efficient performance of work, because it encourages employees to expand the time a given amount of work is to take and removes the employer's financial incentive to make the work more efficient and productive.
- c. 134(1)(da): The need to provide *additional remuneration for employees working overtime* is highly relevant to this claim, and a new legislative provision which requires the Award provision to be considered afresh in light of this. In the context of the 134(1), "overtime" can only be a generic reference to additional hours, not to *paid* additional hours. Otherwise the sub-clause would have no work to do. While it would not be a fair safety net (for

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employers) if unauthorised overtime were paid for, it is appropriate that *prima facie* overtime be paid for. This can be achieved in part by ensuring that either the overtime work is paid for by way of additional remuneration, or not done. In the context of this Award, for the great majority of employees, the way in which *weekend work or public holiday work* (Section 134(da) (iii)) is performed is by way of overtime so this part of the modern award objective is also advanced by the NTEU's proposed term.

- d. 134(1)(f): The term proposed by the NTEU will increase *productivity*, for the reasons cited above. The term proposed by the NTEU will, it is acknowledged, increase the *regulatory burden* on employers by requiring that they take reasonable steps to put in place arrangements to minimise the performance of work which should not be occurring. However this would not impose an unreasonable burden for the reasons described above. The *employment cost* should ideally be zero, as the provision is about unpaid work not being performed at all. However, to the extent that it requires the employer to make the choice between paying for the work and not having it done at all, it will, it is acknowledged, increase employment costs.

## Conclusion

E35. In relation to the proposed variation that;

**23.2 The employer must take reasonable steps to ensure that employees are not performing work in excess of the ordinary hours of work or outside the ordinary spread of hours as specified in clauses 21 and 27, except where such work has been authorised and compensated in accordance with clauses 23, 24 or 26.**

the NTEU says as follows:

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- The scheme of the award as a safety net, is that employees who work outside or in excess of ordinary hours are (in different ways, depending on their classification or preferences) entitled to be compensated by paid overtime or time-off-in-lieu.
- The working of overtime requires authorisation, and this is reasonable.
- However, that scheme should not provide an employer with the opportunity for unjust benefit where, for whatever reason (other than misconduct) employees are working overtime without claiming it, or even informing their employer that they are doing so.

E36. The evidence is sufficient to justify the very mild injunction proposed by the NTEU, that the employer take reasonable steps to ensure that employees are not working uncompensated overtime. This requirement is not onerous, nor excessively prescriptive, as it leaves it to the employer to choose the reasonable steps which will be most suited its own operations.

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## **Part F – [AM2014/230 Item 8, link wages to classifications]**

That an express link be reinserted between the rates of pay and the classification definitions

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### **The Change Proposed:**

- F1. It has been agreed in the exposure draft process that words previously in the two main pre-reform awards which were omitted when the modern award was made should be reinstated, providing a link between the classification levels and the rates of pay.
- F2. The matter still in dispute is whether the words proposed by the NTEU are sufficient, or whether an additional sentence should also be transposed from the pre-reform awards, as urged by the employer associations.
- F3. The exposure draft currently includes both sets of words, as follows:
  - 8.1** *The higher education worker level classification standard set out in Schedule A—Classification Definitions shall be the primary determinant of the classifications of general staff positions. Positions will be classified at the level which most accurately reflects the work performed by the employee as required by the employer, taking into account the skills and responsibilities required to perform that work.*
  - 8.2** *No employee shall refuse to perform duties reasonably required, consistent with the employee's classification and which the employee is competent to perform.*

with a note that the NTEU opposes the insertion of clause 8.2. These submissions address why the inclusion of 8.1 *without* 8.2 is the correct approach.

### **8.1 is necessary to meet the modern award objective.**

- F4. This variation addresses an oversight and anomaly from the award modernisation process and it clearly reflects the intent and agreement of the parties.

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- F5. The variation is necessary as without it, the Classification Definitions (known in the industry as the “Descriptors”) at Schedule B have no work to do *in determining the relevant minimum pay rate for employees.*
- F6. Section 139 (a) (i) of the *Fair Work Act* prescribes that skills based classification and career structures are terms that may be included in modern awards. Without 8.1, there are minimum wages set out in 10 levels and Classification Definitions, but these two provisions do not create a skills based classification and career structure unless they are linked in some way.
- F7. 8.1 does the required work of ensuring a link between the pay ascribed to each HEW Level and the Classification Definitions for that HEW Level at Schedule A.
- F8. The Modern Award objective requires the Commission to ensure that the awards and the NES provide a ‘fair and relevant safety net of terms and conditions’ [s.134] and the minimum wage objective prescribes that a ‘safety net of fair minimum wages’ must be established and maintained [s.284]. The insertion of 8.1 achieves these objectives.

## **8.2 is neither necessary nor permissible**

- F9. Go8 point to the former Higher Education General Staff Salaries and Classifications Award 2002 (AP 815982) in support of their contention that the sentence to which NTEU objects – “*No employee shall refuse to perform duties reasonably required, consistent with the employee’s classification and which the employee is competent to perform.*” – should be included.
- F10. The relevant clause of that Award read in full (emphasis added):

### **6. CLASSIFICATIONS AND SALARIES**

- 6.1** *The classifications and minimum salaries applicable to adult employees covered by this award in respect of each of the classification levels are set out in Schedule D - Classifications and salaries for each Institution.*

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- 6.2 Juniors and apprentices are to be paid at agreed percentages of the appropriate adult rate prescribed in Schedule D - Classifications and salaries.
- 6.3 Classification descriptions for each of the classification levels prescribed in Schedule D - Classifications and salaries are as set out in Schedule A - Position classifications standards of this award.
- 6.4 The Higher education worker position classification standards set out in Schedule A - Position classifications standards shall be the primary determinant of the classifications of general staff positions. Positions will be classified at the level which most accurately reflects the work performed by the employee as required by the employer, taking into account the skills and responsibilities required to perform that work.
- 6.5 No employee shall refuse to perform duties reasonably required, consistent with the employee's classification and which the employee is competent to perform.

F11. Self-evidently, this clause went to many more issues than are contemplated by the current/proposed clause. Each sub-clause addressed a different issue, and none of them is essential to the operation of another.

F12. The history of the creation of the relevant provisions shows that they were not connected matters.

F13. In 2001, His Honour SDP Duncan (**PR911627**) issued a decision about the simplification of the *Higher Education General Staff (Interim) Award 1989*. This dealt in large part with the national general staff classification descriptors.

F14. At para 7 of his decision, SDP Duncan listed a series of matters which were agreed between the parties, which included the following:

#### ***Agreed matters***

1. Ten broad classification levels in the simplified Award(s).
2. Salary rates reflecting those inserted in the section 134 agreements with all available safety net adjustments added.
3. Salary relativities as per the section 134 agreements, as adjusted in light of subsequent safety net adjustments.
4. The original DWM descriptors to be inserted in the Award(s) on an interim basis and remain in the Award(s) unless varied by agreement or as a result of arbitration.

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*Wording in the simplified Award(s) which ‘links’ the descriptors to the classifications of positions along the lines of the following:*

*‘Positions will be classified at the level which most accurately reflects the work performed by the employee as required by the employer, taking into account the skills and responsibilities required to perform that work.’*

- F15. At para 65 of his decision, SDP Duncan directed that a draft order based on this agreement would form the basis of the Order of the Commission. As it happened, the Award subsequently made (PR917819) also included the form of words now sought by the employers. However, that was no part of the agreement of the parties, nor is it necessary to give effect to the terms of the modern award. It did not result from and was not connected in any way to the considerations which gave rise to the words at 8.1. It was a set of words commonly inserted as a consequence of Award Restructuring Agreements in the 1990s.
- F16. There is no logical link to be drawn between 6.4 and 6.5 in the manner contended by the employer submissions. 6.5 was not incidental to 6.4, and should not be imported into the modern award merely because of a coincidence of location in a predecessor instrument.
- F17. There must be some more substantive basis for its inclusion, and the employer submissions fail to point to one. The Go8 submit (at 187) that the words “concern classifications and duties relevant to classifications and [are] otherwise incidental to such matters”. In fact the words relate to the performance of duties once classification is known. It relates only to duties which are consistent with the employee’s classification, and therefore can play no role in determining the classification of the employee.
- F18. The Go8 further submit (at 188) that the words are incidental to the requirement to provide an instrument of employment setting out classifications and the main

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conditions of employment. This submission is without merit. Unless the words regulate (or are incidental to the regulation of) classification, which they are not, they have no role in relation to the instrument of employment. They cannot otherwise become incidental to the instrument of employment because they are “a main condition of employment”. If that were so, then any and every matter not currently contemplated within the scope of awards could be brought within award regulation merely by asserting that it was a “main condition of employment”. The words must be separately permissible on an independent ground before they can be considered incidental to the instrument of employment.

- F19. In any case, the words sought by the employers have no basis whatever in a minimum safety net of conditions for employees. They would mean an employee could be prosecuted and fined for refusing to perform a particular duty, even in circumstances where the employee had a contractual right to refuse that duty. These words have no place in a modern award.
- F20. There is nothing either in the history of the pre-reform award provisions, or in the modern award objective which supports the insertion of the proposed 8.2. Its inclusion would be contrary to s.138, since its inclusion is not necessary to achieve the modern award objective or the minimum wages objective. Those objectives are met by the inclusion of 8.1.

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**Part G – [AM2014/230 Item 13, minor updates to classification definitions]** – no longer pursued

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**Part H – [AM2014/229 Item 5, BUASA proposal] – no longer pursued**

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**Part I – [AM2014/229 Item 6, & /230 Item 5, “Full time” or “continuing” employment] – matter resolved in Exposure Draft process.**

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- I1. A revised formulation was developed during the Exposure Draft process and agreed to by the parties.

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## Part J – [AM2014/229 Item 6, & /230 Item 12, ICT Allowance]

A new allowance for personal ICT expenses incurred for work.

- J1. The proposed words to be inserted in the *Higher Education General Staff Award 2010* in Schedule C (Allowances) are as follows:

Information Technology	<p>Reimbursement of the actual costs incurred, up to the value of the monthly subscription cost of the cheapest service package (sufficient to provide the level of data connection required for the performance of the work) that is readily available in the location (whether that is a bundled package or not), payable for each month of employment after the first month.</p>	<p>Where an employee is required by the nature of their work, including by custom and practice, to use any of the following services for work purposes other than at the workplace:</p> <ul style="list-style-type: none"> <li>(a) A telephone connection;</li> <li>(b) Email access;</li> <li>(c) An internet connection;</li> <li>(d) Any like data connection or account;</li> </ul> <p>and the employer has not provided that service at no cost to the employee.</p>
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- J2. The proposed new Schedule C would be inserted in the *Higher Education Academic Staff Award 2010*, to read as follows:

### **Schedule C—Allowances**

#### **C.1. Information Technology Allowance**

*C.1.1 Where an employee is required to use any of the following for work purposes other than at the workplace:*

- (a) A telephone connection;
- (b) Email access;
- (c) An internet connection;
- (d) Any like data connection or account;

*the employer shall either provide that connection at no cost to the employee, or shall pay an allowance to the employee in accordance with this clause.*

*C.1.2 The value of the allowance shall be reimbursement of the actual cost incurred by the employee, up to the value of the monthly subscription*

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*cost of the cheapest service package (sufficient to provide the level of data connection required for the performance of the work) that is readily available in the location (whether that is a bundled package or not), and is payable with respect to each month of employment*

- C.1.3 *For the purposes of sub-clause C.1.1, an employee is required to use any of the services itemised in that sub-clause for work purposes if that use is required by the nature of their work, including by custom and practice, unless they are directed in writing not to perform any work requiring any of those services when away from the workplace.*

## **Arguments of merit and principle in support of the proposed changes**

### ***The modern awards fail to provide a fair and relevant safety net***

- J3. Neither the Academic nor the General Staff Award currently provides an allowance or any other payment in relation to Information and Communication Technology expenses incurred in the course of their employment by university staff.
- J4. It is clear from the evidence (summarised below) that:
- a. Changes in systems of work and available technologies mean that the reliance on personal ICT equipment and connections is increasingly integrated into the normal work of many university staff;
  - b. The extent of personal ICT use varies between staff, reflecting different job roles and different levels of employer provision of equipment and connections. Not all staff are required to use personal ICT equipment or connections for work; and
  - c. In the absence of an award provision, employers, by and large, are neither paying such expenses on behalf of their staff nor reimbursing staff for expenses incurred.

### ***The NTEU proposal gives effect to or advances the modern awards objective***

- J5. An award provision is both necessary and appropriate in order to establish a fair safety net of conditions. It is a longstanding principle of industrial fairness that where an employee is required in the course of their employment to incur expenses, the award

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should provide for the reimbursement of those expenses. The evidence shows that a significant number of university employees are now required by the nature of their work to incur Information and Communication Technology expenses, including the maintenance of a home internet connection.

- J6. Particularly for some tens of thousands of casual employees who are provided with limited or in some cases no adequate ICT facilities by their employers, yet cannot do their jobs without such a connection, this should be considered an essential part of a fair and enforceable set of minimum terms and conditions.
- J7. The NTEU claim promotes modern and flexible work practices (ref. 134(1)(d)) by recognising and compensating for the use of home internet connections for the performance of work. The evidence supports the conclusion that this promotes the efficient and timely performance of work.
- J8. While promoting productivity, the NTEU claim would have a minimal employment cost and regulatory burden impact on employers (ref. 134(1)(f)). It proposes a readily ascertainable measure for determining the value of the allowance, and then payment of that allowance to all relevant staff. This is cheaper and simpler than many of the alternatives. It does not propose employer liability for *all* ICT costs (including hardware, software, maintenance and repair costs, as well as internet connections), it imposes a much lighter regulatory burden than a process of reimbursement requiring the production of receipts, etc, and it strikes a reasonable balance between employer and employee interests given that much of home ICT equipment and connection may be used for personal as well as work-related expenses.

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***The NTEU proposal is a term that may be included in a modern award***

J9. The proposed clause may be included in a modern award. It falls squarely within the terms of section 139(g)(i) – allowances including... expenses incurred in the course of employment.

***The NTEU proposal goes no further than necessary***

J10. The proposed clause merely states who is eligible for the allowance and in what circumstances, what work-related expenses the allowance is paid with respect to, and what the quantum of the allowance will be.

J11. The regulatory approach proposed by the Union is both moderate and reasonable. An employer could avoid ever having to pay the proposed allowance either by directing the employee not to use their own communication devices for work purposes (and organising work in such a way as to make this practical) or by directly providing and paying for whatever devices and connections it thinks necessary to the employee.

J12. The proposal by the NTEU does not include a specified quantum of allowance, as the actual amount payable would vary in different parts of Australia, and from time to time. Internet connection costs of this type may be subject to erratic change in coming years, rather than being stable such that CPI indexation would be appropriate. In fact, it is entirely possible that costs in this area will fall in real terms over time. In addition, there are often multiple providers competing in any geographic market. University staff may for personal reasons choose a more expensive service provider, but the allowance proposed only makes the employer liable for the cost of the cheapest available service with sufficient bandwidth to enable the performance of the required work.

J13. Moreover, NTEU has limited the payment to employees in their second or subsequent month. This would ensure that the payment of the allowance would not need to be

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made for employees who, for example gave a guest lecture, or otherwise worked on a very short engagement.

### **Evidence supporting conclusions of fact:**

- J14. Most academic staff and many general staff routinely use internet and phone connections, and in particular email connections, from their place of residence, or from a mobile device in other locations, to perform their ordinary work. Where such facilities are not provided by the employer, this requires the use of personal ICT devices, and at least for the portion of it which occurs off campus, it also requires the use of non-university internet and WiFi connections.
- J15. For Academic Staff, this reflects the fact that their work involves a considerable amount of work done away from a fixed workstation, including working from home (especially in the evenings and on weekends), attending conferences, travelling between campuses and working at locations on their own or other campuses away from their office or workstation.

See for example:

**Professor Michael Leach - Witness Statement Exhibit NTEU AE**

**Para 28**

*It is essential to the efficient performance of my work that I use my home computer and internet connection for work purposes. In bygone days, academics had designated consultation times, during which students could come to their office and seek assistance. This has largely been replaced by email communication. I am essentially considered as part of my work to be contactable on most days and nights on every day of the week. The use of my home internet for this purpose greatly enhances the efficiency of my work, and the work of those academic and general staff I supervise, such that that access can properly be considered an inherent requirement of the job – certainly in the case of academic staff. I receive no recompense from the university in respect of the purchase or upkeep of my information technology equipment nor any contribution to the maintenance of my home internet connection.*

**Professor Michael Hamel-Green - Witness Statement Exhibit NTEU AD**

**Para 47** - *It is now well established practice that academic staff will undertake online work, including accessing work internet and email systems, online journals, conference papers, etc, when they are away from campus, whether that be at other campuses, at conferences or meetings, or working from home. As a result, I, like most academic staff, maintained an internet connection at home at my own expense. ...*

**Karen Ford - Witness Statement Exhibit NTEU V**

**Para 20** - *As my manager is an academic and he deals with international colleagues, he often works late at night and on weekends. He will email me at night and on weekends*

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**Dr Caron Dann - Witness Statement Exhibit NTEU AO**

**Paras 13 and 14**

**Dr Linda Kirkman - Witness Statement Exhibit NTEU AQ**

**Para 48- 50 -** *My supervisors are well aware that I use and pay for my own technology at home. It is just considered part of the job.*  
*I am on a plan for internet and telephone that costs me \$110 per month; costs are higher in regional areas such as Bendigo. I cannot get naked ADSL so pay \$30 per month for a landline phone that I leave unplugged. (The only calls were from telemarketers.) I estimate 50-60% of my home technology use is work-related.*  
*When I first moved into my current house in 2013 I could not afford a good computer and fast internet access. However I cannot work effectively or stay up to date without these tools. After a few months my very generous neighbour gave me her Wi-Fi password so that I could access the internet.*

**Dr Michael Dix - Witness Statement NTEU AU**

**Para 61-63 -** *. I maintain a personal internet connection and personal mobile phone account. Since 2006, I have had an office on campus, with a computer, phone and internet connection, but it is not possible to perform all my work during office hours. The expectations for increased connectivity by students and international campuses, the expansion of online delivery, the use of web-based interfaces for much student engagement and the capacity to access journals in electronic versions rather than hard copy, all mean that it is inevitable and therefore an inherent requirement of the job that I will use my personal communication technology to perform work. This includes work at home, and also work performed when elsewhere away from campus.*  
*My personal internet connection costs me \$67 per month. My mobile phone account costs me \$25 per month. SUT does not reimburse me for these expenses*

**Para 67 -** *I estimate that in this first week and a half of Semester 2 2016 I have worked upwards of 110 hours. (And although I did much of this work on campus, I could not possibly have done all of it without also using my own computer and my home internet connection.)*

**Dr Camille Nurka - Witness Statement Exhibit NTEU AR**

**Paras 38-42**

**Dr John Kenny - Witness Statement Exhibit NTEU AB**

**Para 51**

*I use my personal phone and laptop to perform academic work when at home or away from campus. This includes marking, preparation, research, student consultation and administration work. I maintain an internet connection at home which I use for work purposes.*

**Para 52**

*I estimate that I spend approximately ten hours a week working online from home.*

**Paras 53 - 54**

**Professor Andrew Vann - Transcript**

**PN5402 - PN5421**

**Sue Thomas - Transcript**

**PN4247 – PN4248**

- J16. For general staff, this reflects the fact that an increasing number of general staff positions require the checking of emails, answering of queries, and completion of

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project work, away from campus, including at home, at conferences, at marketing or promotional events, and when travelling between campuses or working at a different campus where they do not have an office or workstation.

See, for example:

**Karen Ford Witness Statement, Exhibit NTEU V**

**Para 20 -** *As my manager is an academic and he deals with international colleagues, he often works late at night and on weekends. He will email me at night and on weekends, so often by Sunday night I will have 20 new action items in my email box; first thing Monday morning he will ask "did you see my emails?" and they are expected to be actioned straight away, or already to have been actioned.*

**Andrea Brown - Witness Statement Exhibit NTEU Y**

**Para 26**

**Andrew Giles - Witness Statement Exhibit NTEU AG and Transcript**

**Para 29**

**PN6568**

**Professor Michael Leach - Witness Statement Exhibit NTEU AE**

**Para 29**

*Particularly in the last year or two, there has been an occasional but increasing tendency for general staff within my general work area to contact me by email well into the evening, about work matters. It is apparent in most of these cases, by virtue of the fact that I have been sent spreadsheets or other extensive written work that these general staff have been putting in substantial time outside their paid working hours. This work is not the subject of any prior authorisation, and therefore would not qualify as overtime. I am aware that these employees, like their academic colleagues are under considerable workload pressures and often face rigid deadlines.*

**Professor Andrew Vann - Transcript**

**PN5427 - PN5434**

*... Turning to think about professional staff, obviously, the extent of off-campus work for professional staff would not be the same as for academics, and some professional staff roles would be done entirely on campus. But it is true, isn't it, that there are a number of professional staff roles where there is regular or occasional need to work from off-campus?--Yes, there are. I have worked in professional staff roles myself and certainly would have expected to do some things as a senior manager off campus as well as on campus.*

*Perhaps other jobs like jobs in marketing or promotions or industry liaison?--Could be.*

*At less senior levels would take people off campus?--Yes, could be.*

*And there are a number of professional staff roles where there's either a regular or an occasional need to check emails after hours, aren't there?--Depending on the role, yes, and depending on the expectations.*

*Yes, and sometimes to respond to urgent matters?--Yes, depending on who it is.*

*Yes. Now, for those categories of professional staff that do have a need to check their work from outside the campus or carry out work off campus, carrying out work online from home is actually part of the normal performance of the job, isn't it?--Well, as I said, it depends. It depends on the role. In some cases it is. For example, if I think back to my time working in IT, there were systems admin people who would be expected to be able to connect if necessary. Typically the executive officers I have worked with in senior executive roles would be available to some extent out of hours if absolutely needed.*

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*Yes. And the flexibility that the technology introduces of being able to do that online without having to come in is actually an advantage for the university as well as for those staff, isn't it?---It can be. It doesn't always feel that way, but it can be.*

*And as mobile technologies become more widely available, it's more common for professional staff as well as academics to do some work from home out of hours, to check their emails, deal with a couple of urgent things and that sort of stuff?---Well, as I said, it depends on the role and certainly my practice has been to try and minimise the amount of time that you call on people out of hours. So I mean, a vice chancellor's role is a fairly exceptional role in universities, but I kind of jealously guard the time out of hours to be able to process work without interruptions and I've tried to do the same thing for my close staff, which is that you try to interfere into their lives as little as possible. I mean, there are occasions where people are called impromptu, but I think - I am not sure it's necessarily good practice for people to think that they have to be on 24/7.*

- J17. This phenomenon has developed gradually since the mid-1990s, and has accelerated with the development of new technologies. Universities provide external access to many IT systems (including email, internet, intranet, libraries, systems for communicating with students, posting course materials, entering marks, etc.) to their staff, facilitating the performance of work from other locations and out of normal working hours.

#### **Andrew Picouleau - Transcript**

##### **PN618**

Can I just put to you a number of propositions about things that have changed in the last 20 years in university employment?---Of course.

##### **PN619**

Is it fair to say that there has been an increase in the use of email and the internet in the last 20 years?---Very fair to say that, yes.

##### **PN620**

And an increase in online engagement with students?---Certainly.

##### **PN621**

An increase in remote access to university systems for staff?---I believe so, yes.

...

##### **PN625**

That there is now a greater expectation for rapid turnaround of documents?---I think that's a statement that applies to the whole world that we live in, if I may say, Ms Gale.

...

##### **PN629**

There has been an increase in the extent to which university staff might be expected to work overseas?---Yes, certainly to some extent.

- J18. Factors which drive the performance of work using personal ICT devices and connections include:

- a. An increase in online communication with students

#### **Professor Michael Leach - Witness Statement Exhibit NTEU AE**

**Para 28 - . . . In bygone days, academics had designated consultation times, during which students could come to their office and seek assistance. This has largely been replaced by email**

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*communication. I am essentially considered as part of my work to be contactable on most days and nights on every day of the week. The use of my home internet for this purpose greatly enhances the efficiency of my work, and the work of those academic and general staff I supervise, such that that access can properly be considered an inherent requirement of the job – certainly in the case of academic staff.*

**Dr Michael Dix - Witness Statement Exhibit NTEU AU**

**Para 61-62**

**Dr Camille Nurka - Witness Statement Exhibit NTEU AR**

**Para 44-45**

**Dr John Kenny - Witness Statement Exhibit NTEU AB**

**Para 49**

*Every subject in which I teach is required to have an online presence. This includes online delivery of scheduled classes, but also maintenance of online resources and the provision of online feedback and advice to individual students and groups of students.*

- b. An increase in online and email collaboration between staff

**Professor Philip Andrews - Witness Statement Exhibit NTEU P**

**Para 43** - We use dropbox for reviewing and updating documents, and materials are uploaded on Moodle – an online teaching platform. It is clear from the times when documents are updated in these tools that the majority of academic staff in the School work on Sundays. Sunday is, for me and my colleagues, the day when a substantial amount of preparation of teaching materials for the following week will occur. This enables me to get ahead of the game, before the week starts.

**Para 44** - Email is a pervasive evil. It constantly demands attention. Students send emails in the evenings and on weekends, and expect an instant response. In the absence of a direct instruction not to respond to emails out of hours (and no such instruction has ever been issued), academic staff are guided by the demands to achieve high levels of student satisfaction, and in any case if I do not have sufficient time during office hours to deal with those emails either, so it would make no sense to leave them until the next day. I also receive a high volume of emails from colleagues and the University which arrive after hours. Sometimes this will include matters which must be read or responded to before a meeting at 8am the next day.

**Professor Michael Leach - Witness Statement Exhibit NTEU AE**

**Para 29**

- c. Increased demands by students for communication outside scheduled consultation times.

**Professor Michael Leach - Witness Statement Exhibit NTEU AE**

**Para 28**

**Dr Michael Dix - Witness Statement Exhibit NTEU AU**

**Para 61-62**

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**Dr Camille Nurka - Witness Statement Exhibit NTEU AR**

**Para 44**

*There are many types of student enquiries, usually sent by email, that casual tutors are obliged to answer on a daily basis, outside of our allocated preparation and teaching time. These have included the following: requests for feedback on essay topic choice and essay plans; supply of doctors' certificates for proof of illness that interferes with capacity to attend class or hand in work; requests about attendance hurdles; requests about general administrative matters and scheduling; and requests for clarification of assessment instructions. In my experience, the volume of student emails increases dramatically with an impending assessment. During this time, it is not uncommon for students to request urgent extensions or to inform the tutor that they are having trouble with the essay submission software. Sometimes these are urgent requests that really do need to be responded to quickly, from a home workstation. I have often received and responded to such requests from my home computer. I*

**Dr John Kenny - Witness Statement Exhibit NTEU AB**

**Para 50**

*In addition, students regularly contact academic staff by email, without considering the time or day. In many cases it is best to reply to such emails promptly, even if that means doing so in the evening or on a weekend. I attempt to schedule time to deal with out-of-hours email correspondence, to minimise the extent to which it intrudes into my personal time, but in practice it is not possible to corral all such work into planned times.*

- d. Faster turnaround expectations on the completion of work

**Andrew Giles Witness Statement – Exhibit NTEU AG**

**Para 28**

*During my employment at Deakin University, I observed a number of changes which resulted in increased workload for general staff, without a concomitant increase in the number of staff available to perform the work. These changes include:*

*...*

- Increased use of email resulting in shorter turnaround times on most communications.*

J19. Developments in the capacity of ICT devices and the creation of university systems to enable staff to connect to their work while away from their workstations have facilitated the performance of work from home or other locations, enhancing productivity and the efficient performance of work.

**Andrea Brown - Witness Statement Exhibit NTEU Y**

**Para 26-27**

**Professor Michael Leach - Witness Statement Exhibit NTEU AE**

**Paras 29-28**

**Dr Camille Nurka - Witness Statement Exhibit NTEU AR**

**Para 45-47**

**Andrew Picouleau - Transcript**

**PN6621**

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**Sue Thomas - Transcript**

**PN4249-50**

J20. Some university systems exist which enable staff to borrow university equipment for use when working away from campus, but, with the exception of some senior staff who might have a “home office” provided by the University, such equipment is usually only available for particular events or projects, and not for ongoing use.

**Andrew Picouleau Witness Statement – Exhibit Go8 12**

**Attachment AP-5. Clause 2**

**2. Provision of University IT and Communication Equipment**

*Staff need to be aware that there is no automatic entitlement to University equipment and resources being provided to them unless specifically stated in their contract of employment.*

*Heads of Costs Centres will only approve staff requests for the provision of University IT equipment and communication facilities where it is appropriate for the efficient discharge of a staff member's responsibilities and where there is sufficient budget available to meet the costs of any such requests.*

**Andrew Giles Witness Statement – Exhibit NTEU AG**

**Para 29**

*Deakin senior staff would have their information technology equipment provided by the University, and University IT staff would assist in setting up a home office. More junior staff - at HEW 5, 6, 7 and 8, were still in practice required to be accessible out of hours, but would end up using their private phones, computers etcetera. The university did not reimburse more junior staff for such expenses.*

J21. For many casual staff – in particular casual academic staff – the use of such facilities is the only practical means they have of performing their work.

**Dr Caron Dann - Witness Statement Exhibit NTEU AP and Transcript**

**Paras 3-5 –**

*3. In his statement at 73. (a), Mr. Picouleau responds to my statement in relation to information technology and hot desks. It is true that the university provides ‘hot desks’ for use by sessional staff. However, a hot desk on its own does not take the place of an office. In fact, a hot desk can be used for only the most basic tasks, such as checking emails (but not necessarily answering them).*

*4. From my experience, an academic needs more than a shared computer at a hot desk to work. During a typical day working in my home office I require access to my books. These are major ‘tools of trade’ and I have three large bookcases in my office holding about 600 books and journals. In any given week, I would use at least 20 of these, and often more. Addressing the work tasks that I am directly required to undertake as part of my teaching work at Monash University, books are crucial to writing lectures, lecture slides and tutorial material; to refer to when students send emails requiring information about sources that they need for assignments; when compiling reading lists for Unit Guides. I cannot always anticipate which books I will need in any given day. Without these books, I cannot do the preparation for my teaching work at Monash. I cannot physically carry my books with me and so I cannot complete the above work at a hot desk. It is necessary in order to perform my work to a satisfactory standard that I perform much of my preparation work at home, using my own Information Technology hardware and software.*

*5. Every academic I know who is employed on a permanent or long-term contract basis has a lockable office or part of an office provided for them by the University and containing extensive bookshelves. These bookshelves are always full in every academic’s office I’ve ever been into (since 2008). I’m sure the University would not*

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*provide offices with bookshelves if it thought academics did not need them: everyone would just have a hot desk.*

This is both qualified and elaborated by further evidence at **PN8457-8470**

**Also see Exhibit NTEU AP Paras 7-8**

#### **Dr Linda Kirkman - Witness Statement Exhibit NTEU AQ**

**Para 51** - *Before this time (getting wi-fi connection at home) I spent 3-4 months walking to another Bendigo campus of La Trobe University which was 10 minutes away, with my laptop computer, and once there I sat outside on the steps working so that I could access the University Wi-Fi. I did this after house (sic); the building was closed at 5pm*

#### **Dr Camille Nurka - Witness Statement Exhibit NTEU AR**

##### **Paras 48 - 49.**

48. *I have rarely been allocated a dedicated office space on campus that has been suited to the sort of quiet reflection necessary for much academic work. When I have been allocated office space, it was usually shared with other casuals, shared with visiting academics, or the office of another person temporarily on leave. Without a more secure on campus work space, in my experience, the imperative to perform large parts of my duties away from campus has been even stronger.*  
 49. *This lack of suitable office space, and the consequent necessity to perform much of the job from home using personal resources is a common topic of conversation among my casual colleagues.*

#### **Associate Professor Anne Junor - Witness Statement Exhibit NTEU O**

**Page. 20, Type 6** - *Last year when being employed casually to teach total of approx 200 students, I did not have my own phone or office even when working 17 hrs/week contact time. Couldn't have students contact me easily except at home. Had no place to have private discussions with students (2008)*

#### **Dr Robyn May - Witness Statement Exhibit NTEU L**

##### **Page 22-23**

*Similarly in the interviews with casual academic staff, university differences emerged in relation to access to resources such as office and computer space, access to printers, rooms and other facilities. These differences were apparent within the universities as well, with differences revealed between faculties and Departments. The differences impacted heavily on casuals' capacity to perform their work adequately and often had a financial impact on the individual casual academic as Viv's quote shows.*

*For casual academic staff at New University, and in less well-resourced faculties at Old University such as Viv, reported above, most of their preparation work was done at home. Annie was not given an office space and had nowhere to go in between classes: 'I taught over winter and didn't have an office, so I sat on a bench outside in 10 degrees eating my lunch, twiddling my thumbs, in between classes' (Annie, Old University, October 2011). Rita described how inadequate working facilities necessitated both her working from home and also having to purchase her own equipment:*

*'That's where I find it hard as a sessional. We are housed in a storeroom, no windows, no air-con. It's got three computers, two that take half an hour to turn on. We can't even mark in the office. I had to buy a laptop.' (Rita, New University, October 2011).*

*Viv described how tight budgets in her School at Old University meant that access to appropriate resources was often very difficult and that she was made to feel 'needy' if she sought resources for teaching: 'It is always characterised as if you are this needy person, you need an office space, you need to use the photocopier' (Viv, Old University, November 2011).*

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**Professor Glenda Strachan - Witness Statement Exhibit NTEU Z**

"Work and Careers in Australian Universities: Gender and Employment Equity: Strategies for Advancement in Australian Universities" (2012 Report, Attachment 4 to Exhibit #Z))

**Section 4: Casual/Sessional Academics**

Table 149: only 76% of respondents reported that their university employer provides them with an on campus workspace, computer and phone.

J22. Nearly all the employees who use such connections or facilities pay for these themselves. While many use them for private as well as work purposes, they are not reimbursed by their employer for the proportion of the expense that relates to work activities.

**Professor Philip Andrews - Witness Statement Exhibit NTEU P**

**Para 68-71**

*68. Academic staff at Monash are given the option between a desktop computer or a laptop to use in our office. If we opt for a desktop computer, the University does not also provide a laptop.*

*69. I own a laptop, and ipad, a smart phone and a home desktop computer. I regularly use all of these for work purposes. This includes working from home, working interstate or overseas while at conferences, and working at different locations around campus or at different campuses, away from my office.*

*70. I also maintain an internet connection at home and a mobile phone account which I regularly use for work purposes.*

*71. I receive no financial assistance from the University for any of the expenses associated with purchasing and maintaining my own Information Technology equipment or connections.*

**Dr Michael Dix - Witness Statement NTEU AU**

**Para 62-63** - *My personal internet connection costs me \$67 per month. My mobile phone account costs me \$25 per month. SUT does not reimburse me for these expenses.*

**Dr Camille Nurka - Witness Statement Exhibit NTEU AR**

**Para 50 - 51**

**Associate Professor Anne Junor - Witness Statement Exhibit NTEU O**

**Page. 20, Type 5** - *It costs money to teach casually: internet access and up-to-date software for computer so that students may access you beyond contact hours (as one has no office at university), buying books... (2008)*

**Dr John Kenny Witness - Statement Exhibit NTEU AB**

**Exhibit AB para 55**

*As a result of these factors, it is necessary for me to maintain an internet connection at home, as well as a smart phone and a laptop. I estimate that approximately 50% of the use that I make of these is work-related. These are all maintained at my own expense. UTAS does not provide me with any subsidy or allowance in relation to these expenses.*

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## **Part K: [AM2014/229 Item 1, change “context” to “content”]**

Correct a longstanding typographical error in the Academic Redundancy provisions.

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- K1. The NTEU repeats our earlier submissions on this point as follows:
- K2. The NTEU proposes to amend one word in Sub-clause 17.1 of the Academic Award to correct a longstanding typographical error. The change proposed is to replace the word “context” in 17.1(b)(ii) with the word “content”, as follows:

### **17. Industry specific redundancy provisions**

- 17.1 This clause applies to any institution which:
- (a) was bound by the *Universities and Post Compulsory Academic Conditions Award 1999* [AP801516] at 12 September 2008; and
  - (b) has decided to terminate the employment of one or more academic employees for reasons of an economic, technological, structural or similar nature, including:
    - (i) a decrease in student demand or enrolments in any academic course or subject or combination or mix of courses or subjects conducted on one or more campuses;
    - (ii) a decision to cease offering or to vary the academic ~~eontext~~ **content** of any course or subject or combination or mix of courses or subjects conducted on one or more campuses;
    - (iii) financial exigency within an organisational unit or cost centre; or
    - (iv) changes in technology or work methods.

- K3. This “typo” has been present in the Award and its predecessors from the first inclusion of the redundancy provisions by decision of Commissioner Baird in 1989.
- K4. In Print H6821, Baird, C, decided the question of principle that provisions should be inserted into the Academic award providing for the involuntary redundancy of

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academic staff in “rare and unusual” circumstances. The question of principle having been resolved, the industrial parties were directed to prepare draft award provisions to give effect to the decision.

- K5. The parties were able to reach consent on large parts of the proposed provisions, and the remaining issues in dispute were brought back to Baird, C, for determination in Print J0176. That decision details the matters which were determined by arbitration. The wording that is now 17.1(b)(ii) was not among the matters arbitrated.
- K6. The drafts submitted by both the NTEU’s predecessors (FAUSA and UACA) and the AHEIA and Go8’s predecessors (AUIA and AAEIA) in that arbitration all used the word “content”. The wording was based on drafts submitted by the parties, and the Order setting out the resulting award variation, Print J0207, reflected the consent position of the parties:

- (e) “Surplus” indicates that an academic position is no longer required, or belongs to a class of positions not all of which are required, because of:
    - (i) a decrease in the student demand or enrolments for any course or courses;
    - (ii) a decision by the institution to:
      - (1) cease offering a course or courses; or
      - (2) vary the academic **content** of a course or courses to such an extent that one or more positions are not required;
- Taken in accordance with the academic procedures applicable from time to time at the institution.
- (iii) institutional financial exigency; or
  - (iv) substantial changes in work methods adopted as a result of organisational or technological change.
- (iv) provided that the following matters shall not be the basis for a position being surplus:
    - (1) opinions held or expressed by an employee or his or her refusal to express any particular opinion;

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- (2) matters relating to the methods of teaching and research used by an employee;
- (3) any matter properly dealt with as a case of serious misconduct or unsatisfactory performance.

(emphasis added)

- K7. In 1994 and 1995, the redundancy provisions were the subject of further arbitration. Commissioner Bryant undertook a process of final offer arbitration. The word “content” was not at issue in those proceedings, although other aspects of the redundancy clause were (for example, the original reference to “institutional financial exigency” was changed to “financial exigency within an organisational unit or cost centre”).
- K8. In Print L9844, the relevant sub-clause is expressed using the word “context” instead of “content”. This change did not arise from any argument put forward by the parties or canvassed by the tribunal itself. The word “context” appears to have entered the final award as a result of a transcription error.
- K9. The different word was not the subject of particular notice by the union until a recent proposed redundancy of a Professor at Monash University (Professor Komesaroff) where one of the issues in dispute was whether moving the delivery of a unit on professional ethics – a program in the development and delivery of which Professor Komesaroff had been closely involved for a number of years – from one school to another, without any substantive change in the content of the unit, was sufficient to constitute a change in the “academic context” and therefore provide a basis for involuntary redundancy.
- K10. The proposition that a university varies the ***content*** of a subject or subjects to the extent that an academic whose teaching fields were particularly in the area of ***content***

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that was being eliminated, might be redundant, is logical. The proposition that by moving a subject or subjects from one organisational unit to another, or from one degree program to another – that is, changing the *context* without changing the *content*, could justify declaring the staff teaching in that subject or subjects redundant, is far less obvious.

- K11. NTEU submits that the original intent of the parties, as well as the more logical and just formulation, should be reflected in the words of the Award, and therefore that the amendment proposed by the NTEU should be made.

## Additional submissions

- K12. NTEU notes that Mr Picouleau gave evidence disputing the NTEU’s submissions in relation to the particular instance of Professor Komesaroff mentioned at paragraph K9 above. NTEU submits that little turns on the particular facts of the case.

- K13. Contrary to the submissions of the employer parties, the amendment proposed by the NTEU is appropriate under the statutory framework since:

- K14. The current wording of the clause is ambiguous as to meaning, and therefore mitigates against a simple, easy to understand award system. It is difficult to imagine what might be meant by the phrase “academic context” in 17.1(b)(iii) that is not already provided for by “a decrease in student demand or enrolments in any academic course or subject...” in 17.1(b)(i) or “a decision to cease offering ... any course...” in 17.1(b)(ii), or “changes in ... work methods” in 17.1(b)(iii). On the other hand, a decision to vary the academic **content** of a course can more readily be understood to lead to a circumstance of redundancy. The change proposed results in a clearer and more logical award provision, and at the same time reflects the actual historical intent of the Commission and the parties.

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## **Part L: [AM2014/229, Item 2, & /230 Item 2, Research Institutes]**

That both Awards be amended to include Independent Research Institutes

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L1. The Commission has before it two competing applications – the NTEU’s application, which would bring research institutes (as defined) within the coverage of the two industry awards applying to academic and general staff (MA000006 & MA000007), and an application supported by APESMA and AAMRI.

### **Competence to bring the application**

- L2. NTEU is entitled to bring an application to vary the coverage of the *Higher Education Industry Academic Staff Award 2010* and the *Higher Education Industry General Staff Award 2010*, under Section 158, as it is an organisation that is *entitled to represent the industrial interests of one or more employers or employees that would become covered by the modern award*.
- L3. Amongst a number of other generic rules, in respect of general and some academic staff the NTEU eligibility rule confers coverage in Rule 6.2 (g):

*The positions of keyboard, secretarial clerical, administrative, technical, and professional staff employed by the Howard Florey Institute, the Walter and Eliza Hall Institute, the Baker Institute, the Ludwig Institute and the Murdoch Institute.*

In respect of academic, general and research staff, NTEU Rule 6.9 also states, subject to irrelevant exceptions, in part as follows:

*6.9(a) Persons employed by any higher education institution, or employed in connection with higher education or associated research, shall be eligible for membership of the Union.*

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## Introduction

- L4. Given that no one has put submissions in support of the status quo, there is necessarily an artificiality in the separation of the issues into for-and-against submissions. Nevertheless, in accordance with the Directions, these submissions will concentrate on the merits of the NTEU's application, and the submissions-in-reply will concentrate upon the deficiencies of the other parties' proposals.
- L5. The two central themes in these submissions can be stated as follows:
- a. First, NTEU submits that the industrial character of the work performed in research institutes, the subject and process of work, factors giving rise to work value, and the industrial issues likely to be the subject of specific award-based industrial regulation, are manifestly more analogous to university staff engaged in research covered by the two higher education modern awards, than to the employees covered by any other award.
  - b. Second, NTEU submits that the history of this matter shows that the current disposition of award coverage for research institute staff is not the result of the submissions of any parties in the award modernisation proceedings, not the result of any specific consideration, despite the matter having been put squarely to Commission by the ACTU and by the NTEU. Rather, the Commission inadvertently omitted to consider the matters put to it, and the current situation was the result. In the NTEU's submission, equity good conscience and the merits of the case enjoin the Commission to re-visit the merits of the matters as they were in 2009, and look at the issues again through the perspective of the award

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modernisation framework, to the extent this is not inconsistent with the current legislative framework.

## The history of consideration by the Commission

- L6. As stated above, the current award coverage of research institutes represented neither the position of the parties nor the result of any deliberate consideration by the Commission itself.
- L7. On 27 May 2008, in AM2008/1, the Award Modernisation Full Bench heard submissions of the parties about how it should proceed, and what the “priority awards” should be in scheduling award modernisation. Ms Bissett for the ACTU submitted as follows:

*PN90*

*MS BISSETT [ACTU] The Higher Education Industry Award will cover all employees in universities except any person employed in the operation of a commercial theatre venture. It covers controlled entities of universities, relevant research institutes affiliated with universities with some exclusions, private providers of post school education and employees of TAFE institutes in Victoria, but not TAFE teachers.*  
(emphasis added)

- L8. Mr McAlpine for the NTEU and Mr Mendelssohn for the CPSU followed:

*MR MCALPINE: We believe that such an approach is possible in line with the President's statement which talks about the possibility of revisiting the scope of awards as the process goes on, even quite late in the piece. We say our proposed scope clause is reasonably clear and the inclusions are with the qualifications I've already made reasonably self explanatory. However, I would want to make a few specific points. In relation to point 2 of the proposed scope clause, controlled entities at universities, we say most universities have one or more controlled entities and to the extent that these are involved in education and training, they're virtually always carrying out an activity which at some other university is carried out by direct university employees and there are awards in this area, there are federal awards in this area.*

*PN669*

*In relation to point 3, there's a long-standing nexus and similarity between the type of research institute we refer to which is fairly circumscribed and the higher education sector. There's a considerable turnover of employees between those two sectors and the sort of research that they do is very similar to the research that is done in*

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*universities, about 15,000 employees on research only functions, so universities are our biggest research institutes and these organisations essentially carry on the same type of business minus the teaching of undergraduate students, although their work in the supervision of postgraduate students is extremely important and many of the employees in those research institutes carry academic titles conferred by universities as well.*

*PN670*

*COMMISSIONER SMITH: Are those areas where you currently have award coverage?*

*PN671*

*MR MCALPINE: There are some awards in the area, there are some federal awards in the area. It has to be said mostly in Victoria and Western Australia. That partly I think reflects the fact that there are slightly different structures of research institutes in the various states. I don't think its origin is so much in award coverage, but, for example, in New South Wales, I think in Queensland, more of the big research institutes are state government agencies. I mean, while the work is similar, I think they fall into or we propose to exclude them at least on the basis that they are state government instrumentalities and then you've got CSIRO obviously which is the biggest stand-alone research institute and we haven't proposed that that should be included in the Higher Education Award.*

*PN2712*

*MR MENDELSSOHN: One, obviously, it is the persons employed directly by universities. That obviously would be the core of any definition of the higher education industry. The second is entities controlled or owned by universities which are engaged in educational functions, and we would agree that that should be included in the definition or the scope of a higher education industry because those entities frequently perform functions which previously weren't performed directly by universities and which have been in effect outsourced but outsourced to corporations which are relevantly subsidiaries of a university.*

*PN2713*

*But the NTEU proposal, and we would agree with, it would not encompass those university components or controlled entities that, for example, are set up to market a product that's been developed as a result of research carried out in a university, because that clearly has no connection per se with education. The third category in the NTEU list, and we would again support its inclusion in the proposed scope of the industry, is research institutes where in effect supervision of post graduate students takes place. So there is a directly educational role in those particular types of institute, but that clearly would exclude entities like the CSIRO for example.*

- L9. In its Decision of 20 June 2008, [2008] AIRCFB 550, the Commission reviewed the submissions of the parties and made no determination about the scope or number of awards in the area. However the bench did decide to include higher education in the priority-award group as follows;

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[30] We have decided to include a defined area of higher education on the priority list. We shall focus on mainstream universities both public and private. At this stage we shall not include the TAFE sector or the not-for-profit faith-based institutions which may offer a limited number of degree courses. Although we intend to include both public and private universities, the number of modern awards to be made is yet to be decided. But, in our view, it is preferable to examine all of the relevant issues at the same time.

L10. In further proceedings on 17 March 2009, Commissioner Whelan heard further submissions about the education awards in AM2008/33. On transcript, the following submissions were made:

PN259

*THE COMMISSIONER: They could be covered.*

PN260

*MR MCALPINE: That the classification descriptors are sufficiently broad and generic to encompass them, and the salary rates are not that different from the salary rates in the Non Enterprise Student Union Awards.*

PN261

*THE COMMISSIONER: Can I just ask you the other issue which is in some sense related, because I think it was also discussed in the context of higher education, and that's the university controlled entities.*

PN262

*MR MCALPINE: Well, again our position remains the same, which is that the university controlled entities whose primary business is the delivery of education, should be covered by the Higher Education Award. However ---*

PN263

*THE COMMISSIONER: What about the ones that are research institutes?*

PN264

*MR MCALPINE: Well I'll – can I deal with those ---*

PN265

*THE COMMISSIONER: Yes.*

PN266

*MR MCALPINE: Yes,*

PN267

*THE COMMISSIONER: All right, sorry.*

PN268

*MR MCALPINE: The university controlled entities that are research institutes are very small in number.*

PN269

*THE COMMISSIONER: Yes.*

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PN270

MR MCALPINE: *As in separate employers.*

PN271

THE COMMISSIONER: *Yes.*

PN272

MR MCALPINE: *So, for example, a university - there may be a university - there's the, you know, Western Australian Medical Research Institute, which is huge.*

PN273

THE COMMISSIONER: *Yes.*

PN274

MR MCALPINE: *And everybody who works for that is an employee of the University of Western Australia.*

PN275

THE COMMISSIONER: *Of the university, yes.*

PN276

MR MCALPINE: *It's more things like the Monash International Group of companies et cetera, et cetera, that run various foundation programs, in some cases even run - well, for example, Campus Management Services or whatever it's called this year, which is a controlled entity of the university - of Central Queensland University. Last time I looked, it provided 40 per cent of all the undergraduate education provided by Central Queensland University. Now, it is a wholly owned subsidiary of Central Queensland University. The students who go to it are students of Central Queensland University. If we walk up here to, I think, Lonsdale Street, we'll walk past a sign that says "Central Queensland University" and you walk in and the person who greets you at the reception desk is employed by the university controlled entity.*

PN277

THE COMMISSIONER: *Right.*

PN278

MR MCALPINE: *So there - it's - they're like BHP and BHP Steel, you know, they're two - when that existed, sorry. I'm showing my age. But the ---*

PN279

THE COMMISSIONER: *They don't own it anymore.*

PN280

MR MCALPINE: *Now that's at one extreme.*

PN281

THE COMMISSIONER: *Yes.*

PN282

MR MCALPINE: *That's at one extreme, and then there are other university controlled entities who do things like own property and maintain buildings, which are - which we have no interest in.*

PN283

THE COMMISSIONER: *Yes.*

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PN284

*MR MCALPINE: Now, we put proposals about university controlled entities in our earlier submissions to the Full Bench regarding higher education. We have assumed, I suppose partly not wanting to look recalcitrant and persistent, we have assumed that in relation to those we've lost that argument, and that they should be included in this Private Sector and Community Award, so that's actually our formal proposal today.*

PN285

*THE COMMISSIONER: Yes.*

PN286

*MR MCALPINE: But I suppose we do say that - -*

PN287

*THE COMMISSIONER: Well, all I can say is that I don't believe that any avenue are always totally closed.*

PN288

*MR MCALPINE: Now in relation to research institutes, research institutes are rarely controlled entities of universities. However, they employ people who have academic titles and there's a significant award that provides for salaries, effectively for research and academic staff employed at a lot of those research institutes. We put a proposal for a scope for research institutes which was fairly - which was quite limited. It obviously excluded the CSIRO, it excludes state government research institutes and it excluded for profit corporations. But that leaves a group of organisations like the Howard Florey Institute, the Baker Institute, the Lions Eye Institute in WA. There's a series of about 20 or 30 of those that have close affiliation arrangements with universities, are involved in the teaching and supervision of postgraduate students, and I think it's the Florey Institute, for example, is constituted as a department of the university, even though it's actually a separate body.*

PN289

*THE COMMISSIONER: Yes.*

PN290

*MR MCALPINE: We genuinely can't see any reason why those institutions, given the character of their business, the distinction between for example, the WA - the University of Western Australia Medical Research Institute and the Howard Florey Institute in terms of the type of work that is done, seems to us to be - you know, the distinction is very small and if the university descriptors, the university conditions and the university salary structures are appropriate to the UWA Medical Research Institute, then they're appropriate to the Howard Florey Institute. And we think that the alternative is that these institutions who have their own enterprise based awards and with whom we negotiate, the alternative would seem to me that they're going to be split up amongst about six different occupational awards; which can't be - can't be very efficient, because the way things are heading we presumably have an award for professional scientists, and engineers. We have another award for clerical staff. I don't know who would cover the technical staff. So we think whatever you do, they should be in one - they should be in an integrated award.*

The full transcript includes comments from Mr Pill (for some universities) and from Ms Pugsley (for the AHEIA).

<http://www.airc.gov.au/awardmod/databases/education/Transcripts/170309AM200833.pdf>

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L11. By these submissions the matter was squarely put again before the Commission as had earlier been foreshadowed. The Full Bench in its Decision of 22 May 2009 [2009] AIRCFB 450 acknowledged that this had been the appropriate place to raise remaining matters of coverage from the higher education awards:

*[63] Awards in this sector also cover employees of university unions, student unions and university controlled entities. When the higher education awards were created in the priority stage of award modernisation we did not deal with the coverage of these areas but provided for them to be considered in this stage.*

L12. This is clearly a reference to the matters put to it by the ACTU, CPSU and NTEU in the initial proceedings (including about research institutes), and was about the issues raised in the Stage 3 “education proceedings” before Commissioner Whelan. However the Commission’s Decision at para 64 omitted to respond to the matter which had been foreshadowed and argued for:

*[64] We have decided that coverage of university unions and student unions can most appropriately be dealt with by amendment to the Higher Education Industry–General Staff–Award 2010[22] rather than by the creation of an award specific to those organisations. In relation to non-teaching staff in university controlled entities generally, some may be covered by the draft Educational Services (Post-Secondary Education) Award 2010. Others will be covered by a classification in another industry award or in an occupational award.*

L13. NTEU does not consider this omission to be anything other than inadvertent. However, the Full Bench, among the many submissions and issues it had to consider, did not consider, even in a formal sense the issue of award coverage for research institutes. This was no trivial matter, as it affected the award coverage and rates of pay quite significantly for several thousand employees who had properly set minimum rates awards applying to their employment.

L14. This raises a number of issues for the Commission in these proceedings. NTEU contends that before the Commission considers whether to change the existing legal

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disposition of award coverage, under the existing legislative regime, it needs to decide whether in *equity good conscience and merit* (Section 578) the Commission needs to revisit the previous Commission's Decision. In particular, if the Commission omitted in 2009 to consider, let alone give reasons for, the inclusion or otherwise of research institutes in the higher education award, NTEU submits that the matters which were relevant to the setting of the modern award safety net *at that time* should receive consideration in relation to its application, in addition to the modern award objective stated in Section 234.

L15. In determining whether the current safety net is fair, the Commission should therefore consider the matters listed in the Award Modernisation Request under Section 576C

(1) (see in full at

[http://www.irc.gov.au/awardmod/download/request\\_cons\\_260809.pdf](http://www.irc.gov.au/awardmod/download/request_cons_260809.pdf)) NTEU

considers the following parts of the Request, especially those marked in bold text, to be particularly relevant:

*2. The creation of modern awards is not intended to:*

*(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;*

*(b) result in high-income employees being covered by modern awards;*

*(c) disadvantage employees;*

*(d) increase costs for employers*

*3. In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:*

*...*

*(h) relevant rates of pay in Australian Pay & Classification Scales and transitional awards;*

*...*

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**9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.**

- L16. To the extent that the Commission's Decisions in 2009 had the effect of taking some employees out of their previous award rates, these employees were very dramatically disadvantaged as can be seen by the comparison between the rates under the *Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989* and the *Professional Employees Award 2010*. There is no indication that the Commission had regard to this disadvantage, which constituted a decrease in the award safety net of up to \$35,000 p.a.
- L17. Moreover, there is no indication that the Commission had regard to the properly set minimum rates for academic and research staff, as included in the *Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989*, which were the only properly set minimum rates specifically formulated to deal with this type of work and which applied to some 14 research institutes' academic and research staff and which were a part of the *Australian Pay & Classification Scale*.
- L18. The same can be said of the rates forming part of the *Australian Pay & Classification Scale*, included in the Higher Education Workers Victoria Award 2005, which was an award containing properly set minimum rates and which applied to the general staff in Victorian universities, and as part of the same award, to Macfarlane Burnet Centre for Medical Research Limited, the Howard Florey Institute of Experimental Physiology & Medicine; and the Ludwig Institute for Cancer Research.

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L19. The Award Modernisation Request stated that Modern Awards were not intended to *extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free.* As a “class” of employee, it is clear that neither research institute academic nor general staff has “traditionally been award free”, although award coverage was not universal. The Award modernisation request also specifically permitted the Commission to extend award coverage *to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards.*

L20. The Commission also greatly increased the number of awards that apply to employers and employees at research institutes, as compared to the previous situation (see further below).

L21. The ACTU, NTEU and CPSU did clearly put the issue of research institutes before the Commission, and it has to be admitted that given the history of award coverage, the manifest historical nexus between the two groups (research institute staff and university staff), it was assumed that the Commission would have regard to the submissions particularly in the absence of any probative arguments put against it.

L22. Without any apparent deliberation, the Award Modernisation Full Bench:

- Removed a significant number of employees from any award coverage and/or;
- Dramatically reduced the applicable award rate of pay;
- Significantly increased the number of awards which apply to employers and which may apply to employees.

L23. NTEU submits that in light of this, the Commission as presently constituted is entitled to look afresh at the question of whether a fair safety net of salaries and conditions for

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research staff was actually established in 2009. The existing safety net of salaries and classifications cannot be fair if its fairness was not actually considered in 2009. This is not an argument alleging in any legal sense that the 2009 decision was invalid or void.

- L24. Rather it is based squarely upon the principle that, while the Commission has said correctly that *prima facie* the Modern Awards are considered to have achieved the modern award objective (Section 134), it cannot be a fair safety net if it were established without proper regard to a key relevant instrument – the Award Modernisation Request.
- L25. Moreover, in light of this, NTEU contends that for research institutes, the modern award objective has not been achieved in respect of Section 134:

*(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards;*

### **The relevance of the Award history to the industrial similarity of the work of university research staff and research institute staff**

- L26. NTEU concedes that in the way the Commission dealt with the award modernisation process in 2008 and 2009, the mere history of previous award coverage could not be entirely determinative of how many modern awards were established or who they covered.
- L27. Nevertheless, although the history of award coverage is not itself absolute proof of identical or very similar work, it can be highly indicative of a relevant industrial nexus, and is so in the case of research institutes.
- L28. In respect of salaries, Awards made in the past which applied to university academic staff have applied in the same or nearly identical terms to the same classes of employees employed by research institutes.

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- L29. *The Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989* applied to:

The University of Melbourne  
 Monash University  
 LaTrobe University  
 Deakin University  
 Howard Florey Institute of Experimental Physiology and Medicine  
 The Walter and Eliza Hall Institute of Medical Research  
 Ludwig Institute for Cancer Research  
 The Murdoch Institute for Research into Birth Defects Limited  
 Royal Children's Hospital Research Foundation  
 Baker Medical Research Institute  
 St. Vincent's Institute of Medical Research  
 The University of Western Australia  
 Curtin University of Technology  
 Murdoch University  
 Lions Eye Institute of WA (Inc.)  
 The Australian Neuromuscular Research Institute  
 Princess Margaret Children's Medical Research Foundation (Inc.)  
 The Western Australian Research Institute for Child Health Ltd  
 Bionic Ear Institute  
 Macfarlane Burnet Centre for Medical Research.

- L30. Moreover, the industry award for general staff in higher education in Victoria – the Higher Education Workers Victoria Award 2005 covered universities and some of the larger research institutes.

Australian Higher Education Industrial Association  
 University of Melbourne  
 Monash University  
 LaTrobe University  
 Deakin University  
 Victoria University of Technology  
 RMIT University  
 Swinburne University  
 Ballarat University  
 Hawthorn Institute of Education Ltd  
 Victorian College of the Arts  
 Macfarlane Burnet Centre for Medical Research Limited  
 Howard Florey Institute of Experimental Physiology & Medicine and  
 Ludwig Institute for Cancer Research.

- L31. AAMRI's apparent recent "discovery" that research institutes are fundamentally different from universities, contradicts the practice of quite a number of its members

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in the past. The work has been considered sufficiently similar that by consent they have agreed that the same awards should apply to them and to universities. The Commission has also been willing to accept that the award salary structures are appropriate as properly fixed minimum rates for the relevant work, whether that work be performed in a research institute or a university. The commonality of *salary and classification structures and descriptors* found in these awards, is far more indicative of an industrial nexus than are other award conditions. They indicate crucially that the way the work is *described and valued* is the same or has sufficient in common as to not require distinct regulation. For many years the practice of a significant number of relevant industrial parties has been to treat these employees, whether employed in universities or research institutes as appropriately being covered by the same awards.

## **Issues of fact and what the evidence disclosed**

A111. NTEU formally relies on all the witness and other evidence presented. However, set out below is a series of factual contentions which NTEU submits the Commission can find, and under each listed contention some of the more important evidence adduced which supports that contention.

[Note about the Table: Reference to “**Para**” is a reference to witness statement numbered paragraphs. Reference to “**PN**” is a reference to the paragraph number of the transcript. Text in *italic script* indicates a quote from a witness statement or transcript. Other text is a paraphrasing of what the evidence discloses]

**All research institutes have affiliation arrangements with universities and generally close collaboration**

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**Peter Higgs Witness Statement, Exhibit NTEU AI**

**Paras 4, 5**

**Para 18** - *Aside from the actual work, another reason to work collaboratively is related to funding. Burnet is not eligible to apply for Australian Research Council Grants (ARC), unless a project is linked to a research team with investigators at a University. So we design and develop projects with universities. An example is the national drug and alcohol centres which team up to do the annual sentinel surveillance survey in every state. This occurs in conjunction with universities and the Burnet coordinates the Victorian arm of the survey. The money comes via the Department of Health and Aging (DOHA).*

**Roy Sneddon Witness Statement, Exhibit NTEU AH**

**PN7303**

**David Trevaks Witness Statement, NTEU Exhibit AJ**

**Para 8** - *I have never been employed by a University but I am situated on the University of Melbourne Parkville campus and the Melbourne Brain Centre Heidelberg campus and have closely collaborated with many University colleagues. The Institute is recognised as the Florey Department of Neuroscience and Mental Health as part of Melbourne University.*

**Para 13-14** – It is hard to distinguish who employs whom because of the integration of functions.

**Para 18 – 24** - Examples of integration and collaboration

**In research institutes, the industrial character of the work, the subject and process of work, factors giving rise to work value, and the industrial issues likely to be the subject of specific industrial regulation, are more analogous to university staff engaged in research covered by the higher education modern awards, than to the employees covered by any other award.**

**Debra O'Connor - Witness Statement , AAMRI 3**

**PN8165-8166** - Research at the National Ageing Research Institute (NARI) is very different from Laboratory-based science.

**PN8167-8173** - *I'd also like to ask you some questions about the nature of research, because that's at the heart of what we're discussing in these proceedings and I'm going to put some propositions to you about what are some elements of research and ask if you agree or disagree and if you could tell me why you agree or disagree, if you need to expand on that. So the first proposition is that research is about the advancement and discovery of new knowledge and the questioning of accepted knowledge? --- It is and translational research is about bringing that research in to practice, which is what we do as well.*

**PN8168** - *But research is based on a commitment to methodological norms, based on the idea of dispassionate search for truth? Yes.*

**PN8169** - *That should be based on evidence? Yes.*

**PN8170** - *That the presentation of the outcomes of research to the critical scrutiny of peers, both nationally and internationally, is an essential part of research? --- It's not always an essential part for qualitative research, it may be peer reviewed in a different way.*

**PN8171** - *But peer review is part of the research process? --- It is.*

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**PN8172** - *In different ways? Yes.*

**PN8173** - *The research work of independent medical research institutes is work conducted for the public good? -- Yes.*

**PN8174** - *It's subject to ethical guidelines and regulation? -- Yes.*

**PN8175** - *An important element of academic research is that the findings should be free from political or commercial control? --- Yes.*

**PN8201-8207** - NARI is a prolific publisher of peer-reviewed research and peer reviewed research is part of the process of validating research.

#### **Karen Ford Witness Statement - Exhibit NTEU V**

**Para 1, 3** - Describes the range of administrative work done in support of a medical research centre in a University.

#### **Peter Higgs Witness Statement - Exhibit NTEU AI**

**Para 6** - *In my extensive experience working in and for both universities and research institutes I have had the opportunity to observe and interact with the work of many other colleagues - both academic and general staff – in the research sector and to see the interaction between health care, research and higher education. Although there are significant differences within and between those research institutes where staff hold academic titles or supervision of research students occurs, in my extensive experience the fundamental nature of the work has common dominant features. These include that they are not themselves, except incidentally, involved in the provision of medical health or dental services, but are engaged in the search for new knowledge and in the development of that knowledge such that it can be applied, commercially or socially, to the benefit of individuals and society. An essential part of the search for that new knowledge is the integration of new researchers, undertaking PhDs, post-doctoral fellowships, or other advanced studies into that search. At that advanced level, education and research are part of an integrated process. Moreover, although the process has to be managed in a business-like manner, the ultimate purpose of the search for new knowledge and the education of new researchers is not to return a profit to the employer but to advance knowledge and human health. These are essential characteristics of such medical research institutes. Precisely the same type of work as this occurs, and for the same purposes, in Universities, where there are many research only staff (academic and non-academic) who undertake no or very little undergraduate teaching duties, but are devoted to the same type of work and for the same purpose.*

**Para 14** - *The job roles at the Institute are equivalent to academic roles in Universities. For example, a Research Assistant, Research Officer or Research Fellow can apply for an academic role at a University and expect that the roles they have been doing in their job would be equivalent. A Senior Research Fellow such as myself could apply for a Senior Lecturer role in a University. I have two business cards – one as a Senior Research Fellow at Burnet and one as an Early Career Research Fellow at Curtin University.*

#### **Para 15-17 –**

**15.** *In any case, I define my vocation as a “Researcher”. By this I mean someone who collects analyses and writes up data. Generating and publishing new knowledge is a big and important part of this.*

**16.** *Of course, in addition to staff who undertake this role as “Researcher”, there are others who are engaged in the research process but who do not themselves publish new knowledge. These include some classes of research assistants and skilled technical and information technology staff. These staff are also engaged in the same type of work and exercise the same types of skills directed to the same purposes, as their counterparts in Universities. Their work is an integral and necessary part of the research. Research Institutes such as mine also employ a range of administrative, finance, human resources, fundraising, public relations and general information technology staff who perform important corporate roles but are not directly engaged in the research process.*

**17.** *There is no difference at all between the research work I've done at the Institute and within a University.*

**Para 22** - *I am a member of the UniSuper higher education industry superannuation fund and the Burnet also pays into this.*

**PN7354 – 7356** - *Researchers at the Burnet are more concerned with developing a new drug or a treatment or a prevention method than the publication of their research in a journal.*

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*Do you agree with that? --- I don't, actually.*

*You don't agree with it? --- No, I think there's - I think ultimately we are doing research to get published in journals.*

*You don't think that you are not as concerned or more concerned with the development of new drugs and treatments and prevention methods? I don't know about "more concerned", I'm not sure that the weight - that you would put weighting - how you would kind of work out the weighting of that. I think the Burnet, as you have pointed out, is quite a unique institution in that we are doing a lot of public health kind of work and that the work, I think - our little slogan is "From evidence to action" - that we make contributions to public health that are beyond or more than just writing for publications.*

**PN7358** - Yes? --- *But I think publications are an important and an essential part of the work that we do.*

**PN7359** - *But you do translational research, don't you? --- Yes, definitely.*

**PN7360** - Okay? --- *That gets published in journals.*

**PN7361** - *But you don't agree with Professor Crabb that it is really the development of the drug and the translation of that into activities that are important rather than the journal publication? To be honest, I think that if you weren't publishing in the journals, you wouldn't be getting the money to do the research. So that's hard to work out exactly where you put the balance in terms of the importance, but I think Brendan, Professor Crabb, would say that all of the work that we do needs to be published because without having good and important publications in academic journals, they're not going to get the grants or the Burnet won't get the grants to enable them to do the research to do that sort of stuff. So to be ---*

**PN7362** - *MRI researchers do publish in academic journals? --- Absolutely.*

**PN7363**

**Also**

**PN7410** - *You agree that public health activities conducted at Burnet are not usually carried out by a university, or do you not know? --- I don't think - certainly the public health activities that I conduct at the Burnet are no different to that that I have done at the universities that I have been employed at. So, every Thursday, for example, as part of my active research role, we have a van that goes into street drug markets where we are collecting data for research purposes. We do regular testing, we are doing a clinical trial of new treatments for Hepatitis C at the moment, and my role in that is no different based at the universities or at the Burnet.*

**PN7411** - **COMMISSIONER JOHNS:** *Who are you doing that with? With the university or with Burnet? --- Well, I am employed by the university but I am a collaborator on a Burnet project, so they - I mean, this is kind of the subtlety of who employs me to do the work that I kind of do. I am employed to be a researcher at the university, I am working on a Burnet, essentially, project, but whether I'm a Burnet employee for that part of the time or whether I'm a university employee, it's not - like it's hard to kind of say whether I'm ---*

**PN7412** - *But you get paid by both? --- I do get paid. I'm a point 2 position with the Burnet, so the work that I do, whether it's that part of the job, whether it's the supervision of students, whether it's the writing up of papers, it's hard to kind of say. Well, I don't like to sit down and say, "This is my job, 15 minutes of this hour I'm spending doing this". I've got three email accounts that are operating all the time, you know, it's ---*

**PN7413** - *It's all a bit blurry? --- It's very blurry, to be honest, in terms of that, and I don't know that the organisations themselves could say - they would just say that Peter - when I write papers, I have both affiliations, so it's kind of - it's work that I do, I get paid by two employers, mostly by one, a little bit by the other.*

**PN7414** - **MR RUSKIN:** *The AusAID work that is done, that can't be done by a university, can it? --- I'm not sure. Probably not, I would say, but I don't ---*

**Also**

**PN7517** - *How would you characterise what is involved in PhD supervision? --- For me, and I've got a number of - well, I've got a PhD student at the moment but I've had a number of people who have finished - and what it meant was that we were working together to develop a protocol for the research, we were reflecting on the data as it was being*

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*collected and as it was being written up, collaborating on the writing of papers. A lot of the papers that I have written are jointly done with people who are either honour students or PhD students.*

**PN7518** - *Has that involved any role in assessment? --- Yes, it does, for sure, like at the moment, anyone who supervises an honours student at Monash as part of the Burnet will also be asked - I think there's about 18 students who are doing honours, so I will be asked to mark someone else's honours and those supervisors will be asked to mark the honour students that I have responsibility for, yes.*

**PN7519** - *Are those characteristics of PhD supervision different whether you are at a university or at Burnet? --- No, well, they haven't been in my experience.*

#### **Professor Doulas Hilton - Witness Statements, Exhibit, AAMRI 1, AAMRI 2**

**AAMRI 2 – Para 19** – *The core research work of MRI researchers is aligned with improving health outcomes and is based on scientific method. While it is similar to the work of medical researchers and other scientists employed in universities, it is clearly different from the kind of work performed by the majority of academics in universities such as in the humanities.*

**Also AAMRI 2 – Para 20-22**

#### **Roy Sneddon - Witness Statement, Exhibit NTEU AH**

**Para 6-7, 32; and re medical research administrators - 20, 22, 24, 29, 42**

**PN 7291-7292**

#### **David Trevaks - Witness Statement, NTEU Exhibit AJ**

**Para 29-30** - *I do not see a distinction between research which occurs at a University and that which occurs at the Florey Institute. I would describe our output at the Institute as new knowledge and a researcher in science as someone who discovers new knowledge. Researchers at the Florey Institute conduct original research and publish in peer reviewed journals, just as their colleagues do at a University.*

**30.** *My work is in research and education. We don't interact with health patients or provide a health service. We publish research outcomes in scientific journals, not health journals. Down the track we hope our research assists in the health industry, but we are not applying a health service.*

**Para 36** - *As the grants are portable I have witnessed many groups who have moved from University departments to research institutes and vice-versa and staff are simply placed on the same HEW level.*

## **Most Research Institutes have a systematic and ongoing commitment to education.**

#### **Peter Higgs - Witness Statement, Exhibit NTEU AI**

**Para 10-12**

#### **Professor Doulas Hilton - Witness Statements Exhibits, AAMRI 1, AAMRI 2**

**PN9020-8023** - WEHI promotes its education functions and its status as a Department of the University of Melbourne.

#### **Roy Sneddon - Witness Statement, Exhibit NTEU AH**

**Para 34**

#### **David Trevaks - Witness Statement, NTEU Exhibit AJ**

**Para 11** - *The Florey Institute has around 400 staff and 100 PHD students.*

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**The sources of funding for research institutes are the same or similar as those for analogous components of universities (e.g. medical research institutes in universities)**

**Professor Doulas Hilton - Witness Statements, Exhibits AAMRI 1, AAMRI 2**

**PN7989** - Universities and MRIs are the main recipients of NHMRC Grants.

**Roy Sneddon Witness - Statement, Exhibit NTEU AH**

**Para 36** - (qualified by PN 7279 – only universities can get ARC grants)

**The award structures applicable to university academic and general staff have applied within some research institutes for many years and have been appropriate to that work.**

**Professor Doulas Hilton - Witness Statements, Exhibits AAMRI 1, AAMRI 2**

**PN8003** - WEHI uses the higher education general staff classifications to classify and advertise positions, even though it has no EBA

**David Trevaks - Witness Statement, NTEU Exhibit AJ**

**Para 3** – Job Classification under Howard Florey Institute Union Enterprise Agreement 2014-2017 is HEW 7.

**Para 26-28 and Attachment 3**– Classifications and titles are identical with universities' general staff and General Staff Modern Award.

**The research staff of research institutes are considered to be academic staff, unlike other researchers (except some working in hospitals)**

**Debra O'Connor - Witness Statement - AAMRI 3**

**PNT8236-8237 & 8252-8258** - NARI uses the same classifications and titles for academic staff as are used in universities, and divides its staff into "academic staff" and "administrative and general staff".

**PN8269** – Academic titles are important to researchers.

**David Trevaks - Witness Statement, NTEU Exhibit AJ**

**Para 27 and Attachment 2 to Statement** - Academic classification titles are used for research staff.

**The organisation of the industry of employers demonstrates the affinity between universities and medical research institutes.**

**Professor Doulas Hilton - Witness Statements, Exhibits AAMRI 1, AAMRI**

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**AAMRI 1 - Para 21** – Five of AAMRIs members are universities (parts of universities)

## General Issues of Merit and the Statutory Scheme

- L32. AAMRI witnesses attempted to make much of the “differences” between universities and medical research institutes. Clearly, considered as institutions, there are undoubtedly differences between the range of functions covered by universities and independent research institutes. The most obvious examples would be that independent research institutes do not confer degrees and do not run undergraduate teaching. This is conceded.
- L33. However, NTEU submits that this is of limited relevance to the matter before the Commission. The universities are enormously diverse institutions, and the evidence discloses that there are some 17,000 staff employed as “research-only” staff in universities (as opposed to “teaching and research” or “teaching only” or “other” staff). See, for example, Exhibit G, Attachment C. These staff are engaged in the process of research, which a general consensus of the evidence seems to involve the search for new knowledge based on evidence, and the peer review of findings to test and question established knowledge and theory. Such research can be basic, applied, or translational, but all are forms of research.
- L34. The question before the Commission should not be *“Are universities and research institutes the same?”* The question should be *“Is the work – considered as industry or occupation – of research institutes of a similar nature to work that is covered by the higher education modern awards?”*, (to borrow the words of the Award Modernisation Request).
- L35. There are five large medical research institutes which are members of AAMRI, whose staff are all staff of a university and in this crucial sense *are* universities. When

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pressed about the activities undertaken in university-based medical research institutes,

AAMRI witnesses were at a loss really to explain much about the alleged differences.

- L36. Moreover, in relation to one of these, AAMRI President Professor Hilton answered as follows:

**PN7777**

*In that context, as you described, John Curtin School of Medical Research, being sufficiently independent, it has its own mission, in a sense?---Yes.*

**PN7778**

*So in relation to medical researchers, if we were looking at the mission of those who work in university medical research institutes and those who work in independent medical research institutes, we'd be comparing the mission of the medical research institutes, not the mission of the university as a whole, would that be correct?---That would be correct.*

- L37. AAMRI failed to show how the mission of this work was different. In fact, in his own witness statement, Professor Hilton stated (AAMRI 2 – Para 19) “*The core research work of MRI researchers is aligned with improving health outcomes and is based on scientific method. While it is similar to the work of medical researchers and other scientists employed in universities, it is clearly different from the kind of work performed by the majority of academics in universities such as in the humanities.*”

- L38. The two higher education modern awards already cover the work of medical research institutes and employees who work in medical research institutes – academic, research and general staff. According to Professor Hilton, the work is similar, it can be assumed that the mission is similar – the promotion of human health through research. Professor Hilton also concedes that it is similar to “*other scientists employed in universities*” a much larger group even than those employed in university medical research.

- L39. AAMRI witnesses did give some evidence, which was contested by NTEU witnesses, that the research work undertaken by medical researchers in universities is different,

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or has a different emphasis, from that done by researchers in independent medical research institutes. Even if all this evidence were accepted and all the opposing evidence were discounted, the type of difference described is commonplace in any industry award. *The Manufacturing and Associated Industries and Occupations Award 2010* covers bottle merchants and space tracking, and by definition covers both a high-tech for profit engineering firm and a non-profit workshop run to provide work for people with severe disabilities. By comparison, the alleged differences between medical research in universities and in independent medical research institutes are trivial.

- L40. Universities are covered by Awards which include “Higher Education” in the title, but the industry they cover at the moment – universities – have for many decades carried out all of undergraduate and post-graduate course teaching, and the supervision of postgraduate research students and stand-alone research carried out by staff not significantly engaged in coursework teaching. The Awards are not Higher Education *Teaching Awards*; they have always had to encompass staff who engage only in part of what a university does. This is self-evident from the Award Classification Descriptors for research staff set out in Schedule A to the *Higher Education Industry Academic Staff Award 2010* (part A.2), which establish the work-value equivalence between teaching/research and research-only staff. The research-staff descriptors are manifestly broad enough to encompass the research of medical researchers in independent medical research institutes, and the only evidence presented against this was elicited through cross-examination and was unconvincing (See for example Professor Hilton at transcript PN 7800-7900). As with all such descriptors, not all words will be applicable or relevant to all employees. This does not render them inappropriate. Nor does the fact that employees may engage in some other activities

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not listed in the descriptors, whose purpose is to identify the key work value distinctions, not to provide a description of a job. There was no evidence from anyone that throughout all the years during which this structure applied to a number of research institutes, they presented any practical problem.

- L41. There was no evidence or even a suggestion from anyone that the award classification and salary structures as found in the *Higher Education Industry General Staff Award 2010*, which are the same as previously applied to a number of research institutes, were inappropriate to the performance of work or indeed had ever presented any difficulty. These descriptors are manifestly designed to cover research institutes and centres, of the type found in universities and medical research institutes.
- L42. Set out below are the descriptors for the most numerous classifications used in the sector – HEW4 to HEW7, taken from the Award. Not only is it apparent from the words of the Award that it is capable of covering all professional, scientific, administrative, clerical, computing, technical and trades staff which are likely to be employee of a research institute. It is also obvious from reading the descriptors that they were written very much with scientific research in mind. Although research institutes employ a range of professional and clerical staff who may in the general workforce be covered by one or more modern awards, the NTEU has marked in *italic underlined* those parts of the descriptors which might be considered research-work-specific:

#### **HIGHER EDUCATION WORKER LEVEL 4**

##### **Training level or qualifications**

Level 4 duties typically require a skill level which assumes and requires knowledge or training equivalent to:

- completion of a diploma level qualification with relevant work related experience; or
- completion of a Certificate IV with relevant work experience; or
- completion of a post-trades certificate and extensive relevant experience and;
- on the job training; or
- completion of a Certificate III with extensive relevant work experience; or
- an equivalent combination of relevant experience and/or education/training.

##### **Occupational equivalent**

Technical officer or technician, administrative above Level 3, advanced tradespersons.

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#### **Level of supervision**

*In technical positions, routine supervision to general direction depending upon experience and the complexity of the tasks. In other positions, general direction.* May supervise or co-ordinate others to achieve objectives, including liaison with employees at higher levels. May undertake stand-alone work.

#### **Task level**

*May undertake limited creative, planning or design functions;* apply skills to a varied range of different tasks.

#### **Organisational knowledge**

Perform tasks/assignments which require proficiency in the work area's rules, regulations, processes and techniques, and how they interact with other related functions.

#### **Judgment, independence and problem solving**

In trades positions, extensive diagnostic skills.

*In technical positions, apply theoretical knowledge and techniques to a range of procedures and tasks.*

In administrative positions, provide factual advice which requires proficiency in the work area's rules and regulations, procedures requiring expertise in a specialist area or broad knowledge of a range of personnel and functions.

#### **Typical activities**

In trades positions:

- work on complex engineering or interconnected electrical circuits; and/or
- exercise high precision trades skills using various materials and/or specialised techniques.

*In technical positions:*

- *develop new equipment to criteria developed and specified by others;*
- *under routine direction, assist in the conduct of major experiments and research programs and/or in setting up complex or unusual equipment for a range of experiments and demonstrations; and/or*
- *demonstrate the use of equipment and prepare reports of a technical nature as directed.*

In library technician positions:

- undertake copy cataloguing;
- use a range of bibliographic databases;
- undertake acquisitions; and/or
- respond to reference inquiries.

In administrative positions:

- may use a full range of desktop based programs, including word processing packages, mathematical formulae and symbols, manipulation of text and layout in desktop publishing and/or web software, and management information systems;
- plan and set up spreadsheets or database applications;
- be responsible for providing a full range of secretarial services, e.g. in a faculty;
- provide advice to students on enrolment procedures and requirements; and/or
- administer enrolment and course progression records.

## **HIGHER EDUCATION WORKER LEVEL 5**

#### **Training level or qualifications**

Level 5 duties typically require a skill level which assumes and requires knowledge or training equivalent to:

- completion of a degree without subsequent relevant work experience; or
- completion of an advanced diploma qualification and at least one year's subsequent relevant work experience; or
- completion of a diploma qualification and at least two years' subsequent relevant work experience; or
- completion of a Certificate IV and extensive relevant work experience; or
- completion of a post-trades certificate and extensive (typically more than two years') relevant experience as a technician; or
- an equivalent combination of relevant experience and/or education/training.

#### **Occupational equivalent**

Graduate (i.e. degree) or professional, without subsequent work experience on entry (including inexperienced computer systems officer), administrator with responsibility for advice and determinations, *experienced technical officer*.

#### **Level of supervision**

In professional positions, routine supervision to general direction, depending on tasks involved and experience. In other positions, general direction and may supervise other staff.

#### **Task level**

*Apply body of broad technical knowledge and experience at a more advanced level than Level 4, including the development of areas of specialist expertise. In professional positions, apply theoretical knowledge, at degree level, in a straightforward way.* In administrative positions, provide interpretation, advice and decisions on rules and entitlements.

#### **Organisational knowledge**

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Perform tasks/assignments which require proficiency in the work area's rules, regulations, policies, procedures, systems, processes and techniques, and how they interact with other related functions, in order to assist in their adaptation to achieve objectives, and advise, assist and influence others.

#### **Judgment, independence and problem solving**

*In professional positions, solve problems through the standard application of theoretical principles and techniques at degree level. In technical positions, apply standard technical training and experience to solve problems.* In administrative positions, may apply expertise in a particular set of rules or regulations to make decisions, or be responsible for co-ordinating a team to provide an administrative service.

#### **Typical activities**

##### *In technical positions:*

- *develop new equipment to general specifications;*
- *under general direction, assist in the conduct of major experiments and research programs and/or in setting up complex or unusual equipment for a range of experiments and demonstrations;*
- *under broad direction, set up, monitor and demonstrate standard experiments and equipment use; and/or*
- *prepare reports of a technical nature.*

In library technician positions:

- perform at a higher level than Level 4, including:
- assist with reader education programs and more complex bibliographic and acquisition services; and/or
- operate a discrete unit within a library which may involve significant supervision or be the senior employee in an out-posted service.

In administrative positions:

- responsible for the explanation and administration of an administrative function, e.g. HECS advice, records, determinations and payments, a centralised enrolment function, the organisation and administration of exams at a small campus.

##### *In professional positions and under professional supervision:*

- *work as part of a research team in a support role;*
- provide a range of library services including bibliographic assistance, original cataloguing and reader education in library and reference services; and/or
- provide counselling services.

## **HIGHER EDUCATION WORKER LEVEL 6**

#### **Training level or qualifications**

Level 6 duties typically require a skill level which assumes and requires knowledge or training equivalent to:

- a degree with subsequent relevant experience; or
- extensive experience and specialist expertise or broad knowledge in technical or administrative fields; or
- an equivalent combination of relevant experience and/or education/training.

#### **Occupational equivalent**

Graduate or professional with subsequent relevant work experience (including a computer systems officer with some experience), line manager, *experienced technical specialist and/or technical supervisor.*

#### **Level of supervision**

In professional positions, general direction; in other positions, broad direction. May have extensive supervisory and line management responsibility for technical, administrative and other non-professional employees.

#### **Task level**

Perform work assignments guided by policy, precedent, professional standards and managerial or technical expertise. Employees would have the latitude to develop or redefine procedure and interpret policy so long as other work areas are not affected. *In technical and administrative areas, have a depth or breadth of expertise developed through extensive relevant experience and application.*

#### **Organisational knowledge**

Perform tasks/assignments which require proficiency in the work area's existing rules, regulations, policies, procedures, systems, processes and techniques and how they interact with other related functions, and to adapt those procedures and techniques as required to achieve objectives without impacting on other areas.

#### **Judgment, independence and problem solving**

Discretion to innovate within own function and take responsibility for outcomes; design, develop and test complex equipment, systems and procedures; undertake planning involving resources use and develop proposals for resource allocation; *exercise high level diagnostic skills on sophisticated equipment or systems; analyse and report on data and experiments.*

#### **Typical activities**

##### *In technical positions:*

- *manage a teaching or research laboratory or a field station;*
- *provide highly specialised technical services;*
- *set up complex experiments;*

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<i>AM2014/230</i>	<i>Higher Education Industry – General Staff – Award 2010</i>	<i>MA000007</i>

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- design and construct complex or unusual equipment to general specifications;
- assist honours and postgraduate students with their laboratory requirements; and/or
- install, repair, provide and demonstrate computer services in laboratories.

In administrative positions:

- provide financial, policy and planning advice;
- service a range of administrative and academic committees, including preparation of agendas, papers, minutes and correspondence; and/or
- monitor expenditure against budget in a school or small faculty.

In professional positions:

- work as part of a research team;
- provide a range of library services, including bibliographic assistance, original cataloguing and reader education in library and reference services;
- provide counselling services;
- undertake a range of computer programming tasks;
- provide documentation and assistance to computer users; and/or
- analyse less complex user and system requirements.

## HIGHER EDUCATION WORKER LEVEL 7

### Training level or qualifications

Level 7 duties typically require a skill level which assumes and requires knowledge or training equivalent to:

- a degree with at least four years' subsequent relevant experience; or
- extensive experience and management expertise in technical or administrative fields; or
- an equivalent combination of relevant experience and/or education/training.

### Occupational equivalent

Senior librarian, technical manager, senior research assistant, professional or scientific officer, senior administrator in a small less complex faculty.

### Level of supervision

Broad direction. May manage other employees including administrative, technical and/or professional employees.

### Task level

Independently relate existing policy to work assignments or rethink the way a specific body of knowledge is applied in order to solve problems. In professional or technical positions, may be a recognised authority in a specialised area.

### Organisational knowledge

Detailed knowledge of academic and administrative policies and the inter-relationships between a range of policies and activities.

### Judgment, independence and problem solving

Independently relate existing policy to work assignments, rethink the way a specific body of knowledge is applied in order to solve problems, adapt procedures to fit policy prescriptions or use theoretical principles in modifying and adapting techniques. This may involve stand-alone work or the supervision of employees in order to achieve objectives. It may also involve the interpretation of policy which has an impact beyond the immediate work area.

### Typical activities

In a library, combine specialist expertise and responsibilities for managing a library function.

In student services, the training and supervision of other professional employees combined with policy development responsibilities which may include research and publication.

In technical manager positions, the management of teaching and research facilities for a department or school.

In research positions, acknowledged expertise in a specialised area or a combination of technical management and specialised research.

In administrative positions, provide less senior administrative support to relatively small and less complex faculties or equivalent.

L43. As can clearly be seen from this extract, and indeed from a closer examination of all

the descriptors in the Award, this Award:

- would cover all non-academic staff of research institutes
- has specifically research-related descriptors, and

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- establishes comprehensive internal relativities based on work value, which ensures equal pay for equal work-value across the diverse occupational categories.
- L44. It is no wonder that a number of research institutes have agreed to be bound by this structure in the past, and it is also not surprising that a number of enterprise agreements continue to use it. It is the right award.
- L45. While the foregoing arguments are framed as questions of general merit, NTEU submits that the following elements are relevant to the statutory framework and the general approach of the Commission.
- L46. The modern awards objective set out in Section 134 is a starting point for consideration:
- L47. Under Section 134 (1) generally the NTEU submits that the existing safety net is not *fair* and is *not relevant*. The safety net as it currently exists fails to recognise properly set minimum rates established by the Commission in the past for this type of work. NTEU is not seeking anything more than to have those rates recognised. Not that it is strictly necessary to the argument, but NTEU submits that, at least in a residual way, the *Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989* still applies and the rates in that Award continue to have some application. The safety net is not relevant or fair in that it leaves a significant number of general staff employees previously covered by awards without award coverage. Moreover, it is not relevant because it was set without regard to the specific needs of the research institutes' employees.
- L48. As regards Sub-sections 134(1) (a)-(c), (da), and (e), NTEU considers these factors to be of limited relevance here. The only possible exception to that is that there may be less encouragement to collective bargaining with a confusing mixture of occupational awards for non-academic staff making it less easy to take account of the BOOT test.

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- L49. Section 134 (1) (d) - the *need to promote flexible modern work practices and the efficient and productive performance of work* and 134 (1) (f), insofar as it relates to *productivity*, are highly relevant, in particular for the general staff in research institutes. An integrated ten-level structure spanning the different occupational streams, and establishing a set of coherent internal relativities specifically designed for this type of work, has to be preferred to a mish-mash of occupational awards with different rates, with some other employees being award-free. It is also relevant to the academic staff, whose structure is designed to reward, recognise and provide incentives for, excellence at the highest level of research. To cut that structure off also therefore has implications for Sub-Section 134 (1) (h), particularly in relation to the *competitiveness of the national economy*.
- L50. In relation to Section 134 (1) (f) as it relates to *employment cost* no arguments or evidence was put about this and NTEU suspects that it is not relevant. As the sub-section relates to regulatory burden, NTEU submits that having all employees covered by one of two awards will reduce the regulatory burden.
- L51. NTEU's proposals also advance Section 134 (1) (g). Two simple and straightforward awards covering all employees, are to be preferred to the current arrangements.

## **Alternative position**

- L52. NTEU is not obsessed with independent research institutes being covered by the two Higher Education Awards, if the objection is that they want to remain “different”. NTEU’s primary concern is the protection of rates of pay and an integrated fit-for-purpose award structure based on the needs of this industry’s employees.
- L53. On this basis, though it is not our preferred position, we would prefer a separate modern award covering research institutes to the current position. However NTEU

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draws attention to the provisions of Section 163 (2), which in our submission would make such a course of action inappropriate in the present case.

## **Part M: [AM2014/229 Item 9, Academic Casual Conversion]**

### A new provision for the conversion of certain casual academic work

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- M1. This claim will be scheduled and addressed after the conclusion of the Common issue – AM2014/197. Therefore the NTEU has not addressed it in these submissions and reserves our position until such time as it is listed for consideration.