

**IN THE FAIR WORK COMMISSION**

***Fair Work Act 2009***  
**s.156 - Four Yearly Review of Modern Awards**

**AM 2014/229 - Higher Education Industry - Academic Staff - Award 2010**

**AM 2014/230 - Higher Education Industry - General Staff - Award 2010**

**THE GROUP OF 8 UNIVERSITIES FINAL SUBMISSIONS IN RESPONSE TO NTEU CLAIMS**

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## 1. Introduction and Previous Submissions

1. These submissions are made on behalf of the Group of 8 universities in Australia, comprising the University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland (**Group of 8**).
2. The Group of 8 are research intensive universities and employ approximately 50% of employees in the higher education sector and perform approximately 75% of the Government funded research in Australia. This is important given the emphasis in the NTEU applications in these proceedings to its attempt to have the Commission introduce detailed award regulation of academic work, hours and imposition of requirements to pay "overtime" payments to academic staff, including attaching such regulation to self-determined, self-directed and innovative research.
3. The submissions are filed pursuant to the Amended Directions of the Fair Work Commission (**Commission**) issued on 3 March 2017 and comprise these submissions and one attachment.
4. The submissions are made in response to a number of variations sought by the NTEU to the Higher Education Industry - General Staff - Award 2010 (**General Staff Award**) and the Higher Education Industry - Academic Staff - Award 2010 (**Academic Staff Award**) (together "**the Higher Education Awards**") (**NTEU Claims**), as set out in its closing submissions dated 3 February 2017 (**Closing Submissions**).
5. The Group of 8 oppose the majority of the variations/claims made by the NTEU on the basis that those substantive variations are not necessary for each of the Higher Education Awards together with the NES to meet the modern awards objective under s.134 of the *Fair Work Act 2009* (Cth) (**FW Act**).
6. The Group of 8 have previously filed detailed submissions in respect of the NTEU Claims, dated 6 June 2016 - **Exhibit 5** in these proceedings (**Previous Submissions**). Those Previous Submissions analysed each of the NTEU claims and identified both general and specific reasons why the NTEU Claims should not be accepted by the Commission.
7. These final written submissions do not repeat all the matters set out in the Previous Submissions which continue to be relied upon in full. This is particularly the case given the weight of the evidence in these proceedings supports and reinforces the matters set out in the Previous Submissions, and in particular the reasons why the NTEU claims should not be accepted.
8. In these submissions:
  - (a) In **Part 2** we have highlighted the nature of the review, the task of the Commission and issues and the questions it needs to determine;

- (b) In **Part 3** we have provided an overview of the Group of 8 position in respect of the NTEU proposed variations and why they should not be made;
- (c) In **Part 4** we have identified some issues that are relevant across all of the claims and should bear on the Commission's consideration of each of the specific claims:
  - (i) the nature of the industry;
  - (ii) the settled industrial regulation;
  - (iii) the existence of comprehensive EBAs; and
  - (iv) the difference in philosophical approach to this review as between the parties and how that manifests in the material;
- (d) In **Part 5** we have identified general issues with deficiencies in the nature, quality and integrity of the NTEU evidence and made submissions about the survey material relied upon by the NTEU; and
- (e) In the remainder of the submission in **Parts 6 to 16** we have then addressed in turn each of the substantive variations sought by the NTEU:
  - (i) identifying the variation sought, and particular issues the Commission needs to consider;
  - (ii) key arguments against the variation;
  - (iii) key conclusions regarding what the evidence shows;
  - (iv) responding to discrete issues raised by the NTEU, where relevant; and
  - (v) further identifying why the NTEU Claims should not be granted, including where relevant by reference to the modern awards objective that the award in conjunction with the NES provide a fair and relevant safety net of minimum terms and condition taking into account the factors set out in s.134(1).
- (f) In **Part 17** we have briefly referenced previous submissions in respect of annual leave and award flexibility.

9. Given the significant volume of materials filed in the proceeding, we have sought to assist the Bench in identifying more important evidence in the proceedings and key issues and reasons why the variations should be rejected, without it being possible to exhaustively reference all such evidence. Further reference to critical evidence will be made in closing oral submissions.

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## 2. Provisions, Principles and Task of the Commission

10. The task of the Commission under s.156 is to review the existing awards and the Commission "may" make one or more determinations varying modern awards (or make one or more modern awards or revoke modern awards).
11. The power is discretionary in nature and the Commission is not compelled to make an award or to vary it.<sup>1</sup>
12. The task of the Full Bench in this matter is therefore to review the two existing Higher Education Awards, consistent with s.156 and the award review principles set out below. In doing so, the Commission has generally proceeded in the 4 yearly review on the basis that its review will focus on any proposals for variation made by the parties.<sup>2</sup>
13. The review is to proceed on the basis that, prima facie, the Higher Education Awards achieved the modern awards objective at the time that they were made. This is appropriate and necessary given the requirement to ensure that the awards met the modern awards objective of a fair and relevant safety net also applied in 2010, when the modern awards were made.
14. The Commission is not creating a new higher education award(s), nor establishing conditions afresh.

### 2.1 Principles

15. The above matters are supported by the wording of the legislative provisions and the guidance of the Full Bench of this Commission in the *Preliminary Jurisdictional Issues* decision, which identifies the following:<sup>3</sup>
  - (a) whilst broader in scope than the Transitional Review of modern awards completed in 2013, the nature of the task remains one of review of the existing award provisions;<sup>4</sup>
  - (b) each of the awards must be reviewed in their own right as part of the process;<sup>5</sup>
  - (c) the Commission is obliged to ensure that each of the Higher Education Awards together with the NES provide a fair and relevant minimum safety net;<sup>6</sup>
  - (d) the Commission must have regard to the historical context applicable to the Higher Education Awards;

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<sup>1</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 at [35].

<sup>2</sup> *Black Coal Mining Industry Award*, Transcript of Proceedings, 5 February 2014 per Justice Ross at PN111, 114.

<sup>3</sup> [2014] FWCFB 1778.

<sup>4</sup> *Ibid* [60(1)].

<sup>5</sup> *Fair Work Act 2009* (Cth), s 156(5).

<sup>6</sup> *Ibid*, s 134(1)(g).

- (e) the characteristics of employees and employers covered by the Higher Education Awards influence the determination of a fair and relevant safety net;
- (f) on their face the Higher Education Awards will be considered by the Commission as achieving the modern awards objective at the time that they were made in 2010;<sup>7</sup>
- (g) any party seeking to vary the Higher Education Awards must advance a merit argument accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation;<sup>8</sup> and
- (h) the parties must demonstrate that if the Higher Education Awards are varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.<sup>9</sup> [our emphasis]

16. Subsequent Full Benches of the Commission have affirmed these principles and provided some further guidance. The Full Bench in *Re Security Services Industry Award 2010* [2015] FWC FB 620 identifies:

*"[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 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."* [our emphasis]

## 2.2 Fair and relevant safety net of minimum terms and conditions

17. In relation to a concept of a "fair and relevant safety net of terms and conditions":

- (a) the award alone is not itself the safety net and needs to be considered in conjunction with the NES. This is clear in the modern awards objective itself.<sup>10</sup>

<sup>7</sup> [2014] FWCFB 1178, [24].

<sup>8</sup> [2014] FWCFB 1178, [60(3)]. See also *Black Coal Mining Industry Award 2010* [2015] FWCFB 2191, where the Full Bench stated that it must be satisfied that it has a very substantial merits case before it in order to be persuaded to make substantial amendments to a modern award.

<sup>9</sup> *Ibid*, [36].

<sup>10</sup> *Fair Work Act 2009* (Cth), s.134

This is important in respect of the NTEU's claim to impose additional regulation to seek to regulate hours of work for academic staff on the basis that they are working unreasonable hours. The NTEU position effectively seeks to ignore s.62 of the FW Act and existing regulation on unreasonable hours determined by the Parliament;

- (b) "fair" needs to take into account fairness from the perspective of both the employer and employees; and
- (c) in relation to being a "relevant" safety net:
  - (i) it needs to be appropriate to the circumstances of the particular industry (in the case of industry awards) and the circumstances of the employers and employees in that industry. As set out further below the established industrial practices and industrial terms in the higher education industry are part of the context for the award review. Award variations that depart significantly from the existing industrial regulation, reinforced in many enterprise agreements comprehensively across the sector is not a "relevant" safety net and also would undermine a stable award system, underpinning bargaining; and
  - (ii) the NTEU's submissions appear to equate a "relevant" safety net to being one that is of interest to employees, citing that a number of their members in the higher education industry are concerned about hours of work and therefore a term regulating the hours of work for academic staff is "relevant" to them. We submit that the fact that an issue is of interest or concern for employees (or indeed employers) is not the issue to which the concept of a "relevant" safety net is directed.

18. In relation to it being a "safety net of minimum terms and conditions" this reflects that the award operates as a "safety net" of "minimum terms", in the sense that:

- (a) for those employees to whom the award is actually applied, the employees' actual conditions cannot go below those award conditions and needs to meet or exceed them; and
- (b) for employees whose terms and conditions are regulated by enterprise agreements (as is the case for all relevant employees of the Group of 8), that the award, in conjunction with the NES and State laws, operates as a benchmark of minimum terms against which the BOOT is assessed and supports enterprise bargaining.

19. In the context of the higher education industry it is accepted that (save for a small number of staff at Bond University), that the award terms do not apply to the employees in the sector. Employees are not reliant upon the awards for their actual terms and conditions as there are comprehensive, "wall to wall" enterprise bargaining agreements, marked by high rates and comprehensive, beneficial terms, all of which exceed the award conditions.

20. Considered objectively, the awards have fulfilled their role in the industrial regulation in the higher education industry and operated effectively as a relevant safety net underpinning bargaining for the actual terms and conditions of each university and its staff (as set out in their enterprise agreements and supplemented by policies and procedures).
21. This is an important consideration in this matter given that:
- (a) the NTEU seek a number of fundamental changes to the Higher Education Awards in circumstances where no significant problems in the operation of the awards have arisen, either in their application to employees or in underpinning enterprise bargaining; and
  - (b) none of the evidence called by the NTEU relates to staff who actually have the awards applied to them (accepting that some EA terms are similar to some award terms) and there is no evidence of difficulties in negotiating enterprise agreements or applying the BOOT.
22. There is a tension in the position of the NTEU. While pursuing significant changes the NTEU asserted as being "necessary" to provide a fair set of conditions and bringing evidence to demonstrate problems that the award must be varied to address, are at pains in their submission to say that the proposed changes to the awards will not apply to employees and would have very limited impact upon employers because of the enterprise agreements. ie the NTEU identify problems that are not a function of the operation of the award and propose variations that they say will have little or no impact.
23. Whilst acknowledging the statutory compulsion to review the awards, on one view this Full Bench is entitled to ask- Why are we here NTEU? How does this demonstrate problems with the award safety net and how do you say the proposed amendment to the award will actually address the "problems", given the awards do not apply?

### **2.3 Questions for the Commission**

24. The NTEU seeks to support their case in relation to a number of variations by referencing them as being "moderate" or "reasonable" and also seek to portray a benevolent approach by seeking to somehow benefit employers by adopting variations that, whilst imposing additional obligations seek to minimise the impact upon employers. Without going to the particular issues in detail, the general point to be made is that this is an exercise of reviewing whether the Higher Education Awards in a practical and real world sense, constitutes a fair and relevant minimum safety net of minimum terms and conditions. The test is not whether additions would be moderate or reasonable, nor is the test that the Commission should adopt variations simply because they may have limited adverse impact upon employers.
25. Based upon the FW Act provisions and the principles established above, to grant the NTEU Claims, the question for the Commission is whether it satisfied that:

- (a) the NTEU has established, based upon relevant prohibitive evidence about the operation of the award, that the relevant higher education award must be varied because in the absence of that variation, the award in conjunction with the NES, does not meet the modern awards objectives; and
- (b) the NTEU has demonstrated that the proposed variation:
  - (i) if made would result in the award, in conjunction with the NES meeting the modern awards objective; and
  - (ii) varies the award only to the extent necessary.

26. In considering what is "necessary", as noted in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* by Tracey J, it is necessary to draw a distinction between what is necessary and what is desirable or preferable, stating:

*"In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable."*<sup>11</sup>

27. Those observations were endorsed by the Full Bench in the Preliminary Issues Decision in respect of s.138 of the FW Act.<sup>12</sup>

## **2.4 Onus**

28. The NTEU in its submissions submits that the need to make substantive changes that they propose to the award are "self-evident" and that the universities carry the onus to demonstrate why the Commission should not make the variation that they seek. At paragraph 8 of the NTEU closing submissions the NTEU reference various claims for variations, including more significant claims regarding *academic hours, academic classifications and promotions, general staff hours and ICT allowances*, and submit:

*"The existing awards manifestly fail to provide a fair and objective safety net. They [the various NTEU claims] 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 the NTEU is not appropriate."*

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<sup>11</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 at [46]

<sup>12</sup> *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 [39]

29. This submission is without proper basis or merit. It is clearly inconsistent with all of the Full Bench decisions referenced above. It is a mischaracterisation of the award review process and the task of the Commission to suggest that it is incumbent upon our clients to demonstrate anything and particularly to demonstrate why the NTEU's claim should be rejected.
30. To the extent that it is appropriate to talk of "onus" in the context of the review the onus is clearly on the NTEU to establish that the award and NES do not meet the modern awards objective and "*demonstrate that if the modern award is varied in the manner proposed in its applications then it would only include terms to the extent necessary to achieve the modern awards objective*".<sup>13</sup>
31. As set out by a Full Bench of the Commission recently in *Black Coal Mining Industry Award 2010* [2015] FWC FB 2192, the Commission must be satisfied that it has "*a very substantial merits case before it in order to be persuaded to make substantial amendments to a modern award*".<sup>14</sup>
32. This is particularly apposite here, where there are substantial variations sought by the NTEU to the awards, notwithstanding the absence of award reliant employees and that the changes sought by the union would fundamentally alter the long accepted forms of industrial regulation in the higher education sector.
33. All of these principles weigh against granting the NTEU claims in respect of the Higher Education Awards and support the substantial retention of the existing provisions.

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<sup>13</sup> *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788at [36].

<sup>14</sup> *Black Coal Mining Industry Award 2010* [2015] FWC FB 2192 at [44].

### 3. Overview of Group of 8 Position and why NTEU Claims do not meet the modern awards objective

#### *Overview of Group of 8 position why the NTEU Claims should be rejected*

34. The approach taken by the NTEU to this award review process is a stark contrast to the properly limited and soundly based approach adopted by the Group of 8.
35. There is a 'mixed bag' of variations sought by the NTEU to the Higher Education Awards, ranging from more limited drafting amendments through to significant and substantial amendments relating to the introduction of entirely new clauses and new entitlements.
36. The Group of 8 oppose the majority of the NTEU claims to vary the Higher Education Awards. A high level summary of the NTEU claims that are still to be determined by the Full Bench and the Group of 8 position for each of the claims is set out in the table below. That position is dealt with in more detail in the specific sections that follow:

NTEU Claim	Group of 8 Position - High Level summary
Part A - New clause to regulate academic hours of work and/or provide for overtime pay for academic staff	<p>Opposed for the following reasons:</p> <ul style="list-style-type: none"> <li>• NTEU have not established as a necessary variation to meet the modern awards objective;</li> <li>• inconsistent with the historical context applicable to the award and approach to the regulation of academic employment;</li> <li>• no evidence of substantial change since award modernisation in 2010;</li> <li>• existing safety net of an annual salary for the whole of the academic's work together with s.62 of the NES, is appropriate and is consistent with appropriate award regulation for self-managed, autonomous and well paid professionals;</li> <li>• the NTEU attempt to attach overtime payments, proceeds for an incorrect assumption that the current annual salary only compensates for 38 hours work a week rather than all of their employment;</li> <li>• NTEU proposed clause is complex, unworkable, and inconsistent with the nature of academic employment and introduces concepts of "required work", and "ascertained hours" that cannot readily be determined;</li> <li>• The NTEU approach and clause is ill-suited to the nature of academic employment and its activities, in particular research, which is not and cannot be meaningfully allocated, estimated or pre-determined in hours, to determine an overtime payment (and for this reason alone is not "relevant");</li> <li>• the NTEU variation is completely novel, is inconsistent with Australian and International regulation of academic work;</li> <li>• the NTEU variation is inconsistent in significant ways with the established regulation in EBAs;</li> <li>• the NTEU clause if required to be applied would have a number of adverse consequences, including: <ul style="list-style-type: none"> <li>• tighter managerial control and regulation over research;</li> <li>• recording or monitoring of hours and time;</li> <li>• it would damage trust and confidence in the academic cohort and be resisted by academic staff;</li> <li>• a high likelihood of disputes based upon fine judgements required about activities being "required work" and the time a competent academic should take to perform the particular</li> </ul> </li> </ul>

NTEU Claim	Group of 8 Position - High Level summary
	<p style="text-align: center;">work of the staff member;</p> <ul style="list-style-type: none"> <li>• it would impose a significant additional regulatory burden; and</li> <li>• it would lead to significant issues and problems with the BOOT.</li> </ul>
<p>Part B - Claims for two new allowances for casual academic staff:</p> <ul style="list-style-type: none"> <li>• policy familiarisation</li> <li>• discipline currency</li> </ul>	<p>Opposed for the following reasons:</p> <ul style="list-style-type: none"> <li>• increases rate payable in respect of lectures and tutorials and is not supported by work value reasons (s.156(3));</li> <li>• not established as necessary variations to meet the modern awards objective;</li> <li>• no evidence of substantial change since award modernisation;</li> <li>• would be inconsistent with the approach to award regulation in all other awards, including various industries and government that have significant policy requirements;</li> <li>• the claims are excessive;</li> </ul> <p>Further, with respect to policy familiarisation:</p> <ul style="list-style-type: none"> <li>• expectations to be aware of key or incidental policies are no different to that which applies to all employees and contractors in Australian workplaces;</li> <li>• significant resources and assistance are available to staff;</li> <li>• this is a matter appropriately dealt with through, bargaining and policy and provision for induction;</li> <li>• any obligations regarding policy familiarisation arise from contract not the award;</li> </ul> <p>and with respect to discipline currency:</p> <ul style="list-style-type: none"> <li>• casual academic staff are experts in their field who are engaged because of that expertise to deliver specific lectures or tutorials;</li> <li>• the staff are engaged in delivery not course development or subject coordination or broader disciplinary inquiry;</li> <li>• rates for lectures and tutorials incorporate preparation time, including reading to the extent that they are required to spend time, this is built into the existing award rates and this helps maintain currency;</li> <li>• a very significant cohort of staff are current post-graduate students and industry experts who are already studying/current within their discipline;</li> <li>• existing provision already has payment mechanism if significant other academic activity required by employers.</li> </ul>
<p>Part C - Variation to clause referencing MSALs to qualify the exclusion on the MSALs being used for reclassification (i.e. enabling them to be so used in certain circumstances)</p>	<p>Opposed for the following reasons:</p> <ul style="list-style-type: none"> <li>• existing regulation is sufficient and not the subject of dispute;</li> <li>• not a required modern award term;</li> <li>• not established as a necessary variation to meet the modern awards objective;</li> <li>• inconsistent with the historical context applicable to the award including as agreed by the NTEU and determined by the AIRC;</li> <li>• existing entitlement to be classified upon commencement of each appointment and advanced in written instruments of appointment;</li> <li>• there is good reason for excluding certain categories of employees from coverage under academic promotion policies.</li> </ul>

NTEU Claim	Group of 8 Position - High Level summary
Part D- insertion of further definitions for the purpose of casual academic rates of pay	Main contentious issue, now dropped by the NTEU; Insertion of definitions now proposed by the Group of 8, not opposed
Part E - General Staff overtime - claim to impose additional employer obligation to take positive steps	<p>Opposed for the following reasons:</p> <ul style="list-style-type: none"> <li>• not permitted matters under s.139 FW Act;</li> <li>• existing regulation is standard award formulation providing overtime for authorised work;</li> <li>• not established as necessary variations to meet the modern awards objective;</li> <li>• no evidence of substantial change since award modernisation;</li> <li>• existing provisions, processes and supporting policies available for claiming overtime and TOIL;</li> <li>• the issue identified by the NTEU is one of enforcement and there are existing mechanisms in place to deal with such issues;</li> <li>• provisions vague and uncertain and ill-suited to enforceable award regulation</li> </ul>
Part F - Linking wages to classifications	Not substantively opposed - minor difference in formulation.
Part G- changes to professional classification descriptors	NTEU no longer pursuing
Part H- BUASA Proposal	BUASA withdrew
Part I- Changes to "full time", part time and fixed term	Matter agreed in exposure draft process.
Part J - Claim for ICT Allowances	<p>Opposed for the following reasons:</p> <ul style="list-style-type: none"> <li>• not established as necessary variations to meet the modern awards objective;</li> <li>• inconsistent with approach in all other awards;</li> <li>• substantial resources and work spaces provided by universities;</li> <li>• reverse onus to apply if academic staff work away from campus by "custom and practice" rather than where required to in not appropriate;</li> <li>• appropriate matter for policy regulation/bargaining</li> </ul>
Part K - Wording change from "academic context" to "academic content"	Unnecessary change
Part L - Claim to extend coverage to research institutes.	N/A (save that oppose elements of proposed definition of "Research Institute")
Part M - Claim for conversion of academic staff	Not presently pursued by NTEU

37. The NTEU variations should be rejected for the reasons set out above and several reasons that apply across most of the claims/proposed variations now sought by the NTEU:

- (a) the NTEU variations would not result in a modern award supporting modern higher education institutions and their employees, but rather involve the imposition of additional and restrictive provisions, increased costs and more detailed regulation;

- (b) several of the proposed clauses sought in the claims are uncertain and unclear. They are therefore ill-suited to a binding award obligation, breach of which is a contravention of civil penalty provisions attracting penalties;<sup>15</sup>
- (c) the NTEU claims would create entitlements for employees, and obligations and restrictions on employers that are not found or prevalent in other awards, including those applying to similar staff and/or in associated industries. This would result in significant disparities in award regulation and is not a fair and stable safety net;
- (d) many of the NTEU claims are more appropriate for determination at the enterprise level through bargaining. They have been pursued in bargaining by the NTEU, with various enterprise outcomes. Such claims extend beyond a fair and relevant minimum safety net of award terms and certainly extend beyond the Commission's role to only vary modern awards to the extent necessary to meet the modern awards objective;
- (e) the NTEU claims, particularly in relation to academic hours of work would be unworkable and impose obligations that cannot reasonably be applied and enforced;
- (f) the NTEU claims are not necessary to achieve the modern awards objective (s.138), including having regard to the factors identified in s.138(2):
  - (i) s.138(2)(b) - the need to encourage collective bargaining - many of the NTEU claims have already been pursued in bargaining and are more appropriate for bargaining. In a number of cases they are also inconsistent with outcomes agreed to by the NTEU in bargaining;
  - (ii) s.138(2)(c) - the need to promote increased workforce participation - the NTEU Academic hours of work clause and discipline and policy allowance claims increase costs and undermine flexibility in academic employment and would undermine increased workforce participation;
  - (iii) s.138(2)(d) - the need to promote flexible modern work practices and the efficient and productive performance of work - many of the claims, including the academic hours of work clause do not promote flexibility and introduce disincentives for efficient and innovative work;
  - (iv) s.138(2)(f) - the likely impact upon business including on productivity, employment costs and regulatory burden - The NTEU seek to limit the performance of work and to increase its cost. Several of the claims would significantly increase the regulatory burden, requiring introduction of new systems, recording of time, recording of work and monitoring to

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<sup>15</sup> *Fair Work Act 2009* (Cth), s 45.

have any confidence in compliance. They also introduce additional allowances with additional costs;

- (v) s.138(2)(g) - the need to ensure a simple, easy to understand, stable and sustainable modern award system - The nature and extent of the NTEU claims do not promote a stable award system. Further, the NTEU academic hours of work clause is very complex and difficult to understand, let alone apply. It is likely to lead to confusion, disputation and uncertainty;
  
- (vi) s.138(2)(h) - the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy - the NTEU academic hours of work claim will lead to directions to limit research and service to minimise overtime costs and to the recording of time and directions about work time and potentially location. The greater regulation and loss of flexibility and academic freedom will lead to a loss of academics to overseas institutions, and likely limit research, innovation and efficiency, damaging an important part of the Australian economy.

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## 4. General and contextual issues

38. As identified in the Preliminary Jurisdictional Issues Decision, the current and historical context applicable to the Higher Education Awards and the characteristics of employees and employers covered by the Higher Education Awards influence the determination of a fair and relevant safety net.

39. In this part we have highlighted some of the matters identified in the evidence that provide context relevant to the Commission's consideration of the applications.

### 4.1 The nature of the industry

40. The Higher Education industry includes 37 public Universities (including the Group of 8) together with two private Universities and many other private higher education providers who are significantly increasing in number and in student enrolments.<sup>16</sup>

41. The Universities are part of an international industry of higher education and have to compete in an increasingly competitive international and domestic higher education environment for students and academic staff.

42. All public Universities in Australia are not-for-profit organisations, redirecting any "profits" into facilities, research and education activities of the university. The universities play a vital role in our communities both as educators of students, conferring higher education degrees and leading Australia's research and innovation efforts to contribute to Australia's prosperity and successful future.

43. Significant defining features of the higher education industry are the nature of academic appointments and the research and activity that academics undertake. Appointment as an academic has no direct parallel in other employment in Australia. The evidence in the proceedings<sup>17</sup> shows that the academic employment and the academic cohort are characterised by:

- (a) a unique status. Academia is often distinguished from other forms of employment more generally, with persons sometimes being described as being employed in the private sector or the public sector or being a member of academia;
- (b) academia is generally seen as a vocation rather than a career;
- (c) academic appointment is underpinned by a concept of academic freedom with rights to pursue self-directed research and to develop and express opinions or information, including which may be unpopular, including with their employer;

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<sup>16</sup> Exhibit 10 (Hughes-Warrington), [21]; Exhibit AHEIA 9 , [5].

<sup>17</sup> See Part 7 below.

- (d) the majority of academics are autonomous or at least highly skilled semi-autonomous professionals who engage in a range of academic activities. Some activities, particularly research and areas of scholarship and service, are not only self-directed in terms of when and how and where they perform those activities but self-determined in what they will actually do (acknowledging that there is some difference in the NTEU submissions about the extent of such self-determination and self-direction across certain academic staff).
44. The closest comparator to university academics are professional scientists or managerial staff who have high degrees of discretion within a broad framework of things that they are trying to achieve or deliver.
45. The inherent nature of research is the development of new knowledge and/or the identification and development of new applications for existing knowledge. It is fluid, variable and develops over time. The Australian higher education industry is recognised as Australia's second largest export industry.<sup>18</sup> Section 134(1)(h) dictates that these factors must be taken into account by the Full Bench.

#### **4.2 The settled industrial regulation in Higher Education**

46. In considering whether to vary the modern awards, the Commission is entitled to have regard to the history of those awards and the pre reform awards and the industrial regulation in the sector, including to identify the views of the current and predecessor Commission, the view of the parties about fair and relevant industrial regulation, and the context in which the NTEU are submitting that substantial variations are "necessary".
47. It is uncontroversial that in the higher education sector there was an active approach driven by the NTEU to the making of awards and substantive variation applications periodically brought (for example the substantive hearings which led to the making of the Higher Education Contract of Employment Award which introduced significant restrictions around fixed term contracts, the Higher Education Casuals case with inclusion of a casual conversion provision for general staff, and applications for variations of classification structures and descriptors both for professional and academic staff). Accordingly, whilst there have been multiple "rounds" of enterprise bargaining in the sector since the mid-1990s, active consideration continued to be given to what are now the pre reform awards up to and as part of the award modernisation process resulting in the two Higher Education Awards.
48. The Higher Education Awards were the subject of significant consideration by the Commission in 2009/2010, forming part of the priority phase of the award modernisation process. The content of the awards was the subject of conferences conducted by DP Smith, who was intimately familiar with the sector, its industrial regulation and history. Exposure drafts were prepared by DP Smith and submissions made to the Commission both by the employers and

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<sup>18</sup> Exhibit 10, [18].

by relevant unions including the NTEU, leading to further consideration of the issues of content in the Awards before final orders were made by the Full Bench.

49. A number of provisions the NTEU now seek to significantly vary or replace were the subject of agreement in the making of the modern awards in 2009/2010 and accepted by all parties and the Full Bench as constituting a fair and relevant safety net meeting the requirements of the *Fair Work Act 2009* (Cth) (**FW Act**), including the modern awards objective.
50. The NTEU claims now seek to introduce significant new regulation or entitlements.
51. Whilst it is accepted that a review can lead to updating or modernising the existing award, the fundamental changes sought by the NTEU should be approached with significant caution by the Commission. There is no necessity identified for the significant changes sought by the NTEU for the Higher Education Awards to continue to operate as a fair and relevant safety net and meet the modern awards objective.

#### **4.3 The existence of comprehensive EBAs and role of the safety net**

52. This is particularly so where the employees in the sector are not reliant upon the awards for their actual terms and conditions.
53. In the higher education sector, enterprise bargaining agreements have been negotiated since the mid-1990s and most universities have successfully negotiated with the relevant unions (predominately the NTEU and to a lesser extent the CPSU, ASU, AMWU, CEPU and CFMEU) and their staff, at least 5 successive enterprise agreements.
54. The current enterprise agreements are comprehensive and have been negotiated since the modern awards were made on at least one, if not two, occasions at each university. The Higher Education Awards have operated as an effective safety net underpinning bargaining.
55. This includes bargaining in almost every subject area in respect of which the NTEU are now seeking variations.
56. No material problems in the operation of the awards have arisen and no problems or deficiencies in relation to enterprise bargaining have arisen that warrant any significant intervention by the Commission to vary the awards as part of this review.
57. A number of the enterprise agreements (and extracts from enterprise agreements) have been exhibited or marked in these proceedings.<sup>19</sup> It is not suggested that the existence of the enterprise agreements precludes the Commission from considering whether the award in conjunction with the NES meets the modern awards objective. However, it is clearly part of the context that needs to be considered and in particular:

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<sup>19</sup> Exhibit B, Attachment B; Exhibit AA, Attachment 1; Exhibit 9, Attachment SG2-SG-3, SG-6; Exhibit 10, Attachment MHW-2; Exhibit 11, Attachment AP-1; Exhibit 21; Exhibit AHEIA3, Attachment B; MFI 4-7, 9, 14, 26, 29, 34, 36, 37, 40, 47

- (a) it requires recognition that the "safety net" of terms and conditions in this context is primarily relevant in the context of supporting bargaining and in a technical sense, to the BOOT;
- (b) to the extent that the NTEU has brought voluminous materials and evidence to seek to identify "problems" (such as in relation to the administration of overtime for professional staff) these are not issues or problems that have been identified as arising in the award conditions either:
  - (i) directly in the sense that the application of award terms to those employees has caused or otherwise resulted in the "problem";
  - (ii) indirectly in the sense that the award content has precluded or impeded enterprise agreements being negotiated and agreed or created any difficulties in applying the BOOT or in approval by the Commission; and
- (c) this undermines the NTEU's argument that it has demonstrated that its proposed variations are necessary (and vary the award only to the extent necessary) to provide a fair and relevant safety net in conjunction with the NES.

58. It is recognised that in one sense this could mean that the NTEU proposed variations theoretically have limited or no immediate impact in terms of award regulation. It could be considered this makes it easier to vary the awards as the Commission need not be as concerned about the consequences. However, this is not a proper basis to vary the awards and the corollary is that the necessity and utility in varying the awards and the need to do so in a "real world" sense is significantly diminished, if not non-existent.

#### 4.4 Different approaches

59. In its final written submissions<sup>20</sup> the NTEU attempt to criticise the Group of 8 and AHEIA approach to these proceedings, asserting that:

- (a) *"the employer representatives have substantially failed to acknowledge the need for variation to the awards in relation to the matters raised by the NTEU, leaving the Tribunal with only the proposals presented by NTEU to consider"*;
- (b) the NTEU has taken the approach of trying to assist the Commission with material in its possession whereas the "employer associations" have approached the proceedings as though they were inter-parties, refraining from volunteering relevant material which was within their knowledge and *"concentrated their efforts on attacking evidence provided by the NTEU rather than providing statistics or research of their own"*; and

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<sup>20</sup> NTEU Closing Submissions, [11]-[15].

- (c) the Commission is entitled to draw the conclusion that such data the employers have about the issues in context would not have assisted their case.
60. For the reasons below, these submissions should clearly be rejected.
61. Whilst the proceedings are a review, consistent with the approach adopted by the Commission and identified in the Preliminary Jurisdictional Issues Decision, the process has been one that substantively focuses on variations being proposed by the parties.
62. The difference in approach between the NTEU and the employers in relation to making such applications is stark. The employers have proposed very few variations and the Group of 8 has effectively proposed two technical variations.
63. This is a reasonable and practical approach, consistent with the matters identified above:
- (a) the existing awards are taken to constitute a fair and relevant safety net when made in 2009/10;
  - (b) the awards have in fact been operating as a fair and relevant safety net supporting successful negotiation of multiple iterations of comprehensive enterprise agreements across the sector since 2010; and
  - (c) there is neither a necessity nor a proper basis for significant change to the awards of the types sought by the NTEU.
64. Given the above, the question is not why haven't the employers accepted the NTEU applications or accepted problems assessed by the NTEU with the awards and brought more evidence. Rather, the question is how the NTEU applications can be said to be necessary, and whether the voluminous material and substantive variations sought by the NTEU are an unfortunate imposition on the time and resources of the Commission and the parties.
65. The approach of the universities has not been to approach the proceeding as if they were inter-parties. Rather, its approach reflects a fundamentally different view as to the need for significant variations to the awards and that the position that the awards have operated reasonably and have met the modern awards objectives.
66. The universities were clearly entitled to take this view. Indeed the NTEU could (and should have in our respectful view) taken a similar view, and outside of the common issues the review of the Higher Education Awards could and should have been a relatively straight forward matter.
67. Necessarily therefore the focus of any evidence brought by the universities has been in response to the NTEU applications and to demonstrate that the NTEU evidence does not support the strong merit case required to vary the awards in the manner sought by the NTEU.

68. It is also disingenuous for the NTEU to suggest that its approach in this proceeding is effectively because it is simply seeking to assist the Commission. It is clearly pursuing its own industrial agenda by seeking to have the Commission adopt as part of the award, the imposition of additional entitlements and restrictions in areas where the NTEU has pursued the same or similar claims in bargaining. Such claims have resulted in agreement to some provisions at some universities and different provisions at other universities.

69. The NTEU variation claims are therefore not directed at the terms and conditions for staff to whom the award applies, but rather are effectively to seek bargaining leverage. The history of bargaining in the sector clearly shows that the NTEU has generally sought in bargaining the adoption of additional entitlements or restrictions that have been included in or added to awards.

#### **4.5 Disparity with other post-secondary awards**

70. The omission of any acknowledgement by the NTEU of the applications being part of an agenda to further their industrial purposes is disingenuous. This point is underlined by a consideration of the approach adopted in respect of other awards, both generally and in the education sector.

71. The Educational Services General Staff Award 2010 and the Educational Services Post-Secondary Award 2010, which apply to private sector post-secondary education providers (i.e. higher education providers other than the Universities), have been the subject of very limited applications for variation notwithstanding, for example, that those awards contain no prescription in relation to hours of work for academic teachers, no ICT allowance provisions, no policy familiarisation allowances and no maintaining currency allowances notwithstanding the employment of casuals in the delivery of higher education courses.

72. This further undermines the claims by the NTEU that the significant variations to the Higher Education Awards are necessary and that their absence would mean that the awards are not a fair and relevant safety net.

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## 5. NTEU Evidence

73. The NTEU have brought tens of thousands of pages of material to the Commission. Unfortunately, notwithstanding the volume of paper, the reliability, relevance and probative value of much of the NTEU evidence is questionable, as is the consequential weight that the Commission can give it.

### 5.1 NTEU "Experts"

74. A consideration of the NTEU's "expert" witness evidence highlights some of the significant concerns that the Bench should have in receiving and weighing the NTEU evidence and considering whether it establishes the sufficient merit case for the proposed variations.

75. The NTEU has tendered the following witness statements in these proceedings and sought to rely upon those statements (or parts of those statements<sup>21</sup>) as "expert reports":

- (a) Witness Statement of Dr Robyn May (**Exhibit L**);
- (b) Witness Statement of Dr Anne Junor (**Exhibit O**);
- (c) Witness Statement of Professor Glenda Strachan (**Exhibit Z**); and
- (d) Witness Statement of Associate Professor Hepworth (**Exhibit AS**).

76. With the exception of the evidence of Associate Professor Hepworth, there are significant issues regarding whether such evidence can be relied upon by the NTEU as "expert" evidence and given any weight at all. The statements of May, Junor and Strachan are not in the form of an expert report required by *Practice Note CM7 - Expert witnesses in proceedings in the Federal Court of Australia* (Federal Court Practice Note) and:

- (a) the "expert reports" are not signed by the authors;<sup>22</sup>
- (b) whilst claiming to understand that they were being presented as an "expert"<sup>23</sup>, they were clearly giving evidence on behalf of the NTEU and were in effect making a submission in support of the NTEU claims;
- (c) failed to include in their reports the specific questions that the experts have been asked to address;
- (d) failed to identify information and discussions with the NTEU that had informed their draft<sup>24</sup>;

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<sup>21</sup> PN2060-2061 (May).

<sup>22</sup> PN2609-PN2613 (Junor).

<sup>23</sup> PN2061-2062 (May); PN2622-2625 (Junor); PN4319-4320, 4355 (Strachan.)

<sup>24</sup> See footnote 24.

- (e) did not clearly separate as required factual matters from the expert opinions.
77. More fundamentally there were clearly issues with the integrity of the reports and the statements tendered as being their expert views and opinions and supporting materials.
78. MFI-1 is a comparison document comparing a substantive section of Dr Robyn May's expert report with that of Dr Anne Junor. As is readily apparent, the content is for all intents and purposes identical, despite being presented as their expert opinion based upon their "PhD" in the case of Dr May and "academic research" in the case of Anne Junor.
79. This document was put to Dr May and cross-examination of Dr May identified that at least substantial parts of the "expert reports" had been drafted or supplied by the NTEU and provided to her for her comment and adoption. Essentially the reports had been produced by the NTEU or a combination of authors and copied with minor modifications made. It is difficult to conceive a more fundamental failing in the integrity of "expert evidence" led from Dr May and Dr Junor and it casts doubt over the preparation of all of the NTEU evidence.
80. Dr Strahan's report is prepared in a similar format with the identical structure and approach and was clearly influenced by the NTEU.
81. This approach by the NTEU unfortunately is not limited to Dr May and was apparent in the case of other witnesses (as briefly referred to below).
82. Unfortunately, this was further compounded in the case of Professor Junor, when in the course of giving evidence and in the course of being cross-examined it became apparent that she had various notes and other documents with her to which she was referring.
83. When the Full Bench considers statements/reports and the cross-examination of each of the experts (Dr May, Dr Junor and Professor Strachan), we respectfully submit that:
- (a) the Commission should not accept their evidence as "expert" witness reports; and
  - (b) their evidence, including opinion and other evidence, should be given little if any weight.
84. In relation to Associate Professor Hepworth it is accepted that his evidence can be relied upon as expert evidence. However, again, issues arise in relation to the preparation of that evidence. In cross-examination and in questions from the Bench it was established that:
- (a) Associate Professor Hepworth received the request with the brief at 2.28pm on Friday 26 August requesting copies of his report by 4.00pm that day and he provided his report to the NTEU that day;<sup>25</sup>

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<sup>25</sup> PN8949-8956.

- (b) that there had been previous discussions and email correspondence with the NTEU prior to the letter of 26 August 2016;
- (c) these matters were not evident on the face of the report; and
- (d) most significantly, when the email correspondence was subsequently produced by the NTEU to the Commission at the Bench's request (**Exhibit AT**) after Associate Professor Hepworth had concluded his evidence, that correspondence and the apparent discussions went beyond discussions about the process used for the survey as had been stated by Associate Professor Hepworth when asked by the Deputy President, and included:

- (i) the NTEU providing to Associate Professor Hepworth "a copy of a report summarising that part of the results" — which although not supplied as part of Exhibits AS or AT was identified as the report of Dr Paul Kneist (which formed Attachment J to the first witness statement of Ken McAlpine (Exhibit G)), in circumstances where Dr Kneist was foreshadowed to be called <sup>26</sup> and then was never called to give evidence;
- (ii) identifying what the union was seeking to demonstrate and then most relevantly states:

*"We are looking for someone who would be able to look at the responses to a few of the most relevant questions in the surveys, and provide an expert opinion (in the form of an Affidavit which can be presented as expert evidence to the Fair Work Commission) as to whether (and to what extent) it is possible to place any reliance on the results ... One key question is whether the data is sufficiently robust that it can be relied upon to establish likely trend and patterns, even if it does not prove particular percentages beyond doubt."*

*... The basic questions we need to have answered (which might lead to others) are these:*

*1. how representative is the sample, having regard to the response rate, survey methodology, the relevant demographic data we have about the sample group and the whole population, and any other relevant factor?*

*2. [academics] : Having regard to the response rate, survey methodology, the relevant demographic data we have about the sample group and the whole population and any other relevant factor, what*

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<sup>26</sup> PN2004.

reliance can be placed upon the data in table 4 on page 7 of the attached report as:

a. a representative statement of the whole population's reported hours of work; and

b. (if possible) of their actual hours of work?"

3. *general staff: Having regard to the response rate, survey methodology, the relevant demographic data we have about the sample group and the whole population, and any other relevant factor, what reliance can be placed upon the data presented about uncompensated hours of work in the attached report, as:*

c. a representative statement of the whole population's reported hours of uncompensated work; and

d. (if possible) of their actual hours of uncompensated work?

4. What conclusions can reasonably be drawn from the qualitative responses (will bring these on Thursday)?" [Our emphasis]

85. These matters can be compared with and significantly differ from the very narrow question that Associate Professor Hepworth was subsequently formally asked to consider and give opinion about in the briefing letter to the effect: "*your expert opinion is only required as to the appropriateness and clarity of questions and of the structure of the survey for trying to illicit genuine and useful responses, as opposed to another purpose such as, for example to illicit responses with a particular slant?*".
86. The expert report specifically did not go to the representativeness of the survey, the NTEU report or the survey results nor any of the other matters that had been foreshadowed in Exhibit AT.
87. The very clear inference is that Associate Professor Hepworth's opinion in relation to matters about representativeness and the usefulness of the survey outcomes and the data would not have assisted the NTEU.
88. Each of these matters in relation to the experts' evidence taken individually represent a fundamental deficiency in the preparation and integrity of the evidence and casts serious doubt whether any weight should be given to such evidence.
89. Taken together it raises a general concern for the Commission about the process and preparation of the NTEU's witness statements generally and the reliance and weight that can confidently be placed upon any of the written statements.

## 5.2 Other NTEU lay witnesses

90. Unfortunately, a number of the issues regarding the expert witnesses were not limited to their expert statements, and arose in lay witness statements as well.

91. Two examples highlight this. The very first witness for the NTEU, Anthony Wilkes while initially swearing his statement as true, in response to a later question whether there were any errors in his statement stated in part:

*PN777 "It is not so much errors but more just wording. Some of this statement was based on a conversation I had over the phone originally, a few years ago and I think, from my perspective some of the wording I didn't really like too much."*

92. Whilst it is not uncommon for representatives to prepare drafts of statements based upon conversations, the evidence above highlights that matters and content driven by the NTEU, rather than by the witness, have been included in statements filed in the Commission.

93. A similar but slightly different issue arose with the evidence of Dr Kenny who, having sworn his statement was correct, including some evidence concerning previous disputes, subsequently gave inconsistent evidence. When asked a number of questions by the Bench about how he now wished to change his statement having affirmed it as correct, he subsequently sought to change it.

94. The question also arises in relation to the relevance of much of the evidence:

(a) of all of the NTEU witnesses only two witnesses (Dr Phillip Andrews and Mr Ken McAlpine) give any evidence about the impact of the Award (in the context of the BOOT) on enterprise bargaining and that evidence was very limited. No witnesses give any evidence about the actual application of the award to them in one sense this is unsurprising given that for the vast majority of employees in the sector they are not dependent upon the Award for their terms as the actual award terms do not apply to them. However, no evidence was tendered in relation to the application of the awards and their operation in practice to employees of Bond University (for example) to whom the award actually has application and indeed, to the extent that there were applications to vary the award in respect of employees at Bond University there were subsequently withdrawn by the union applicant.

(b) it highlights the perhaps unique nature of this particular award review whereby the Commission is not being presented with evidence about the experience of employees and employers under the conditions of the Award which could provide direct and clear evidence of a merit based case about the need for variation to those particular conditions and the impact that that variation would have on those employees. The impacts upon the employees and upon employers are therefore consequential or theoretical rather than immediate and practical in a real world sense.

95. Significant parts of the evidence, particularly in relation to general staff working hours, ICT allowances and policies tends to raise implementation issues arising in the context of existing measures or protections under enterprise agreements or policy. By way of example:

- (a) Dr Kenny gave evidence about academic workload models at the University of Tasmania, including evidence around disputes, improvements in the models and evidence of faculties not having workload models that were agreed despite the enterprise agreement obligation to do so: "*The mechanisms are there in the agreement but it's one thing to have it in the agreement and it's another thing for the employer to actively implement the agreement*"<sup>27</sup>, although he ultimately acknowledged that following a dispute this issue was addressed;
- (b) As a further example Stephen Adams whilst giving evidence about concerns about staff working additional hours without overtime and TOIL, acknowledged that the issues that he was raising were issues about a failure by the University to fully apply the relevant provision of the University of Melbourne Enterprise Agreement, as follows:

PN2491

Can I hand you a copy of the University of Melbourne enterprise agreement?---Thank you.

PN2492

So this was the agreement that you were involved in negotiating as part of the bargaining team?---Yes.

PN2493

Can I take you to clause number 57 which appears on page 52?---Have I got the right document here? I don't have 52 pages oh yes, I'm sorry. Which clause? 57?

PN2494

Clause 57 entitled "Overtime." Have you got that clause?---Yes.

PN2495

And you'll see at 57.1 that:

PN2496

*The university may require a staff member to work reasonable hours in excess of the ordinary hours, and on reasonable notice will work such overtime in accordance with the instructions of an authorised officer.*

PN2497

And then, if I skip past 57.2 to clause 57.5, the clause provides that:

PN2498

*The staff member must document the hours worked, provide these details to their supervisor within five working days, and discuss with their supervisor the arrangements for taking time off in lieu.*

PN2499

Do you see that obligation there?---Yes.

PN2500

And so to the extent that at various points in your statement you talk about the working of extra hours without accessing TOIL, do you accept that that's a question of clause 57.5 being properly applied and the staff member documenting their hours worked?---Yes, that would be correct.

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<sup>27</sup> PN5857.

(c) Dr Dann gave similar evidence when cross examined.<sup>28</sup>

### **5.3 Lack of evidence about significant change since 2009/2010**

96. In the context of the modern awards having been made in 2009/2010 the circumstances that the NTEU now put forward as constituting a merit basis for their proposed variations are the same or not significantly different to the circumstances in place at that time when the modern award was made and met the modern awards objective.
97. The NTEU asked a number of witnesses about change, but generally framed their questions in terms of changes over much longer periods of time going back to the 1990s. For example, Ms Gale in cross-examination of Mr Picouleau asked him a series of questions and propositions about things that had changed in University employment and each included reference to things "that have changed in the last 20 years". However no questions or attempts were made to identify the extent of change (if any) in the various areas that were asked about since the making of the relevant modern award. In respect of academic hours worked the evidence is mixed, with some evidence showing that reported hours of academics have never been an average of 38, with some evidence from lay witnesses from their experience that it has increased (although over non specified period of time) and evidence from some of the lay NTEU witnesses that their hours have reduced (Professor Andrews being an example).<sup>29</sup>
98. The main general point in respect of the NTEU evidence is that the NTEU has not demonstrated any substantial change in circumstances that existed at the time of the making of the Higher Education Awards. This is important in the context of the NTEU agreeing to a number of the provisions in the making of those awards that it now seeks to vary and others, in respect of which there was certainly no objection by the NTEU in 2009/2010.

### **5.4 The NTEU's survey evidence- no weight should be given**

99. The NTEU seeks to rely on survey evidence to support its claims, particularly academic workloads, policy familiarisation/discipline currency, general staff hours and ICT allowance claims. In particular, the NTEU relies on two surveys: an online survey conducted by the NTEU (**NTEU Survey**), and an online survey conducted by Dr Kenny (**Kenny Survey**) (**Surveys**).
100. It is apparent the NTEU intended to rely heavily upon its surveys and results as a central evidentiary piece before the Commissions to significantly assist in establishing its evidentiary case. However its closing submissions show that, presumably for reasons set out below, it acknowledges that little probative weight can be given to the surveys.
101. The Commission should give no weight to the Surveys. Notwithstanding the voluminous materials tendered by the NTEU, the Surveys do not comprise reliable, representative or probative evidence for the following reasons:

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<sup>28</sup> PN8351.

<sup>29</sup> PN3168

- (a) the Surveys were not independently conducted;
- (b) the Surveys have not been adduced or attested to by expert witnesses, either in relation to their conduct or in relation to any results, save for:
  - (i) the expert evidence of Associate Professor Graeme Hepworth which went to the narrow issue of appropriateness of questions primarily in one area of the NTEU survey and which did not survive cross-examination; and
  - (ii) the expert evidence of Professor Wooden, which was highly critical of the Survey, the appropriateness of the questions, lack of response rate and lack of representativeness;
- (c) the Surveys were in many ways demonstrated to be (and accepted by the proponents to be) not representative of the employees across the higher education sector; and
- (d) the Surveys are not a reliable basis to inform the Commission of either actual hours of work and provide no probative, reliable evidence of the portion of hours that are required by the universities.

***Surveys not independent and not attested to***

102. The weight to be given to the Surveys is impacted by the fact that they were not conducted independently.
103. Mr McAlpine confirms that the NTEU Survey was prepared by the NTEU, and that the expertise, qualification or skill of the authors had not been put forward to the Bench.<sup>30</sup> Further, in his witness statement, despite attaching the NTEU Survey, Mr McAlpine did not state that he was involved in developing the survey. However in questions from the Bench he indicated that he had some limited involvement.<sup>31</sup> Mr Evans agreed that the NTEU Survey was not conducted independently.<sup>32</sup>
104. In relation to the internal NTEU Report prepared by Dr Kniest (which Mr McAlpine attaches to his statement despite not being the author)<sup>33</sup>, Mr McAlpine agrees that Dr Kniest has expertise in data analysis, but the NTEU chose not to put him forward as a witness.<sup>34</sup> Ms Gale stated that the NTEU could do so during the hearing, but he was never called despite him continuing to be employed by the NTEU and no explanation was ever provided for failing to do so.<sup>35</sup> We

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<sup>30</sup> PN1962-1966.

<sup>31</sup> PN1964, 1987, 1995.

<sup>32</sup> PN9660.

<sup>33</sup> Exhibit G, Attachment J.

<sup>34</sup> PN1970-1971.

<sup>35</sup> PN2004.

respectfully adopt the view of the Vice-President articulated during the hearing, where his Honour stated that it is not simply a matter of annexing a document and assuming the Bench can accept it.<sup>36</sup> We submit that, as well as giving no weight to the NTEU Survey, in light of the failure to call Dr Kniest after signalling an intention to do so, the NTEU Report should therefore be disregarded in its entirety.

105. Similarly, Dr Kenny is an active NTEU member and confirms that he conducted the Kenny Survey with a colleague, and it was not conducted by an independent third party.<sup>37</sup> Again, the Kenny Survey was not attested to by an expert witness. Perhaps even more worrying is the fact that Dr Kenny provided only parts of the data as examples as a means to support the matters in his statement, and claims that the reason for doing so was that he went on leave so only did a preliminary analysis. However, one of the tables he provided was prepared on 7 April 2017, several months before he went on leave.<sup>38</sup> This inevitably leads to the conclusion that Dr Kenny had the time to bring to the Bench's attention other relevant data obtained in the Kenny Survey, but intentionally chose not to do so.
106. Further, as set out below in relation to academic working hours, in the material that Dr Kenny did bring, some of that material highlights the diversity and divergence of academic views about the average or median period of time it takes for academic duties to be competently performed.

### ***Surveys not representative***

#### High proportion of Survey respondents were NTEU members

107. As Professor Wooden notes, the responding sample to the NTEU Survey is over-represented by NTEU members.<sup>39</sup> The follow up email seeking responses to the NTEU Survey was only sent to NTEU members.<sup>40</sup>
108. Mr Evans admits that because of the significant overrepresentation of NTEU membership in the NTEU Survey response sample, and the fact that there were significant differences in response rates by institution, the NTEU survey does not constitute a representative set of data across the higher education sector.<sup>41</sup>
109. In relation to the Kenny Survey, the group of academics to whom the survey was sent was selected from those who had completed previous NTEU Survey (i.e. it was a subset of respondents to the NTEU Survey, comprising a group who had indicated that they would be

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<sup>36</sup> PN2003.

<sup>37</sup> PN5967.

<sup>38</sup> PN6136-6137.

<sup>39</sup> Exhibit 25, [32].

<sup>40</sup> Exhibit 25, [25(c)].

<sup>41</sup> PN9666.

prepared to be contacted for further information about hours of work).<sup>42</sup> This strongly suggests that the respondents comprise a group of academics most dissatisfied with their hours of work who "self-selected" for participation. Further, Dr Kenny admits that the results of the Kenny Survey do not necessarily apply to the whole academic profession.<sup>43</sup>

110. While some academics may be members of the NTEU, there are many academics who are not, and their views are not necessarily reflected in the Surveys. Given this, the Surveys cannot be viewed as a representative sample across the whole higher education sector.
111. The NTEU has acknowledged that the NTEU Survey is not a representative survey in their submissions and in their formal request to Associate Professor Hepworth. It now appears to seek to rely upon the Surveys as a source of hearsay statements in response to open ended questions, to buttress parts of the case where limited evidence was otherwise brought.

#### High dropout rate and low response rate

112. The relatively high drop-out rate to each of the Surveys should affect the weight to be given to each of the Surveys. Professor Wooden stated that a high drop-out rate leads to concerns about sample representativeness, especially if the persons that drop out early are systematically different from those who complete the survey.<sup>44</sup> He stated that a high drop-out rate is a feature shared by many online surveys, but that it is widely recognised that this is often the outcome of a survey that is poorly designed or administered. He referred to the Dr Kneist Report, which recorded that the high drop-out rate could be due to a range of factors, including survey length, a faulty question at the end of the survey, complexity of the subject matter and question constructions.<sup>45</sup> Professor Wooden stated that all of these factors suggest flaws in the design process.<sup>46</sup>
113. Professor Wooden gave evidence that the low response rate to the NTEU Survey means that it is very unlikely that the sample will be representative of the broader population of university staff in Australia. The NTEU Report also concedes that response rates are highly variable across institutions, but fails to report any actual numbers.<sup>47</sup>
114. Dr Kenny confirms that many of the questions in the Kenny Survey had a low response rate. For example, he agrees that more than half of respondents did not answer some of the questions he had extracted in his first witness statement.<sup>48</sup>

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<sup>42</sup> PN5977.

<sup>43</sup> PN5980.

<sup>44</sup> Exhibit 25, [28].

<sup>45</sup> Exhibit G, Attachment J, pg. 2625.

<sup>46</sup> Exhibit 25, [28].

<sup>47</sup> Exhibit 25, [32].

<sup>48</sup> PN6023.

### Surveys had industrial purpose

115. In addition to lack of representativeness, the Surveys clearly had an industrial purpose and had the potential to colour both the participants and their responses to the Surveys.
116. Professor Wooden noted that one of the emails seeking responses to the NTEU Survey made it clear that the aim of the survey was to collect evidence to support the argument that university workplaces are not the best places to work. Further, the NTEU blog post referring to the NTEU Survey encouraged responses by stating that "*The results of the survey...will provide the union with data which we can use to make our universities even better places to work*". Professor Wooden stated that, while this may be an accurate statement, it has the potential to encourage both non-random and biased responses.<sup>49</sup>
117. The covering page to the Kenny Survey and preamble to questions about hours was also not provided by the NTEU as part of the witness material by Dr Kenny, until called for by the Bench and subsequently provided (Exhibit AF). It reinforced the potential for the survey to be not only identified as an NTEU survey, but that there was a presumption about excessive hours and work expectations and an industrial agenda. The preamble stated the following before asking questions about workloads, hours and satisfaction:
- "Academic workload remains one of the key areas of concern for our membership. The evidence indicates that many staff are working longer hours and enduring increasingly heavy performance expectations."*
118. Professor Wooden further noted that persons responding to the NTEU Survey were those who are most concerned about their workloads. He stated that the NTEU Survey may well have resonated most with university staff who were most dissatisfied with their working conditions.<sup>50</sup>
119. Given the cohort who were most likely to respond to the NTEU Survey (i.e. those who were most concerned about their workloads), the Surveys cannot be taken to provide an accurate or representative view of academics across the sector.

### Lack of security measures

120. Neither the NTEU Survey nor the Kenny Survey contained the security measures that would be expected of online surveys. This affects the reliability and representativeness of all data obtained as a result of the Surveys.
121. Professor Wooden gave evidence regarding what these typical security measures might include, such as a unique ID number recorded on the completed survey instrument, or a unique log-in link to the survey. He confirmed that neither of these measures was a feature of the NTEU Survey. Respondents were provided with a log-in link, but there is no evidence that the log-in was person specific. He stated that anybody who found the link (including on the

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<sup>49</sup> Exhibit 25, [24(c)].

<sup>50</sup> Exhibit 25, [33].

NTEU blog post, which is public), could complete the NTEU Survey.<sup>51</sup> Mr Evans' evidence in cross-examination supports this, admitting that no unique login was provided to give people access to the NTEU Survey, and anybody who visited the NTEU website could complete the NTEU Survey.<sup>52</sup> In fact, this was contrary to Mr Evans' witness statement<sup>53</sup>, in which he stated that it was not possible to complete the NTEU Survey without a login included in the distribution email.<sup>54</sup>

122. Further, Professor Wooden noted that anyone who found the NTEU Survey could respond more than once, though he did note that a person would need to respond from different IP addresses to do so.<sup>55</sup> This proposition is supported by Mr McAlpine, who conceded that there were no protections measures in place to prevent a person from responding more than once.<sup>56</sup> However, we recognise that the extent to which this occurred, whilst unknown, is unlikely to be significant.
123. Professor Wooden confirms that the first email inviting responses to the NTEU Survey encouraged the recipients to forward the email onto others, meaning that some staff would have received multiple invitations from multiple sources.<sup>57</sup> This, along with the lack of security measures, identified further problems with the representativeness and integrity of the survey.

***The Surveys are not a reliable basis to inform the Commission of actual or required hours of work***

Survey does not provide evidence of actual or expected hours of work

124. The NTEU relies on the Surveys to provide evidence of actual or required hours of work, the evidence shows that Surveys cannot be relied upon for that purpose. Professor Wooden gave extensive evidence on the inadequacy of both the sequence and form of questions in the NTEU Survey<sup>58</sup>, with which Associate Professor Hepworth substantively agreed in cross-examination.
125. In summary, Professor Wooden stated that the NTEU Survey was unable to provide any indication about required or expected hours. He says that this is a concept that will be difficult for many academic staff to answer with any accuracy. The approach used in the NTEU Survey means many respondents are not reporting about required hours anyway. That is,

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<sup>51</sup> Exhibit 25 [25(b)].

<sup>52</sup> PN9621-9623, 9637, 9653-9656.

<sup>53</sup> Exhibit AV, [12].

<sup>54</sup> PN9651-9652.

<sup>55</sup> Exhibit 25, [25(c)].

<sup>56</sup> PN1982-1983.

<sup>57</sup> Exhibit 25, [24(a)].

<sup>58</sup> Exhibit 25, paragraphs [20-25].

many will simply be taking the number of hours they estimate that they usually spend on university work and dividing that number between the four categories.<sup>59</sup>

126. Associate Professor Hepworth also identified<sup>60</sup> that "*academic work*" and consequently estimates of time on academic work, included:

- (a) activities directed by the University;
- (b) work not directed as such by the university but clearly required;
- (c) other research and activities that the staff member chooses to pursue, but which could not be said to be required and which may ultimately assist with career and promotion; and
- (d) other "*duties*" that have benefits for the staff member that aren't directed, required or any part of what the University expects, but the academic has chosen to do as a self-directed academic.

127. Professor Wooden's observations were also supported by concessions by the NTEU witnesses during cross-examination. In particular, Associate Professor Hepworth conceded that the questions would not provide reliable data on expected or required hours.<sup>61</sup> He agreed that using bands gives a less precise estimate of an average.<sup>62</sup> He agreed that the answer to the hours of work questions were estimates and may not be very precise.<sup>63</sup> Further, he agrees that it would be difficult to verify that the people filling in the questionnaire were spending their hours at work to meet their work and performance requirements or whether it was to gain promotion or meet a deadline or some other self-directed purpose.<sup>64</sup>

128. Dr Kenny made similar concessions in cross-examination.<sup>65</sup>

#### The questions are imprecise and confusing

129. In addition to the Survey questions not being directed at required or actual hours of work, the other questions of most relevance to the NTEU claim are either imprecise, confusing, or both.

130. Professor Wooden stated the following:

- (a) One of the NTEU Survey questions includes the concept of "*university work*". The Survey does not define this term and this therefore may be the source of some

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<sup>59</sup> Exhibit 25, [20(e)].

<sup>60</sup> PN 9002-9007 and PN9046.

<sup>61</sup> PN9038.

<sup>62</sup> PN9018-9020.

<sup>63</sup> PN9070.

<sup>64</sup> PN9081.

<sup>65</sup> PN6109-6112.

confusion and uncertainty. It may also mean that responses from different individuals are not strictly comparable given individuals may interpret what is meant by "*university work*" differently.<sup>66</sup>

- (b) The same question asks respondents to estimate the number of hours per week they work on average. For persons whose working hours are highly variable over the year, this can be difficult to answer and hence answers provided may vary significantly from the true average.<sup>67</sup>
- (c) While Q41 is about the number of hours worked on average, the statement that immediately follows this questions refers to a "*normal working week*". It is not obvious why this change in terminology was needed. More confusing, Q42 then goes on to refer to activities in an "*average working week*", which is not necessarily the same as a normal work week.<sup>68</sup>

131. During cross-examination, Professor Hepworth conceded that he would have worded some of the questions differently and that the NTEU Survey could have been better designed.<sup>69</sup> Further, Dr Kenny conceded that the Kenny Survey uses the phrase "*actual academic workload*", but this phrase is not defined in his survey.<sup>70</sup>

#### The questions require assumptions that are not legitimate

132. Professor Wooden referred to Associate Professor Hepworth's claim that "*Some questions relied on certain assumptions for clarity, which may be entirely legitimate but are difficult to verify*". As his only example of this, Associate Professor Hepworth points specifically to the questions on required working hours. Professor Wooden agreed that these questions rely on the acceptance of an assumption, but the assumption required is not one that is legitimate.<sup>71</sup>

133. In cross-examination, Associate Professor Hepworth concedes that it would be impossible to know whether the assumptions behind the questions are correct.<sup>72</sup> Given the impossibility of determining whether the foundation of the questions were correct, it would be improper to give any real weight to the responses to those questions.

#### The questions are not neutrally worded

134. Professor Wooden noted that many of the questions in the NTEU Survey are not neutrally worded, that is, they are likely to lead respondents towards a particular answer.

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<sup>66</sup> Exhibit 25, [18(a)].

<sup>67</sup> Exhibit 25, [18(c)]

<sup>68</sup> Exhibit 25, [19]

<sup>69</sup> PN9034

<sup>70</sup> PN6042-6044

<sup>71</sup> Exhibit 25, [20(b)].

<sup>72</sup> PN9082.

135. Specifically, in relation to the average hours of work question, Professor Wooden stated that it could have the effect of leading respondents. In this specific case, the inclusion of a number of high-ended hours bands might lead respondents to believe that long hours are the norm which may, in turn, influence the way they answer.<sup>73</sup>
136. Professor Wooden considered that "the questions do seem designed (whether intentionally or unintentionally) to lead respondents to overstate the number of required working hours".<sup>74</sup>
137. Professor Wooden noted other issues in the NTEU survey, including:
- (a) the use of pejoratives, leading to a higher likelihood of respondents agreeing with the statement;
  - (b) seeking responses about separate matters in the same question, making it impossible to only agree or disagree with part of the question; and
  - (c) using vague, undefined concepts in questions.<sup>75</sup>
138. Professor Hepworth conceded that it is possible that the questions in the survey might influence the answer that is given.<sup>76</sup> Further, he conceded that most of the questions are negatively framed, and that the questions regarding work hours are more problematic than the non-work hours questions, which were more neutrally framed.<sup>77</sup>
139. Considering the evidence of Professor Wooden and the acknowledgments made by NTEU witnesses, together with the other deficiencies in relation to the Surveys, the Surveys simply cannot be relied on as a basis to inform the Commission of actual or required hours of work across the higher education sector.

### ***Reliance on survey responses in NTEU closing submissions***

140. The NTEU in closing submissions have cited sections of responses said to be comments made by survey respondents.<sup>78</sup> In the context of the above matters, such non-attributed hearsay comments to the survey should be given no weight.

## **5.5 Group of 8 evidence and materials**

141. In respect of the NTEU proposed variations the Group of 8 relies on all written and oral evidence filed and heard in the matter.

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<sup>73</sup> Exhibit 25, [18(d)].

<sup>74</sup> Exhibit 25, [20(f)].

<sup>75</sup> Exhibit 25, [21].

<sup>76</sup> PN9026, 9073-9077.

<sup>77</sup> PN9053, 9067.

<sup>78</sup> NTEU Closing submissions, [A49].

142. The Group of 8 relies on its Reply Submissions (Exhibit 5) in full and also directs the Commission's attention to the following attachments to Exhibit 5:

- (a) Attachment 1: Table of Academic Staff Award Wages compared to Award Wages of other Professionals;
- (b) Attachment 3: Summary Table regarding Overtime provisions in Modern Awards;
- (c) Attachment 4: Modern Awards that Include ICT Allowances or Related Provisions;
- (d) Attachment 5 - Previous submissions concerning the model AL clause; and
- (e) Attachment 6: Previous submissions concerning Award Flexibility - TOIL.

143. Further, the Group of 8 relies on the following evidence (including evidence filed and led by the AHEIA):

<b>Witness</b>	<b>Position</b>	<b>Years' experience in the sector</b>	<b>Exhibit and transcript reference</b>
Professor Stephen Garton	Provost and Deputy Vice-Chancellor at the University of Sydney	34	Exhibit 9, PN4636-4814
Professor Marnie Hughes-Warrington	Deputy Vice-Chancellor (Academic) at the Australian National University	21	Exhibit 10, PN4820-5000
Professor Simon Biggs	Executive Dean in the Faculty of Engineering, Architecture and IT at the University of Queensland	20	Exhibit 11, PN5117-5274
Professor Dawn Freshwater	Senior Deputy Vice-Chancellor and Registrar of the University of Western Australia	27	Exhibit13, PN6790-6850
Andrew Picouleau	Industrial Relations Consultant currently engaged by Monash University and formerly Director of Workplace Relations at Monash University	27	Exhibit12, PN6602-6787
David Ward	Vice President (Human Resources) at the University of New South Wales	20	Exhibit20, PN9089-9262
Professor Mark Wooden	(Expert witness) Professorial fellow at the University of Melbourne	30 (in applied research)	Exhibit25, PN9686-9765
Professor Andrew Vann	Vice-Chancellor at Charles Sturt University and President of AHEIA	21	AHEIA9, PN5277-5588
Professor Owen Coaldrake	Vice-Chancellor of Queensland University of Technology	38	AHEIA10, PN5592-5655
Professor Marie Herberstein	Chair of the Academic Senate in Macquarie University	20	AHEIA11, PN6885-6926

Witness	Position	Years' experience in the sector	Exhibit and transcript reference
Susan Thomas	Director of Human Resources at the University of Wollongong	19	AHEIA8, PN3903-4271
Diana Chegwiddden	Director of Human Resources at the Australian Catholic University	25	AHEIA14, PN9374-9538

144. As a general submission, the Group of 8 and AHEIA witnesses gave candid and forthright evidence, making concessions where appropriate and consistently sought to provide the Bench with relevant, honest answers. As shown in the table above, most of them have held positions at universities for over 20 years, and most of them currently hold senior positions in universities, either in an academic or professional/general staff capacity.
145. By way of their extensive experience and senior positions, the witnesses provided a unique perspective into the higher education sector, both from an institutional perspective (as managers) and an employee perspective (as academics or professional/general staff).
146. Significantly, each Group of 8 and AHEIA witness is currently employed or engaged in the higher education sector. This allowed them to give evidence based on actual, current experience.
147. Their evidence should be accepted by the Commission. Further, in the context of the review, their assessment of the issues and impacts of variations sought by the NTEU should be given significant weight in respect of all variations, but particularly in respect of the fundamental problems with the proposed NTEU variation concerning academic hours of work.
148. Further, the witnesses provided evidence only in the fields or areas in which they have relevant knowledge, and did not give evidence based on unfounded assumptions or otherwise express views without a proper basis.
149. The quality of the Group of 8 and AHEIA evidence is in stark contrast to the quality of much of the NTEU evidence as outlined at paragraphs 73-138 above, and should be given significant weight.

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## 6. Part 6. - NTEU A - Academic Hours of Work Clause (Academic Staff Award)

150. The NTEU proposal is to vary the award to include a completely new, lengthy and complex provision imposing detailed regulation of the allocation and performance of academic work and attaches an "overtime" payment.

151. The clause:

- (a) provides for a concept of "required work". This extends beyond the work that is allocated to the staff member or directed by the University and includes a concept of any work determined to be necessary to meet the performance expectations "of an employee" (which the NTEU has indicated during the hearing incorporates any expectations regarding promotion); and
- (b) requires:
  - (i) setting, recording and monitoring of academic work and hours, including research and other activities that may be undertaken by the staff member; and/or
  - (ii) complex and uncertain assessments of prospective work and hours required to perform the required work of that staff member to some standard of average competence (together with subsequent monitoring/assessment);
- (c) attaches an overtime payment based upon a concept of "ascertained hours" (although it is not actually dependent upon hours worked by any employee) or based upon working in excess of an average of 38 hours per week over a "period of account" if the hours are recorded.

152. The current NTEU variation proposed is **Exhibit K**. For the reasons set out below the proposed variation cannot be adopted by the Commission and no variation should be made.

### 6.1 Introduction

153. Whilst it is, of course, possible for awards to contain detailed regulation concerning hours of work, it is important to note at the outset that the FW Act does not include any requirement that in order to constitute a fair and relevant safety net of minimum terms, in conjunction with the NES, that the award:

- (a) provide overtime payments over and above an annual salary; and/or
- (b) include detailed regulation of hours or allocation of work.

154. It has long been recognised that for certain types and groups of employees, the appropriate regulation is to provide for an annual salary for the whole of their employment and not based upon particular activities or hours of work. This is most evident in relation to autonomous professionals and other employees, such as managers, professional engineers and scientists, and similar employees whose employment is typically characterised by high degrees of autonomy, self-determination of activities and an absence of set hours. Academic staff reflect this and more.
155. For example, this approach is reflected in the Educational Services (Post-Secondary Education) Award 2010 in respect of academic teachers who are provided an annual salary but who do not have prescribed hours nor provision for "overtime", howsoever described. Similarly, the Professional Employees Award 2010 provides for an annual salary for professional engineers and professional scientists and does not provide for overtime payments. Additionally, it is also the case that many employees who, because of the nature or type of their employment and/or their seniority and degree of autonomy are not covered by any award at all and are award free.
156. Award regulation including an annual salary taking into account the nature and scope of employment, is appropriate in such circumstances and can and does constitute a fair safety net of conditions.
157. That regulation is then supplemented by the NES, providing what the legislature identified as an appropriate set of minimum standards regarding reasonable and unreasonable hours. This includes s.62 of the FW Act which provides an entitlement for an employer to request or require employees to work reasonable hours in excess of 38 hours per week and the legal right for an employee to refuse to work unreasonable hours.
158. To the extent that the NTEU asserts that the regulation constituted by s.62, in conjunction with the award is deficient because it is difficult to identify what constitutes a request or requirement by the employer (in the context of an academic staff member's workload), at its highest this is a suggestion for some identification (for the purposes of s.62) of the factors or matters in relation to the hours required that should be taken into account when assessing whether the employee is being required to work unreasonable hours. It does not support the approach or content of the proposed NTEU's variation as being necessary - and certainly provides no support for the imposition of an additional overtime payment being prescribed as part of the Academic Staff Award.
159. It is hard to envisage a type of employment and types of activities undertaken by an employee that are more ill-suited to an attempt to prescribe their hours of work, and for which to attach overtime payments (whether that be based upon recording or some form of complex "scientific estimating process"), than that which is covered by the Academic Staff Award (whether that be lecturing, or more self-determined and self-directed tasks such as innovative research and service contributions to the community).

160. This is clearly apparent from the evidence in this proceeding about the nature and type of academic employment and activities, but is also reinforced by the history of regulation (both award and EBA), and the evidence in these proceedings about how academics work and how their work is allocated.
161. The conclusion that close regulation and overtime payments are ill-suited to academic employment is further evident in the manifest problems and complexities with the proposed NTEU clause. As previously pointed out, the proposed clause (which is presented by the NTEU as a variation that is necessary and that only goes so far as is necessary to achieve the modern awards objective) is now in at least its fifth iteration. This is not a criticism per se of the drafter, as while there are no doubt drafting issues, the problems and changes across the different NTEU clauses go well beyond drafting issues to more fundamental issues about the approach and components of the clauses. For example:
- (a) the first two proposals (one initially proposed early in the process for making the modern award in 2009 and the second in March 2015 as part of this review) were based around limiting the work that could be allocated to the staff member;<sup>79</sup> and
  - (b) subsequent proposals (including the most recent proposal) introduced more detailed prescription about allocation of work, systems, processes and regulation of hours and most significantly added provision of overtime pay.<sup>80</sup>
162. As set out below, the NTEU's clause is not an existing award or enterprise agreement provision and does not form part of the regulation of academic work either in Australia or internationally. In fact it is a departure (in a number of significant ways) from all historical and actual regulation of academic work (including all current EBAs negotiated by the NTEU).
163. In large part the difficulties in the NTEU's approach are its attempt to closely regulate types of work that are not amenable to close regulation and attach consequences that are inconsistent with the autonomous nature of academic employment.
164. The focus of the latest NTEU clause is not to guide or prescribe the allocation of a reasonable workload, but rather to impose an additional overtime payment and otherwise require recording of time. The case in support of the "overtime payment" element of the NTEU variation is largely non-existent.
165. Amongst other problems, the NTEU clause is premised on an assumption that the annual salary payable to employees is only payable in respect of 38 hours per week, as opposed to compensating for the whole of job or 38 hours plus reasonable additional hours. The NTEU assumption is not reflected in either the industrial history or the evidence in these proceedings.

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<sup>79</sup> Exhibit NTEU A, page 2 of the document titled "Outline of Issues Identified by the National Tertiary Education Union (NTEU)".

<sup>80</sup> See Exhibit NTEU B, paragraph A7 (pages 3-4) (3 March 2016); Exhibits J and K - versions tendered on 28 July 2016 - PN1706, and subsequently on 29 July 2016 - as referenced at PN2576 - PN2581.

166. In effect the NTEU variation is to eliminate annual salaries in favour of an "ordinary hours workload" salary, and attach an overtime payment based upon a complex assigning and estimating process about prospective work. This assumption and resultant approach by the NTEU is not supported by any evidence in the proceedings and is contrary to the evidence.
167. The proposed NTEU variation is not necessary to achieve the modern awards objective and otherwise clearly fails to meet the requisite threshold for such a significant variation. It is a variation that not only adds a clause to the award, but represents a fundamental paradigm shift in the way academic employment is conceptualised, the way their employment is regulated and rewarded, and is inconsistent with current practices and approach.
168. We note that the NTEU commences its submission by asserting five "conclusions of principle". This appears to, in part, recognise the significant problems and deficiencies with the variations sought by the NTEU. Accordingly, the NTEU should indicate whether it is abandoning its proposed variation.
169. The task of the Commission and the test is not the adoption or endorsement of such principles, but rather to undertake the review in accordance with the FW Act and the guidance provided by Full Bench decisions of this Commission. The attempt to proceed on the basis of adoption or endorsement of such principles puts a "gloss" on the task and test required to be determined by the Commission. Accordingly, the identification or assertion of such principles does not assist the Commission.

## **6.2 NTEU merits case not made out**

170. The NTEU's position at paragraph 8 of its closing submissions is that the merits of the claim concerning academic hours are "self-evident" and that the onus lies with the employer parties to demonstrate why the alleged deficiency with the Academic Staff Award does not need to be remedied, and why the NTEU's remedy is not the appropriate one. As set out in Part 3 above, this is a gross mischaracterisation of the 4 yearly award review process and inconsistent with the Preliminary Issues Decision and the Black Coal Mining Industry Award decision referenced above.
171. The characterisation of its claim as "self-evident" reflects in part the NTEU's poor evidentiary case advanced in relation to this claim, a significant portion of which was reliant upon the survey data (which for reasons set out above in Part 5 should be given no weight) and is primarily supported by limited amounts of anecdotal evidence about employee dissatisfaction with their hours of work.
172. For the reasons set out in Part 5 above regarding the NTEU evidence generally, and for the reasons identified below, the Group of 8 submit that the evidentiary case advanced by the NTEU is deficient. Contrary to its stated position, the NTEU case fails to establish many of the key factual matters upon which its claim is based, even on a conservative basis. The

Commission should not therefore find that the Academic Staff Award fails to meet the modern awards objectives.

### **6.3 Group of 8 Position**

173. In summary, the Group of 8 position is as follows:

- (a) the NTEU variation manifestly is not a variation necessary to meet the modern awards objective or a variation only to that extent, for several reasons as set out below at paragraphs 174 to 178;
- (b) there is no proper basis and no substantial merit case made out for inclusion of an overtime payment and there is no sound basis on which the Commission can be satisfied that inclusion of an overtime payment provision is necessary; and
- (c) if (contrary to our submissions) the Commission considers that additional regulation of academic hours is necessary, the regulation should be directed at informing what constitutes "unreasonable hours" being required by the employer in the context of section 62 of the FW Act.

174. In relation to the first and second points, the substantive submissions below set out in detail why the NTEU's proposed variation should be rejected including for the following reasons:

- (a) the existing provisions of the Academic Staff Award combined with the NES are sufficient to meet the modern award objectives. NTEU submissions with artificial hypotheticals about what can presently occur (eg EAs could prescribe 50 hours a week and pay only one dollar more than the award), are either incorrect or otherwise overstated and have no basis in reality; and
- (b) the introduction of overtime payments for academic staff (whether by the NTEU's clause or otherwise) would be inconsistent with the modern awards objective because it:
  - (i) introduces award regulation for professional, autonomous employees that is inconsistent with the regulation of other similar professional employees;
  - (ii) is not supported by the history of industrial regulation in the industry nor by the NTEU's consistent position over the last 30 years;
  - (iii) does not reflect existing regulation in the sector including as agreed by the NTEU and endorsed by the AIRC;
  - (iv) is ill-suited to the nature of academic employment and its activities, in particular research, which is not and cannot be meaningfully allocated or estimated in hours, to determine an overtime payment;

- (v) is inconsistent with the nature of how such work is organised and determined, with a large proportion of academic work and activities, their location and time undertaken by an academic staff member to perform them, being self-determined rather than directed or required by the employer;
- (vi) would lead to a number of adverse consequences if required to be applied, given the evidence of academic leaders in the proceedings is that:
  - A. the clause and the fine judgements required by it, particularly to determine the overtime payment issues, would lead to conflict and dispute; and
  - B. the consequences of having to ensure compliance with the clause would lead to much greater prescription by the employer on activities, including curtailing research that the staff member is approved to undertake, potentially imposing limits on time approved for research, and otherwise requiring recording of time;
- (vii) would be divisive and undermine relationships of trust within the academy and lead to disputes; and
- (viii) would undermine innovation and potentially lead to a reduction in international attractiveness for academics and potentially damage higher education and innovation research,

and all of the above means it is not "relevant" and the variation would be inconsistent with section 138(2)(b).

175. Further:

- (a) the clause is complex, ambiguous and would create significant problems if it actually had to be applied. It would also create significant problems in relation to the application of the BOOT in respect of the approval of future enterprise agreements. The NTEU submission that their proposal goes no further (and introduces no greater complexity) than is necessary<sup>81</sup> to achieve the modern awards objective and that their proposal is simple and straight forward is not credible; and

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<sup>81</sup> NTEU Closing Submissions paragraph 6.

- (b) there is no doubt that if required to be applied, the NTEU clause would necessitate the introduction of new systems, additional resources and significantly increase the regulatory burden on employers.

176. Each of the above matters are supported by evidence given in these proceedings.

177. The focus of the following sections (Part 6.4 to Part 6.18) is to expand on some of these matters and identify a number of evidentiary matters that support the above arguments and support the conclusion that the Commission should reach that the NTEU submission is not necessary to meet the modern awards objective and is otherwise highly problematic.

178. Without limiting the evidentiary matters below, the Commission should take particular note of the following evidentiary conclusions supporting the Group of 8's objection to the NTEU's claim:

- (a) that the existing approach to regulation is well established and supported. It is also consistent with the regulation of other similar employees;
- (b) there is no reliable evidence of the total average hours that represent what universities require. Whilst there is some evidence of the approximate number of hours that staff report themselves as "working" (in the sense that they are performing academic activities), there is also strong evidence that there are a number of contributing factors or reasons for that, driven by the staff member. Further, the evidence shows that the estimates of time worked do not distinguish between activities that (in a broad sense) constitute "academic work" but are not work requirements imposed by the university;
- (c) that the key features of academic employment and the nature of academic activities support the current approach to regulation and do not support the NTEU's position;
- (d) that academic employment and the activities performed are ill-suited to the regulation of the type sought to be imposed by the NTEU, including the concept of "required work" and "ascertained hours" which are not capable of being established to the degree of precision required for the purposes of the NTEU's clause (or to calculate any entitlement to overtime);
- (e) that the NTEU's reliance on performance expectation as a basis for determining a staff member's required activities (and for making a determination of the hours or a "fair average" that a staff member should take to perform their activities) is contrary to the weight of the evidence and is misconceived;
- (f) that universities do not attempt to quantify research outputs based upon time taken to generate the outputs, and whilst the NTEU seeks to draw parallels between its

proposed clause and the work allocation processes under enterprise agreements, the clear weight of the evidence shows:

- (i) that the existing workload allocation processes are focused on the allocation of teaching and teaching-related activities to provide for a certain residual period or percentage of the total workload available to undertake research (or in some cases enterprise agreements involve an allocation of an amount of future research time based upon historical research performance over the previous 3 years); and
  - (ii) contrary to the NTEU's position, the process does not involve the universities determining, either directly or indirectly, the research activities the staff member will undertake nor attaches, estimates or "ascertains" the amount of time that the academic's chosen activities will take;
- (g) that the NTEU's clause (and what it would require) is inconsistent with all current regulation of academic work, both nationally and internationally;
- (h) that compliance with the NTEU's clause would lead to a number of adverse outcomes, including:
- (i) it would likely lead to disputation given differences of views about what the "required work" is and estimates of hours that a competent academic would take to perform the work to the requisite standard;
  - (ii) the university would have to more closely regulate research and prescribe what research activities the academic staff member could do (and could not do) and would be recognised, to ensure compliance with the clause and so that additional unfunded labour costs do not occur. This would be contrary to concept of academic freedom and the nature of self-determined and self-directed research and resisted by academics;
  - (iii) the need to move from "assumed" effort to "ascertained" effort, which would require the recording or capping of research time to meaningfully comply with the clause;
  - (iv) would consequently adversely affect research and innovation and impact upon the international attractiveness of Australian academic employment;
  - (v) as a consequence of the above would lead to less "discretionary effort" and a consequent loss of productivity.

179. After discussing the evidence in support of the above conclusions, we then address the specific elements of s.134 in part 6.15.

## **6.4 Evidence of the existing industrial regulation and current annual salaries**

### ***History of Regulation***

180. Evidence of the history of the regulation of academic hours and salaries was given by Mr Andrew Picouleau, the former Director of Workplace Relations at Monash University who has had significant involvement in industrial matters and the negotiation of collective agreements within the Higher Education sector since the mid-1990s and also had previous knowledge of the sector and its regulation.<sup>82</sup>

181. The evidence shows several critical matters in relation to the history of industrial regulation of academic salaries and hours:

- (a) that at all times the relevant award regulation for academic staff has provided for an annual salary as compensation to perform the entirety of their role as an academic staff member and was not based upon 38 hours or "ordinary hours of work";
- (b) at no time has there been any award provision regulating hours of work for academic staff in any industrial awards prior to the modern award made in 2010;
- (c) clause 22 in the Academic Staff Award was a discrete provision included solely to meet a specific requirement in the relevant Ministerial Request that each award specify a number of ordinary hours "for the purpose of the NES", so that entitlements in the NES expressed in hours could be calculated for that purpose;
- (d) at no time, including in the current modern award has there otherwise been any regulation of academic hours and no provision for dealing with recording or setting hours, spans of hours, shifts, overtime or similar award restrictions more typical for staff with set hours and set duties; and
- (e) these matters reflect the fact that academic staff are highly skilled, and autonomous professional employees who undertake activities that are highly variable and changeable, reflecting the nature of academic research and other self-directed activities. Academic staff perform a significant proportion of their work as self-determined and self-directed work at hours and at locations and at a pace that they themselves determine. They generally pursue their particular discipline or research as a vocation and a passion, both to innovate, discover and create new knowledge and in doing so to advance their own domestic and international standing and their careers. The concept of regulating when work can be performed and how much

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<sup>82</sup> Exhibit 12, [5]-[10]

work is inconsistent with this academic character of their employment and manner in which they determine and perform their activities.

182. The above positions have been endorsed and supported by the NTEU up until the commencement of this proceeding in 2015.

183. In relation to the annual salaries included in the award, Mr Picouleau's evidence<sup>83</sup>, which was unchallenged, was that:

<p>Andrew Picouleau (Exhibit 12)</p>	<p>17. Academic staff have always been paid an annual salary.</p> <p>18. The salary rates in the ...modern award were, and remain, annual salaries payable for all work undertaken by academic staff. <b>They are based upon performance of the whole of the employment, and are not based upon a notion of working particular hours or "ordinary hours of work" or similar. Staff were and are entitled to the annual salary irrespective of the work performed and hours worked</b>" [emphasis added].</p>
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184. This evidence was supported by others in the proceeding, including the following evidence:

<p>Ken McAlpine</p>	<p>PN1315</p> <p>That situation that I've just described is an annual salary paid for the performance of all of my work as an academic has been in place since the late 1980s, is that fair?---Yes.</p>
<p>Dr John Kenny</p>	<p>PN6061</p> <p>Yes, and your contract would specify an annual salary?---Yes, that's correct.</p> <p>PN6062</p> <p>That's the salary that applies to you irrespective of whether you work 30 hours or 60 hours a week?---Yes, that's correct.</p>
<p>Professor Hughes Warrington (Exhibit 10)</p>	<p>[33] Academic work is largely self-directed and autonomous. This is reflective of the highly skilled nature of the profession and the work being performed. Consistent with this, academic staff (excluding casual academics) are paid an annual salary and hours and location are not required to be recorded or monitored.</p>
<p>Professor Biggs (Exhibit 11)</p>	<p>[14] Academic staff are highly skilled professionals who are paid an annual salary for the entirety of the work activities undertaken, irrespective of time worked.</p>

185. In other words, the modern award salaries compensate academic employees for all work performed including reasonable additional hours of work that may be required to fulfil the requirements of the role. This means that the number of hours compensated by the annual salaries set out in the Academic Staff award have never been limited to 38 and extends to the whole of job and hours performed.

<sup>83</sup> Exhibit 12

### **Assessment of Current Rates**

186. The NTEU does not advance any evidence demonstrating that the hours worked by academic staff exceed the number of hours reflected in the annual salaries contained in the Academic Staff Award (or that they would do so if the employees actually had the Academic Staff award applied to them).
187. Critically, if the Full Bench accepted the NTEU's claim that overtime rates should be introduced to the Academic Staff Award, it would need to conduct a forensic analysis of the current salaries to facilitate their conversion to "ordinary hours based" annual salaries - in other words adjusting the salaries to remove any element of payment for reasonable additional hours. This adjustment would require the consideration of detailed 'work value' evidence in accordance with section 156(3) of the FW Act.
188. The NTEU has not submitted any such evidence and does not appear to have turned its mind to the effect of its claim on the existing salaries.
189. Rather than provide any substantive analysis about these critical matters, the NTEU has relied upon theoretical estimates of what an hourly rate might be if academic staff worked an average of 45-55 hours per week.<sup>84</sup> Its analysis equates hourly rates for academic staff with base level trade persons and graduate engineers under the Manufacturing Award.
190. In response to this submission, the Group of 8 submitted at paragraphs 56 to 58 and 106 to 109 (and Attachment 1) of Exhibit 5 that:
- (a) a more valid comparison of rates can be drawn to professions such as engineers, scientists, doctors and academic teachers - all of which are paid an annual salary. As identified in Attachment 1 to Exhibit 5, the rates for a higher education academic employee who works 45, 50 or even 55 hours per week is comparable to or higher than, the hourly rate for these broadly equivalent staff;
  - (b) additionally, academic staff enjoy significant benefits, flexibilities and self-determination as outlined below and a raft of other employment benefits that are not enjoyed by the employees to whom the NTEU is comparing them. Academic employment has a number of characteristics that are limited to that employment;
  - (c) the UNESCO recommendations concerning the status of higher education teaching personnel relied upon by the NTEU regarding Bond University coverage, further reinforces the nature of academic employment as a profession and "a community of scholars with high degrees of professional responsibility and autonomy"; and

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<sup>84</sup> See pages 18 to 21 of Exhibit B.

- (d) the EU directive<sup>85</sup> regarding working hours which imposes a 48 hour cap, excludes academic staff from that cap. Evidence was also led to this effect by Professor Dawn Freshwater.<sup>86</sup>

191. Accordingly, to the extent that the NTEU variation provides for overtime payments and fails to adequately address the fundamental question of what employees are already compensated for, means that the substantial merits case for the imposition of overtime payments has not been established and that part of the NTEU variation should not be adopted by the Full Bench.

***Relevance of the NTEU's Withdrawal of "Consent"***

192. One of the premises for the NTEU's claim is that the settled and established industrial regulation and approach to the safety net for academic staff, which it has endorsed at all times up until these proceedings, must be departed from because while the established industrial regulation was permissible and appropriate because it was with their consent, the NTEU has now "withdrawn its consent".

193. Whilst the NTEU may well have recently adopted a new policy platform or position in relation to academic hours this is not a proper basis for the variation of the award safety net. To the contrary, the Commission can and should have regard to the historical regulation and can take into account that the NTEU position put in these proceedings is inconsistent with its position prior to that time and inconsistent with claims made in EBAs, including since the making of the modern award.

194. Further the "withdrawal of consent" argument overlooks that the absence of the prescription of academic hours and the attachment of overtime was a reflection of the type and nature of academic employment, the fact that academic staff are autonomous, professional employees and because their activities are highly variable and self-directed, particularly reflecting the nature of academic research. These are all matters that continue to have application today.

195. The approach of the annual salary applying in respect of the entirety of the role as an appropriate form of regulation is also reflected in the existing enterprise agreements and the NTEU claims in respect of those enterprise agreements. The evidence clearly demonstrated that the position of the NTEU in bargaining claims made and agreements reached, are based upon an annual salary in respect of the performance of all work. There was no claim or provision in the sector for academic overtime. See for example:

No similar claim in previous enterprise bargaining or in other forums	
Professor Andrews	PN3239-3241, 3259-3261 He acknowledges that there has been no claim in previous EA bargaining to have academic

<sup>85</sup> Directive 203/88/EC of the European Parliament and of the Council of 4 November 2003

<sup>86</sup> Exhibit 13, paragraphs 16 and 17.

	hours of work set and recorded by the employer, overtime loading, or a distinction between self-directed and required work.
Catherine Rytmeister	PN5066-5070 She accepts that there has never been an NTEU claim in bargaining for overtime for academic staff, or a claim that the university should record and monitor the actual working time of academics, or that academics should record and monitor their own time
Professor Hughes-Warrington (Exhibit 10)	[48(d)] At no time has there been any claim or log of claims seeking overtime payments for academic staff.
David Ward (Exhibit 20)	[17] In enterprise bargaining NTEU has never sought to include a provision in the form currently sought, nor has it sought overtime, or for a mechanism to record academic staff time, work and activities
Andrew Picouleau (Exhibit 12)	[61] At no stage during bargaining has the NTEU sought to include any overtime payment or similar for academic staff, or a clause similar to the one being sought.
Ken McAlpine	PN1309 He concedes that this is the first time the NTEU has sought to raise the prospect of overtime being a relevant or necessary part of award or industrial regulation.
Ken McAlpine	PN1334-13339 He concedes that none of the EAs attached to his statement include the payment of overtime, or recording or monitoring of research hours.
Professor Garton (Exhibit 9)	[28] The NTEU representatives on the Workloads Committee have not suggested a desire to prescribe, monitor or in any way control or record the hours of research performed by academic staff

## 6.5 Existing regulation can and does meet the modern awards objective

### *Role of the NES*

196. As set out at paragraphs 55 and 56 of Exhibit 5, the existing industrial framework clearly does meet the requirements of s.147 of the FW Act, specifying the ordinary hours of work for all classifications of academic staff under the award *for the purposes of the NES*, and provides protection for employees against being required by their employer to work unreasonable hours, as specified in s.62.
197. The NTEU's submission identifies a number of "reasons" why the existing framework could conceivably result in employees being disadvantaged and necessitates the imposition of additional award provisions concerning hours of work. These reasons don't reflect the protections afforded to employees under the FW Act. Nor do they reflect the actual state of affairs - with all employees being covered by enterprise agreements and many of the NTEU hypotheticals having no basis in reality.

198. Particular reference is made to:

- (a) paragraph A7 of the NTEU's Closing Submissions, in which the NTEU states that employees could be required to work 50 hours per week at the same rate of pay as employees required to work 35 or 40 hours per week; and
- (b) paragraph A100 of the NTEU's Closing Submissions, in which the NTEU refers to the possibility of staff being employed at Level A Step 1 of the Academic Staff Award (\$48,280.00) whilst being given work that can only be performed satisfactorily in a 45 hour week.

199. The existing award and NES regulation could address these situations:

- (a) The starting position under section 62 of the FW Act is that an employer must not request or require an employee to work more than 38 hours a week unless the additional hours are reasonable, and allows an employee to refuse a request or requirement to work unreasonable hours.
- (b) A requirement to work 45 or 50 hours a week is not therefore a lawful direction unless the hours are reasonable within the meaning of the FW Act. Relevant factors that are required to be taken into account include, inter alia, the nature of employment, whether the hours meet occupational health and safety standards, whether the employee has received remuneration for those hours, and "any other relevant matter". As a NES entitlement, whether or not hours are "reasonable" can also be the subject of a dispute notification under the dispute resolution provisions of the Award.
- (c) It is therefore inconceivable that the hours of work requested of employees in the NTEU's hypothetical scenarios could constitute a lawful direction within the meaning of the FW Act if the employee was paid only the minimum award wage. The employee could refuse to work those additional hours. It is not necessary to adjust the minimum wage or vary the modern award to achieve this objective.
- (d) Similarly, an enterprise agreement that provided an obligation for all employees to work 50 hours, irrespective of the reasonableness of the hours for the particular employee, at the award wage would not meet the BOOT (which is conducted against the Award, the NES and State laws), as it would be inconsistent with the NES.

200. The NTEU repeatedly states that the current award is not a suitable basis upon which to commence enterprise bargaining negotiations and that it has to negotiate "to" a safety net<sup>87</sup>.

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<sup>87</sup> See paragraph 59 of Exhibit B and paragraph A81 of the NTEU's Closing Submissions.

This is also not accurate. As stated above, the BOOT is required to be conducted not just against the award, but also against the NES and State laws.

201. Further, the existence of an annual award salary for professional, autonomous employees together with the NES can provide a fair and relevant safety net and enable the BOOT to be conducted. This is borne out by the multitude of enterprise agreements across the sector that do not prescribe detailed hours and overtime, and which, as identified by the NTEU, provide significantly higher salaries than the Academic Staff Award. Those enterprise agreements do not (and could not) contain provisions limiting or excluding section 62 of the NES.
202. The existing approach to the safety net of conditions for academic staff is also comparable with other similar types of employees reflecting a stable award system and a simple and easy to understand set of award provisions.
203. This is also reflected in Attachment 1 to Exhibit 5 which identifies a number of relevant and related awards to the higher education sector and academic employees and otherwise are awards that contain annual salaries, do not provide for detailed regulation of hours of work and do not provide for overtime payment for the relevant staff. This includes academic teachers in post-secondary institutions, specialist doctors, pilots, professional engineers, professional scientists and Government Agency engineers/scientists and executive level staff in the public sector.
204. The NTEU submission that the FWC now operates under a different statutory scheme under which its responsibility for settling disputes has lessened<sup>88</sup>, this is not a compelling explanation for the complete NTEU reversal of its prior support of the current industrial framework. Further, whilst a general dispute cannot now be notified to create an award:
- (a) the NTEU has not pursued such a dispute for 25 years and the argument now put forward is a convenient, theoretical one at best; and
  - (b) the scheme of the legislation has changed with an emphasis on enterprise bargaining and the capacity to bring disputes under enterprise bargaining agreements, which are required to contain a dispute settlement procedure enabling the Commission to deal with disputes under the agreement and the NES. This includes disputes about requirements to work additional hours in excess of 38 hours and the employee's ability to refuse reasonable additional hours an average of 38 per week.
205. Against this background, the Full Bench can be satisfied that the annual salaries contained in the Academic Staff award, together with the NES and other award benefits for academic staff, already provide a fair and relevant minimum safety net of terms and conditions.

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<sup>88</sup> Paragraphs A95-A96 of the NTEU's Closing Submissions.

***The award and NES have operated as a safety net underpinning successful bargaining***

206. It is not in contention that universities and the NTEU have successfully negotiated enterprise agreements at all of the public universities, setting out comprehensive terms and conditions. This includes provisions concerning academic work allocation and generally including provisions that provide mechanisms for review and/or application concerning unreasonable working hours by a faculty review board or similar, in addition to the general disputes provision.
207. As noted above in Part 4, the primary role of the safety net in the higher education sector is for the purposes of underpinning bargaining. The Commission could reasonably expect that in support of its submission that the NTEU variation is a critical and necessary change to the award, that there would be significant evidence of problems in negotiating the enterprise agreements, including provisions in relation to hours of work and evidence of claims by the NTEU for prescriptive regulation and overtime payments of the type now sought has been necessary industrial regulation.
208. There is an almost complete absence of such evidence from the NTEU and the evidence is to the contrary.

***There has been a lack of disputes, notwithstanding EA provisions and access to various review mechanisms and review of unreasonable hours***

209. There are a number of practical mechanisms in place in universities to assist in academic workload allocation and oversight, which includes enterprise agreement clauses providing for the creation of academic workload models or policies, principles to guide allocation and the capacity to seek review of unreasonable workloads.
210. Notwithstanding the prevalence of such clauses, as noted above at paragraph 204, the evidence shows that there have been very limited disputes and that where applications to review workloads as being excessive or unreasonable have been brought, the review mechanisms have dealt with those requests.
211. Dr Kenny gave evidence in relation to some disputes that he was involved in in respect of the University of Tasmania on behalf of the NTEU in relation to workload models and that those disputes were resolved using the disputes procedures and the assistance of the Fair Work Commission<sup>89</sup>.
212. Examples of the evidence concerning review or appeal mechanisms and the absence of significant disputes include:

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<sup>89</sup> PN5834.

Provide for review mechanisms and limited to no evidence of disputes	
Ken McAlpine	<p>PN1340</p> <p>He agrees that the EAs attached to his statement provide mechanisms for review of workload allocation, including on the basis that they are unfair or unreasonable, including in some cases an oversight committee with representatives nominated by the NTEU.</p> <p>PN1376 - PN1377</p> <p>He agrees that only a small number of requests for review (of academic workloads) have been received and that the evidence of Andrew Picouleau is probably correct in that respect.</p>
Andrew Picouleau (Exhibit 12)	<p>[22] The Monash clause allows for determination of unreasonable workloads and access to a Faculty Board of Review.</p> <p>[23] Since 2010 there have been 5 requests for review, only 2 of which required a Faculty Board of Review.</p>
Andrew Picouleau	<p>PN6772 - PN6774</p> <p>He explains the process under the enterprise agreement for reviewing unreasonable workloads, which process involves the Director of Workplace Relations (his former role), and notes that it has rarely needed to be used.</p>
Professor Hamel-Green	<p>PN6248</p> <p>He acknowledges that VU has mechanisms for staff to speak to their supervisor if they feel they are working excessive hours</p>
Professor Hughes-Warrington (Exhibit 10)	<p>[48(e)] Since 2005 there have been 2 requests for review of workloads notified as part of the formal disputes process and these were resolved locally through discussions between the academic staff members and their supervisor.</p>
Professor Hughes-Warrington	<p>PN4998</p> <p>Are you able to inform the Commission as to the extent to which issues or complaints had been raised about workload being unacceptably high at the Australian National University? - -Your Honours, it would be seen as a very rare occurrence for staff to raise workload disputes.</p>
Professor Biggs	<p>PN5265-5269, PN5271</p> <p>He is aware of some workload disputes in his faculty, and these have been resolved individually with staff members. There has never been any serious issues.</p>
Professor Biggs (Exhibit 11)	<p>[20(d)] Staff may raise any concerns about their workload in the first instance through the Staff Grievance and Resolution Procedure.</p>
Professor Garton (Exhibit 9)	<p>[32] If a staff member does not agree with their workload allocation or otherwise has issues with their workload then there are review and compliance mechanisms they can avail themselves of, including review at a local level, the Workloads Committee or utilising the review of actions procedure.</p>
Professor Garton	<p>[50] Access to review and complaint mechanism, including if they consider their workload is</p>

(Exhibit 9)	unreasonable.
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## 6.6 Lack of evidence of change since the making of the modern awards

213. The NTEU submissions and evidence speak in general terms about changes over the last 20 years, but the evidence does not establish any significant changes in the nature of academic work, its allocation or that the hours being worked by academic staff have changed (or changed significantly) since 2010. In particular:

Ken McAlpine	PN1069, 1085, 1108  He says that the way courses are assessed and what curriculum goals it has to meet have become more regulated over the last 20 years. He says that output requirements have become more prescriptive over the last 5-15 years. He says that over the last decade or so there has been increasing pressure for academic staff to be in their office.
Professor Strachan	PN4523  She agrees that academics were working the same hours before 2010 and after 2010.
Professor Hughes-Warrington	PN4851  She agrees that since the mid-1990s there has been a significant increase across the sector in student to staff ratios.
Professor Hughes-Warrington	[49] The nature and extent of academic workloads has not significantly changed since the Academic Staff Award was made in 2009/2010.
Professor Vann	PN5341, PN5476-5481, PN5315, 5318  He says that expectations have changed since the 1950s/60s. He agrees that over the last 20 years there has been an increase in requirements for reporting and accountability measures, that student/staff ratios have increased, that research expectations have increased, that there has been an increase in the requirement to articulate learning outcomes, and that there has been expansion of annual performance reviews.
Professor Coaldrake	PN5616  Gives evidence about changes to the higher education sector over the last 20 years.
Professor Garton (Exhibit 9)	[36] there have been no fundamental changes in the nature of academic work since 2010.

## 6.7 Excessive hours required by Universities?

214. The evidence about academic working hours relied upon by the NTEU does not reliably establish either the hours worked by academic staff or the proportion of those hours that are actually required by the employer.

215. What is clear is that self-estimation of hours is fraught in a number of ways and also includes many hours performed for reasons beyond the employer's requirements (see paragraph 224 below).
216. There is no evidence before the Full Bench of the actual hours required to be worked by staff to whom the Academic Staff award has actually been applied (because in fact enterprise agreements have applied).
217. The NTEU suggests that Universities have withheld information within their knowledge and instead concentrated their efforts on attacking the evidence provided by the NTEU. This submission is rejected. It is clear from the calibre of witnesses who gave evidence on behalf of the Group of Eight and AHEIA membership that all universities have taken the matters before the Commission very seriously, and have provided all information requested of it in relation to the NTEU claims. The wealth of experience of university witnesses was acknowledged by the NTEU.<sup>90</sup>
218. Further, as acknowledged by the NTEU on page 17 of its Final Submissions, there has been no attempt by universities to record the actual hours worked by academics or require academic staff to do so<sup>91</sup> and such data is not available.
219. In the absence of reliable data about actual hours of work, the NTEU's submission (that employees are required to work an average of up to 55 hours per week) is almost entirely inferential, based upon various survey and "expert" evidence led about employees attitudes to their workload, or estimates of their "work" hours provided by them.
220. The NTEU suggests that this data should be preferred to the views of the very senior and experienced witnesses who gave evidence on behalf of universities on the basis that the survey results indicate that senior management at the University of Wollongong reported high levels of satisfaction with their workload<sup>92</sup>. This proposition is rejected. The university witnesses who gave evidence are in most cases academics who have experienced both over lengthy careers and currently, academic workloads. Alternatively, the witnesses are senior HR professionals with administrative oversight over the negotiation of enterprise agreement clauses and any workload disputes.
221. Even if it were accepted that these personnel were "satisfied" with their own workloads, it is illogical to suggest that this would impair their professional judgement of the workload of others.
222. In any event, as set out above, the position of the Group of 8 is that the survey evidence relied upon by the NTEU is of very limited value, including as it does not reliably demonstrate the

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<sup>90</sup> See for example the comments at PN9425 in relation to Ms Diana Chegwidan.

<sup>91</sup> Garton PN4794; PN4982 (Hughes-Warrington); Picouleau (PN6756); Freshwater PN6875-6

<sup>92</sup> NTEU's Closing Submissions at A41.

reasons why some employees perceive they are working long hours, or alternatively why they are otherwise dissatisfied with their workload.

223. For example, Ms Strachan acknowledged in cross-examination that her research does not differentiate between "work" and "required work"<sup>93</sup> and it cannot therefore be used to demonstrate the number of hours universities "require" employees to work in order to perform the requirements of their role. The data from the 2011 Census also makes no such distinction, nor do the surveys conducted by the NTEU or John Kenny (in any meaningful way).

224. By contrast, the evidence provides several reasonable alternative explanations of why academic staff might work additional hours, or otherwise have negative attitudes about their workload. In particular, the Full Bench heard evidence that:

- (a) academic staff work long hours for personal reasons such as their love for the work, passion, pride, perfectionism, or the attainment of personal goals;

Philip Andrews	PN3253 Yes. And you'd also accept that for many academics their research is not just their employment, it's their vocation?---That's true and perhaps I'm speaking for myself. I think that's true to a certain extent....
Simon Biggs	PN5255 ...in an intelligent conversation with an intelligent member of staff you might say, I think you're being a little overambitious at what you think you can achieve in the next 12 months, do you really believe that's all achievable? And they will, nine times out of ten, I guarantee you, argue very strongly that yes, yes, I can achieve all that....
Owen Coaldrake	PN5619 ...People will work according to what they want to do, where they want to excel, if someone has a view that I think people who are very ambitious may impose significant disciplines on themselves in their expectations...

(See similar evidence from Michael Hamel Green at PN6223, and Ken McAlpine at PN1204).

Ken McAlpine	PN1281 He accepts that a researcher will pursue their area of research whether the employer directs them to do so or not.
Professor Andrews	PN3253 He accepts that an academic's research is not just their employment but also their vocation.

<sup>93</sup> PN4425

Ken McAlpine	PN1139 He concedes that many academics perform service far in excess of what is required by the employer.
Dr Kenny	PN6045-6046 He concedes that an academic pursuing their vocation is likely to consider that part of their academic workload.
Dr Dann	PN8509 She accepts that her attendance at industry conferences is done partly to develop her own career and knowledge.
Professor Freshwater	PN6834-6836 There is nothing in the EA to prevent an academic from working more than those hours on additional self-directed work . Some academics do this as a result of their passion in their area of research or some other community service or engagement.
Professor Garton	PN4795 Academics are likely to want to pursue their research for as long as it takes.
Professor Garton (Exhibit 9)	[18]: Most academics do not want to be "competent" or to work to a professional standard. They want to pursue their research and teaching passions and transform their discipline areas through the creation of new knowledge and innovation.  [40] Academics will do teaching and related activities well within the allocated time and spend every other waking moment on research because it is their intellectual passion  [57] Directive to limit time would significantly undermine the relationship with academic staff and limit their research development and career advancement .
Professor Biggs (Exhibit 11)	[15] For many academics, including myself, we are getting paid to pursue our passion. If my research grants were taken away, I would still do it. I would do it at home, on the weekend, because I am passionately interested in what I do. It also advances my international standing and reflects my vocation not just "my job". In my experience, this reflects the views of a large proportion of academics.
Professor Coaldrake (AHEIA10)	Academics view the work as a vocation rather than as a mere job, and are driven by their desire to advance knowledge in their chosen field. The idea is reinforced by non-assigned hours, indeed assigned hours would cut across academic freedom.

- (b) academic staff work long hours at their own initiative to enhance their prospects of attaining academic promotion or general academic standing or reputation;

Michael Hamel-Green	PN1139 ...Many academics perform service far in excess of what is required of them by their employer, it's in the nature of the work.
	PN1145 All of those matters, my clinical role and, to a lesser extent, my private practice, but certainly my clinical role and the research I'm doing at the hospital, they all contribute to my standing as an academic?---Absolutely, yes...
	PN1685 ...as I think we've established that most academics do lots of additional work above their required work. But, yes, the point you make is fair enough.
	Exhibit NTEU AD At paragraph 27, Professor Hamel-Green notes that academics are "preferably exceeding" their research expectations
Jochen Schroeder	PN2367 to 2370 Mr Schroeder describes undertaking project leader roles and DECRA research for the purposes of attaining promotion.
Stephen Garton	PN4742 ...Some people will greatly exceed their minimum research expectations, won't they?---Yes.
	PN4743 Yes. And that is the sort of thing that might assist them in achieving academic promotion?---Yes.
Michael Leach	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.

- (c) academics include non-allocated, external work and discretionary activities when they estimate their work hours, such as accepting offers from an external editorial board or similar activities. Examples of such work also include significant private practice or consultancy work<sup>94</sup>;
- (d) academic staff may refuse to cut back their teaching load despite suggestion from their employer, due to a sense of ownership over the relevant units:

Marie Herberstein	PN6910
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<sup>94</sup> PN1151 to PN1156 (Dawn Freshwater).

	...I am thinking of a particular staff member who has been running a very large unit and, you know, every year I've been talking to him about how we can who can share this unit with him and reduce the teaching load. It's a case of ownership, I suppose, in some cases. Staff members feel very protective of their unit and it's theirs. You know, I wouldn't direct them.
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(e) a variety of factors that are a function of the individual academic's approach. See for example:

Professor Biggs  (Exhibit 11)	[28] There are many factors that can impact upon research and the time it takes to do particular activities. Some of these include:  ...  b) the amount of effort an academic staff member chooses to put into a particular task;  ...  h) how efficient and effective academic staff members are with the use of their time and their experience;  i) the availability and input of other staff here and overseas with whom they may be working or collaborating;  j) the ability of academic staff members to recognise when something is good enough and that extra work will not change the quality of the output;  ...
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(f) academics might work for a number of different organisations concurrently, which may not be accurately reflected in the data shown. For example, Mr Michael Dix gave evidence that he concurrently held 5 to 6 jobs in the past;<sup>95</sup> and

(g) dissatisfaction with one's workload is more likely to be a complaint about the academic's allocated teaching load, rather than the entire workload, as any allocated teaching work necessarily is seen as infringing upon the time the employee has been given to devote to their research and passion projects. This dissatisfaction may exist regardless of whether or not the employee's assigned workload can be performed well within an average of 38 hours per week:

Simon Biggs	PN5134  there  are certain parts of workload that we can allocate very clearly, which are the teaching activities, governance and administrative activities to university. The balance of workload is largely self-directed, so people when they talk about excessive workload, in my experience, in the academic context, really talk about the allocation of teaching. The amount of teaching I'm asking them to do is so large they don't feel they've got sufficient time left over to make the contributions in research.
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<sup>95</sup> PN9317.

John Kenny	<p>PN5827</p> <p>...this document was important in order to quantify the teaching and the service, because if those two things were not quantified they would tend to chew up the research time and therefore it would be unfair to expect people to produce have research outputs which assume they have a 40 per cent allocation when in fact they don't.</p>
Glenda Strachan	<p>PN4532</p> <p>Yes. It's fair to say, isn't it your report shows this that 67 per cent would actually have a preference for more research time?---Yes, that's right.</p>
Michael Dix	<p>PN9318 - 9320</p> <p>Dr Dix gives evidence that research is a passion for him and that he would prefer to be engaged on a teaching and research basis than a teaching focussed basis.</p>

Each of those reasons contribute to an explanation of why academic staff might report they are working long hours for reasons other than being compelled by their employer to work an unreasonable workload.

225. The fact that there may be many reasons why employees may report they are working long hours was acknowledged by the NTEU at paragraph A3 of their Final submissions, when they stated that the causes of working long hours "can be debated".
226. As to whether or not employees are actually being required to work long hours (as opposed to having the perception that they are required to work long hours), this must be determined against the background of evidence from both University and NTEU witnesses suggesting that academic workloads are not in fact unreasonable, and that the issue has perhaps been overstated. Namely:
- (a) evidence that allocated work can readily be performed within the time allocated for it and forms a small part of the available time for academic staff;

<p>Simon Biggs (Exhibit 11)</p>	<p>22. Whilst many academics may say they work long hours, the majority of their activities are not directed, monitored or recorded. We can however determine their actual teaching contact hours....</p> <p>23. Based on my experience and direct observation of workload allocation within the Faculty, including the teaching contact hours allocated as part of the workload models, the teaching contact hours and associated activities of preparation and assessment for most if not all academic staff within the Faculty would account for approximately one-third of an academic staff member's work for the year. A significant proportion of the remainder of the year is spent on productive self-directed work related to research, and academic staff have the freedom to determine what research or other activities and questions they pursue, what approach/method they will use to do this and how and when this work will be performed.</p>
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(b) the evidence that research requirements are "not particularly onerous" and that nearly all academics in many institutions either meet these expectations,

<p>Marie Herberstein (Exhibit AHEIA 11)</p>	<p>16... It is possible to achieve the minimum expectations in regard to teaching allocation, research/scholarship and contributions to the University...within the requirements set out in clause 4.3.29 of the EA, that is 1575 working hours per year.</p>
<p>Professor Andrews (XXN)</p>	<p>PN3165  ... I think to meet the minimum standards, you know, I could probably work 40 hours a week, but I would have to have the number of PhD students to run the projects to do the research work. I would have to have the funding available to run those projects.</p>
	<p>PN3171  - - -have you formally disciplined any of your staff who haven't met a metric?...</p> <p>PN3172  ...No. Nearly everyone in the school of chemistry meets or exceeds the minimum standards.</p>
	<p>PN3157  ...one of the issues in the context of the material that's been led thus far before the Full Bench is the distinction between what might be required as opposed to what might be self-initiated in terms of work. What I'm trying to get a sense of is your perspective of, in terms of the performance here and the overachievement what the balance is between the proportionates required of you and that which might be self-initiated, self-driven?---I think the attempt to introduce the minimum performance standards was an attempt by the university to try and quantify what it expects of the research outputs of its academics. And <b>as you can see a lot of people, not everybody, would view them as not particularly onerous.</b> On the other hand the university has a narrative, as an internationally competitive high achieving university which wants to be higher up the international rankings they had a process called academic strengthening which was quite clearly an attempt to buy in high performing academics (emphasis added).</p>
<p>Michael Hamel-Green (XXN)</p>	<p>PN6275  So notwithstanding you were dean of the faculty, fulltime CEO of the faculty?--- Yes.</p> <p>PN6276  You were close to meeting [research performance expectations of a Professor] ? ---Yes, very close...</p>
<p>Glenda Strachan</p>	<p>PN4492  It's a rare thing, unsatisfactory performance, termination of a continuing</p>

	<p>academic staff ...</p> <p>PN4493</p> <p>...Yes. Most of the staff for an employment on process do meet the standards and work hard.</p>
<p>Andrew Picouleau (Exhibit 12)</p>	<p>62. Whilst the NTEU's submissions and material seek to portray a situation where a majority, if not all, academics are significantly overworked and being compelled by their employer to undertake excessive activities and duties, based upon my significant dealings and interactions in the sector and with academic staff across all faculties including high-performing and underperforming academic staff, this is not the case.</p>

and many very significantly exceed them:

<p>Philip Andrews</p>	<p>PN3127</p> <p>...the minimum standard [for research outputs] would be to produce two publications in quality publications?---Yes.</p> <p>PN3128</p> <p>And the aspirational would be to produce five?---Yes.</p> <p>PN3129</p> <p>And these are generally assessed over a rolling three year period?---Yes, correct. Yes.</p> <p>PN3140</p> <p>- - -over the last three years how many publications have you produced?---Good question. Average well, I can tell you because when the ARC application went in I was averaging nine per year, so in the last three years it would probably be nine per year. Eight to nine per year.</p> <p>PN3141</p> <p>So if I take a conservative view of that and say eight, that's 24 over the last three years?---Yes.</p>
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(See also above extracts at paragraph 224(b) for further examples);

- (c) the evidence that there have been no or very few disputes about academic workload, notwithstanding that there are mechanisms for staff to have their workloads reviewed internally (either by consultative committees, or by notifying disputes under the applicable enterprise agreement provisions) and very high instances of union membership (as noted above at paragraph 212);

- (d) the evidence that there is a significant cohort of academics who are paid to produce a research output but who do not do so<sup>96</sup>;
- (e) the observation of the Bench that academic staff cannot be allocated more than a full-time workload and if this occurred it would constitute a breach of the enterprise agreement:

PN6714

What happens at Monash University at the moment if an academic is allocated more than a fulltime workload?--Well, I'm not aware that that would occur or has occurred.

PN6715

COMMISSIONER JOHNS: They would be in breach of the agreement, wouldn't they?--Yes.

227. Consequently, to the extent that the NTEU seeks to rely upon the evidence of Glenda Strachan, John Kenny, or the Census and NTEU Survey data (including for example at paragraphs A33 to A34 and A42 to A4 of its Final Submissions) to support its conclusion that employees are being required by their employer to work unreasonable hours (or that the majority of academic staff are dissatisfied with their work hours), there is no sound basis for the Commission to make that finding.

## **6.8 NTEU variation is ill-suited to nature of academic employment and the nature of academic activities**

### ***The Nature of Academic Employment***

228. The evidence shows the majority of academic staff operate as autonomous and semi-autonomous professionals. Significant and consistent evidence was given by long term academics and senior University managers, Professor Garton, Professor Hughes-Warrington, Professor Biggs, Professor Freshwater and Professor Vann about the nature of academic employment.

229. Mr McAlpine acknowledged and agreed in cross-examination that a key feature of academic employment is their autonomy, flexibility, academic freedom and self-direction. He acknowledged those features are highly valued by academic staff, that the level of autonomy in academia is not found in other types of employment and that academics have more flexibility than any employee in any industry<sup>97</sup>.

230. The evidence also demonstrated that many if not most academics viewed their academic activities as a vocation as well as an occupation and this came through much of the evidence

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<sup>96</sup> Exhibit 12 (Andrew Picouleau) at paragraph 63; John Kenny XXN, PN5944

<sup>97</sup> Exhibit 11 (Simon Biggs) paragraphs 14 to 18; Exhibit 10 (Hughes-Warrington) paragraphs 32 - 37; Exhibit 9 (Stephen Garton) paragraphs 17 - 23; Exhibit 12 (Andrew Picouleau) paragraph 16; and McAlpine XXN, PN 1069, 1071, 1081, 1106 and 1078 - 1079.

as noted above at paragraph 224(a) and this undermines attempts to meaningfully distinguish between required work and undertaking activities by choice or discretion in the context of academic employment.

231. The evidence showed that academic employment operates in a high trust environment, recognising the academics as high skilled autonomous professionals. They are not monitored, checked and substantively are not accountable for their time and location. They are trusted to undertake and pursue their activities, including deciding on their research and other activities.

232. It is common cause that academics do not record their hours, are not required to record their hours and would fiercely resist having to do so and that this is consistent with their role as academics<sup>98</sup>. As noted by Professor Freshwater in cross-examination:

PN6876

... requiring academics to record their time would require a lot of monitoring, regulation and intervention in academic work. The University works within the context of an academic culture allows individuals to make judgments about their own priorities.

***Extent of autonomy and Academic Freedom***

233. Accordingly, consistent and extensive evidence was given about this autonomy of academic staff, founded upon academic freedom and self-direction. There was overwhelming evidence that this self-direction and autonomy includes determining the nature and extent of research and service activities performed, how that is undertaken, locations at which work is performed, attendance at the University, hours of work undertaken and service activities, which are largely determined by the academic staff member themselves:

<b>An integral part of academic employment is that much of their activities are self-directed, flexible, autonomous</b>	
Ken McAlpine	PN1069, 1071, 1081, 1106, 1078-1079  He agrees that a key feature of academic employment is autonomy, flexibility, academic freedom and self-direction and that those features are highly valued by academic staff. He states that there is a level of autonomy in academia that is not found in other types of employment, and that academics have more flexibility than any employee in any industry. He states that academic staff have more flexibility than general staff.
Ken McAlpine	PN1110-1111, 1138  He accepts that academics are not directed to sit in their office from 9-5 and that they largely self-manage their activities.
Professor Biggs	[14] Fundamental to the nature of academic work are concepts such as autonomy, freedom,

<sup>98</sup> McAlpine PN 1223 - 1226, Professor Hughes-Warrington (exhibit 10) [33], Professor Vann PN 5583, Professor Biggs (exhibit 11) [17]

(Exhibit 11)	flexibility and self-direction. Outside of timetabled student teaching and academic committee work, staff enjoy the flexibility to arrange their work as they see fit to maximise outcomes.
Professor Biggs (Exhibit 11)	[36] Other than teaching and related duties, and some administrative duties, most if not all research related work is productive self-directed work and will often be taken into account when the staff member's performance is being assessed and/or they are being considered for promotion.
Professor Hughes-Warrington	PN4859-4862 She confirms that academic work is largely self-directed, including choice of research question and methodology for a researcher, and choice in structure and content of subject and teaching methodologies for a teaching academic.
Professor Hughes-Warrington	PN4895-4897 She agrees that academic staff are not directed to work a set number of hours on a specific task, aside from teaching.
Professor Hughes-Warrington (Exhibit 10)	[37] ..the nature and extent of research performed, how that is undertaken, locations at which work is performed, attendance at the University, hours of work undertaken and activities are determined by the academic staff member themselves.
Professor Hughes-Warrington (Exhibit 10)	[38] This flexibility, independence and ability to self-manage their work and time is both reflective of the nature of academic work and valued highly by academic staff. It is an integral part of academic employment and the trust in the academic cohort.
Dr Dann	PN8899 She confirms that she determines where and when she undertakes her duties.
Professor Vann (Exhibit AHEA19)	PN5425 He confirms that flexibility in academic work is an important part of the value of academic work and that academics are not fond of control.
Professor Vann	PN5452 He says that academics have a high degree of autonomy to determine what they spend their time doing.
Professor Vann	PN5471-5472 He confirms that academics' employment contracts do not specify working hours and do not put a limit on working hours, as the expectation around academic roles is that they will be flexible and autonomous.
Andrew Picouleau (Exhibit 12)	[16] Academic work is characterised by a very high degree of autonomy, significant self-directed work and significant freedom as to how academics pursue research, including the type of research they pursue and the times, location and manner in which it is performed, as well as other activities that they undertake outside of allocated teaching. This reflects both the skilled and professional nature of academic work and the nature of research and academic employment generally.
Andrew Picouleau	[17] Outside of allocated teaching duties and some limited service requirements such as attendance at meetings or as directed, academics have freedom as to where they attend the

(Exhibit 12)	university and how they undertake their academic duties.
Andrew Picouleau	PN6770 He confirms that the staff members set their own research activities.
Andrew Picouleau	PN6663, 6775 There is an understanding that academics are autonomous and self-directed.
Professor Freshwater (Exhibit 13)	[13] The individual academic has, and values, a high level of individual control over the balance of the work that he or she does and when and how that work is done. Introducing regulation constrains individual academic judgement and activity management, and undermines the status of an academic as a self-organising professional.
Professor Freshwater (Exhibit 13)	[15] Research work requires that individuals are free to manage their own time within a framework set by their academic peers and managers.
Professor Freshwater	PN6876 She states that one of the most important benefits of working at a university is the academic freedom, and that much of what an academic does cannot be scheduled. She says that putting parameters around activities is problematic and acts as a disincentive.
Professor Herberstein (AHEIA11)	[9] Apart from the annual meeting, I leave my staff to manage their own workload unless they approach me, as they sometimes do if they believe they require more support to achieve what we've agreed as to the work allocation.
Professor Herberstein	PN6910 She confirms that she would not direct or require an academic to reduce their workload, as the allocation process is a collegiate process and she wants to give colleagues the flexibility and liberty to direct their own work. She does discuss how they will manage their workload.
Professor Herberstein	[19] She would not direct an academic not to undertake 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.
Professor Garton	[19] Academic work is largely self-directed and autonomous...The nature of academic work and academic culture demands autonomy and flexibility.
Professor Andrews	PN3248 He accepts that if the University directed that staff could not research above 38-40 hours per week, most academics would not comply with the directive.
Professor Andrews	PN3102-3105 He says that attending international conferences is at his own initiative, but there is an approval process and it is at the University or ARC's expense.
Catherine Rytmeister	PN5080 She agrees that research is self-directed.

Susan Thomas	PN4169-4170  She confirms that academics are not directed as to how many hours to spend on any particular task, or to stop working when they have worked a particular number of hours in a given period.
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234. This is also supported by the evidence that several academic activities other than teaching and assessment related duties do not involve the University at all. For instance, accepting a position on the board of a professional body or editorial board. Academics also commonly attend conferences—domestically and overseas—and liaise with other academics within the University and at other Universities whether as part of formal research collaborations or more generally as scholars, sharing ideas, information and supporting each other. Academic staff also have the capacity to undertake paid outside studies programs (OSP) typically for periods of 6 months and generally travel overseas as part of their employment with the University which is supported the University including to visit other Universities and colleagues, potentially collaborating on projects or more generally sharing information. During such periods they do not typically undertake teaching or other duties for the University. These activities form part of their employment, but are not requirements of the University.

***The nature and determination of research***

235. The evidence demonstrated that academic research involved research and activities that evolve and develop and involve the pursuit of new knowledge or the new application of knowledge<sup>99</sup>. Such activities are not capable of being reduced to a number of estimated hours and in fact commonly span across a number of years.

236. Universities generally do not determine or allocate the research and other collaborative activities that will be performed. The staff member determines what research they will undertake and its nature and extent.

237. The extent of the framework from the University is that the academic pursue "quality" research that is capable of publication in recognised journals (as discussed in more detail below), and supports the broad strategic direction of the University and to identify some broad expectations about performance to be met over periods of several years. These matters are discussed further below.

<b>Research activities are largely self-determined, as well as being self-directed.</b>	
Ken McAlpine	PN1169, PN1173

<sup>99</sup> Exhibit 9 (Garton), [18]; Exhibit 10 (Hughes-Warrington), [40]; Exhibit AHEIA 10, [15].

	He agrees that it is up to the academic to determine what to do with research as it develops, and that two researches may take different approaches to the same research question.
Ken McAlpine	PN1177 He agrees that the employer does not dictate or direct the scope or methodology of particular research.
Professor Hughes-Warrington (Exhibit 10)	[33] They largely self-manage their work other than teaching.
Professor Hughes-Warrington	PN4979 The university does not determine what research activities the staff member will undertake.
	PN4980 So how would the research activities that, if I am an academic staff member at the Australian National University, how is it determined what research activities that I'm going to undertake?---The staff member determines which research activities they are going to undertake.
Andrew Picouleau (Exhibit 12)	[29(a)] Other than in respect of allocated teaching duties, universities do not allocate specific research duties or work.
Andrew Picouleau	PN6770 Who sets out the research activities?---The staff member would.
Professor Garton (Exhibit 9)	[29] Other than allocated teaching activities and University meetings the remainder of an academic staff member's work is largely self-directed and self-managed.
Professor Garton (XXN)	PN4686 He states that the self-directed nature of academic work means an academic has the flexibility to do what they feel they need to do in order to advance their research.
Professor Garton (Exhibit 9)	[41] Outside of teaching and attendance at University meetings, Universities generally do not require academic staff to be physically in attendance at the University. Research can happen in a variety of contexts.
Professor Garton (Exhibit 9)	[44] Other than teaching hours, the University does not allocate specific duties as such to academic staff particularly around research...Universities do not dictate what the research questions are and don't tell them where to find the answers to their research.
Dr Kenny	PN5784 He agrees that it would be an infringement on academic freedom if a supervisor were to direct an academic not to complete a particular research question because it would require them to work additional hours.
Dr Kenny	PN5786 He says "it would be an unwise supervisor who went down that path" (not agreeing to the

		research an academic wants to perform because it can be done in a quicker way).
Professor Biggs	PN5221	The university does not allocate specific research activities.
Professor Biggs (Exhibit 11)		[27] Universities do not allocate research activities to academic staff and never have.
Professor Biggs (Exhibit 11)		[27] While Universities may provide some guidance and opportunities, it is ultimately up to the individual academic staff member the research they will undertake, the research question they wish to pursue and how they will go about it.
Professor Biggs	PN5222	The staff member self directs their research activity.
Professor Biggs (Exhibit 11)		[16] There are 26 weeks of the year where the majority of academic staff generally do not have any allocated teaching hours but may undertake some teaching-related activities such as marking assessments. Otherwise, academic staff are then largely free to identify and undertake their research and/or scholarship activities.

238. The evidence showed that research is not considered or calculated in time and cannot be meaningfully estimated based upon time. Professor Biggs gave uncontested evidence that the amount of time, was impacted by many factors<sup>100</sup>. We submit this list is informative for the Bench as it summarises overall evidence given by a number of witnesses:

- (a) each academic staff member sees things differently and equally "competent" academic staff can take different approaches and paths to do the same piece of work and ultimately get to the same outcome, with significantly different "hours" to do so;
- (b) the amount of effort an academic staff member chooses to put into a particular task;
- (c) how much reflection time an academic staff members spends before writing. Some academics prefer to start writing immediately whereas others spend considerable amount of time reflecting and thinking before writing;
- (d) the nature and complexity of the particular research task;
- (e) the field in which the research relates and the speed of progress in that field. In some fields if you don't publish your research results quickly then somebody else will jump ahead of you. In other knowledge-based fields such as architecture, the papers published tend to be longer and therefore more time is taken in relation to every aspect of preparing the paper;

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<sup>100</sup> Exhibit 11 at [28]

- (f) how rapidly the individual academic staff member wants to get their work published;
- (g) the requirements of a particular research grant and the complexity and experience of the team of academics engaged to work on the project;
- (h) how efficient and effective academic staff members are with the use of their time and their experience;
- (i) the availability and input of other staff here and overseas with whom they may be working or collaborating;
- (j) the ability of academic staff members to recognise when something is good enough and that extra work will not change the quality of the output;
- (k) the capacity and willingness of an academic staff member to take a risk with their research and reputation; and
- (l) whether the research has commercialisation opportunities which can impact on the strategies taken to pursue that work and publish the findings.

239. Unsurprisingly, therefore, the evidence establishes that to talk of how much time will research take or what's a fair estimate, is largely meaningless and is at best a very broad indication.

Research time significantly varies across research and cannot meaningfully be allocated to research activities or outputs	
Dr Kenny	PN5706, 5714, 5752, 5781, PN5762, 5789  He accepts that the nature of research means that it would be difficult to measure how long a particular research project will take, including individual experience.
Andrew Picouleau	PN6692  The workload models do not specify the time to be taken for research activities.
Professor Freshwater	PN6839, 6875  She states that the university does not prescribe the number of hours it takes to conduct a particular task.
Professor Hughes-Warrington	PN4994  The time taken for research work can vary widely.
Professor Hughes-Warrington (Exhibit 10)	[40] It is meaningless to talk in terms of typical or average hours for research...The particular question being answered and how the researcher will go about answering it or pursuing a new area of knowledge is determined by the researchers and will vary significantly, not only across disciplines, but within disciplines and across competent researchers.
Professor	PN5459

Vann	He confirms that the time spent on tasks is highly variable.
Professor Vann	PN5584 He confirms that the amount of time that would be spent on a particular research output is unpredictable.
Professor Garton	[42] When it comes to research it is impossible to distinguish between thinking and non-thinking time.
Professor Biggs	PN5224-5225, 5256 Research outputs are not equated with time. This is because research involves a variety of work, that different people may put different time into particular activities, and it is impossible to pin time down to a simple given activity.
Professor Biggs (Exhibit 11)	[24] There is so much variability in terms of research related activities which makes the monitoring of hours much more difficult and virtually impossible.
Ken McAlpine	PN1648 He acknowledges that different academics might have differences of opinion in relation to how long a competent academic would take to perform a particular task.

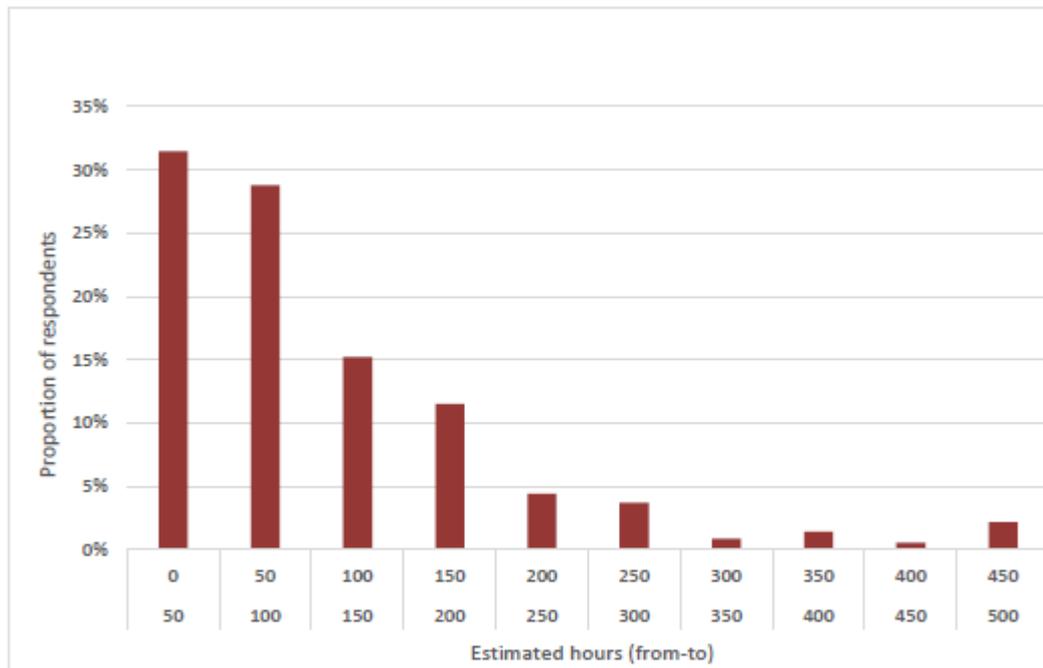
240. To attempt to attach a "fair average" or fair estimate based upon research time, is also largely meaningless and at its highest, it might provide some very broad indication or approximate range. The evidence also showed that that even experienced academics would and can have very different views about what the relevant estimate would be (even moderated for discipline and level), even assuming that there was a uniform view about what competence required. See for example the following:

<b>Estimates of "fair average" for research time would be broad estimates at best and largely meaningless</b>	
Professor Hughes-Warrington (Exhibit 10)	[40] It is meaningless to talk in terms of typical or average hours for research...The particular question being answered and how the researcher will go about answering it or pursuing a new area of knowledge is determined by the researchers and will vary significantly, not only across disciplines, but within disciplines and across competent researchers.
Dr Kenny	PN5768, 5771, 5483 He concedes that it would be difficult to quantify or record research time, or estimate how long it will take to perform a particular task. He agrees that individual academic judgement affects how an academic chooses to produce a paper.
Ken McAlpine	PN1648 He acknowledges that different academics might have differences of opinion in relation to how long a competent academic would take to perform a particular task.

Professor Andrews	<p>PN3250-3252</p> <p>Well, you'd accept, and I think your evidence has been given, that to attach a particular number of hours to research, given the nature of research, is, at best, a broad guestimate?---Difficult.</p> <p>Broad indication?---Yes.</p> <p>You accept that?---Yes. Research is a many varied wonderful thing.</p>
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(This is also dealt with further below at Part 1.9 and in particular paragraph 266).

241. Putting aside for one moment the difficulties and shortcomings of Dr Kenny's initial survey and in (particular the lack of representativeness), the data put in evidence by Dr Kenny in his research following on from the survey showed that in relation to estimates of average time for academic activities that the views of academics were widely divergent:



*Figure 1: Estimated time (in hours) to undertake unit planning activities (on campus teaching) for a totally new unit (or one you have not taught previously)*

242. The above graph shows that, even in a relatively confined activity such as unit planning, the estimated time identified by academic staff varies significantly. For example, over 30% estimated 0-50 hours, whereas over 25% estimated between 100-150 or 150-200 hours, and others estimated in excess of 300 hours. This proposition was acknowledged by Dr Kenny on cross examination:

Dr Kenny	<p>PN6097</p> <p>... it is readily apparent isn't it looking at that graph that there is fairly significant, very</p>
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	significant divergence of views as to how many hours they estimate it would take them to do this particular task?---Yes.
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243. Then overlay this with the fact there may be significant contention as to whether the particular activities or tasks to which you are seeking to attach an estimate of time are required or not, or necessary to meet expectations or not and it can be seen that a meaningful determination of "ascertained hours", as required by the NTEU clause, is not determinable with any precision and certainly not the precision envisioned or necessary to apply the clause. This is expanded upon in the next two parts.

## **6.9 Problems with the NTEU reliance upon academic performance expectations as duty allocations and determinants of "fair average"**

244. The concept of "required work" is central to the NTEU's claim. As defined by the NTEU, this concept extends beyond the work that the university directs or requires the employee to undertake to all activities that the staff member determines are necessary to meet performance expectations. Similarly the concept of "ascertained hours" is a critical part of the determination of whether overtime is paid under the NTEU variation.

245. Consequently, a necessary precondition to the NTEU's claim is the ability to clearly identify the work "required" by the employer and to be able to distil into a precise figure the number of hours an employee could "with confidence" spend to undertake that work to some notional standard of competence.

246. As the Commission is aware, such calculations and approach are well suited to labour (e.g. construction, manufacturing and mining industries) and shift-based work (e.g. hospitality, retail, horticulture, and the like) which can be articulated precisely in required hours and directed tasks.

247. However, as is evident from the above analysis, the roles of academic staff cannot be directly linked to a concept of "required work" or "ordinary hours" and/or directed tasks.

248. The NTEU therefore seeks to support its case by reference to general performance expectations and seek to equate the expectations with activities that the staff member is required to undertake that year and to then seek to use the existence of the standards to enable an estimate or determination of the "ascertained hours" for the purposes of the NTEU clause - i.e. how many hours a competent academic in the discipline at their level could with confidence take to perform the particular "required work" intended to be undertaken by the academic that year.

249. There are many problems with this approach, which are evident from a full consideration of the evidence. Many of the NTEU's evidentiary assertions in their Closing Submissions are superficial or do not reflect the weight of the evidence.

***While the NTEU have sought to present that all (or the majority of universities) have developed and implement such performance expectations, this is not borne out on the evidence***

250. Attachment F to the first witness statement of Mr McAlpine (Exhibit G) includes the performance frameworks he was able to identify, which we have summarised in a table at **Attachment 1 to these submissions**. As is evident from this summary, some of the performance expectations provided include a mix of qualitative and quantitative matters, including some outputs. For example, a quantitative requirement might be to publish a minimum number of journal articles within a 5 year period, whereas the qualitative output might be to make a "substantial contribution" to the faculty. Attachment 1 identifies that there is evidence of performance expectations of this type applying at some universities, but the existence, nature and extent of the performance expectations at other universities are not in evidence.

251. Further, for example, Professor- Hughes Warrington gave evidence that ANU did not use such performance expectations and that performance was based upon individual discussion with the staff member.<sup>101</sup>

***Even if that were not the case, and all universities had such performance expectations, the evidence shows that the performance expectations in practice are used as a general guide***

252. As was borne out in the evidence before the Commission, universities have a legitimate interest in ensuring that the significant public funds allocated to research work are being used appropriately, and it is against that background that some Universities have developed and set expectations (as indicated by Attachment 1) to help identify some level of output and expectations of staff members.

253. Whilst these performance standards can be used as an indication of the types of outputs that universities might expect from academics, it is clear that they do not dictate the activities for staff and are used as a guide and part of the discussion with the staff member. This proposition was accepted by Mr McAlpine on cross-examination<sup>102</sup> and is supported by a range of other evidence:

Andrew Picouleau (Exhibit 12)	[9(b)] the standards were developed to provide guidance as to the types of outputs staff should seek to achieve, which could form the basis of discussions about what the staff member should focus on to improve their research performance. The standards are expressed in outputs over a lengthy period of time and do not necessarily equate to a particular time in a year.
Ken McAlpine	PN1507 Yes?---To be fair, many of them don't actually some of them set performance standards. Others of them set the process by which performance standards are to be set. So covering both of those

<sup>101</sup> Exhibit 10, paragraph 44; PN4875.

<sup>102</sup> See PN1507, PN1534 and PN1568

	<p>things then as a general idea I think that's correct.</p> <p><b>PN1534</b></p> <p>You accept that not only do they not determine the hours, they don't actually determine, other than in a very broad sense, what the activities are?---That's right: they're not the work necessary to achieve any promotion expectations applicable to that employee. They're their indicative or behavioural standards. If one were only given those then I think it would be pretty hard to say that they exceeded 38 hours. If that's all you were given then I think it would be pretty safe to say that there is nothing in that that indicates that you couldn't do that in 38 hours.</p> <p><b>PN1567</b></p> <p>Mr McAlpine, you put this folder of documents to the Commission as a fair and representative sample of the policies and the main matters which they cover and you describe them as the standard academic performance expectation documents?---Yes the policies; they're not the performance expectation documents for 65,000 academic staff. They're the performance expectation policies.</p> <p><b>PN1568</b></p> <p>Yes?---If I have misled the Commission in that respect, I apologise. They are the I think it's fair to say they are documents under which performance expectations are actually set.</p>
Professor Garton	<p>PN4731-4733</p> <p>The minimum research expectations may be a guide.</p>
Professor Hughes-Warrington (Exhibit 10)	<p>[59] Academic staff determine how they will competently achieve expectations.</p>
John Kenny	<p><b>PN5740 - PN5752</b></p> <p>Dr Kenny agrees that there are a range of activities he could undertake to meet the performance expectations set out in the University of Tasmania's workload model - e.g. producing 5 publications over 3 years may be completed by undertaking a long or short project, individually or as part of a collaborative team, publishing at various stages of the project, and the like.</p> <p><b>PN5771</b></p> <p>"... You can't just go there's two publications, therefore that equals X amount of time. Because as we've gone through, the various activities that I might choose to undertake or not choose to undertake as competent academics in my discipline, are really an academic judgment on my part as to how I'm going to produce those two pages. Do you accept that?---Yes, there are a number of factors involved in there."</p>
Philip Andrews	<p><b>PN3120 - PN3127</b></p> <p>Dr Andrews gives evidence about the minimum and aspirational research expectations at Monash University which are based on quantitative outputs .</p>

254. The evidence showed that the performance expectations are not requirements, but a guide and a potential "starting point" for the conversation between an individual academic and

his/her supervisor, about the contribution the academic wishes to make, based upon what is assumed to be an acceptable output.

255. For example:

Simon Biggs	<p><a href="#">PN5232</a></p> <p>"... if we look at the research outcomes activity it's in some senses to provide a bit of a consolidated picture, staff member by staff member, of what they've done with the time available to do research that they have. That's all it is really and it does depend and I can guarantee you every academic unit I've ever worked in, this would simply be the starting point for an argument between staff about the relative value of each activity and whether any tool can actually capture that. So really, one can only use it as a starting point for a conversation with a staff member about their contributions. You can't use it for anything else."</p>
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256. Many witnesses gave evidence that the workload discussions were very much focussed on an individual discussion between the staff member and the supervisor<sup>103</sup>, rather than determined by a performance expectations document.<sup>104</sup>

257. The evidence showed that the expectations may guide performance discussions, but also as a "mentoring" tool to illustrate:

- (a) what an appropriate allocation of public funds translates to, in terms of effectively undertaking research - e.g. the types of activities ordinarily performed by academics, and their weight;

Stephen Garton	<p><a href="#">PN4720</a></p> <p>"... It is very important to let staff know. We are in receipt of significant public funds and administering the funds appropriately so that we can see that there is an outcome, but also it is part of mentoring staff, let them know what the expectations are so that they can really tailor their career to achieving those minimum standards and obviously many of the local disciplinary communities are talking about moving beyond the minimum and saying, "Well, actually we need to mentor your career and you should be achieving better than this."</p>
Simon Biggs	<p><a href="#">PN5225</a></p> <p>"...So one of the biggest challenges I see for junior staff, as a senior staff member who's mentored large numbers of staff, is helping them learn when good enough is good enough on an activity that they're involved in, when they've reached that professional standard. A lot of staff, academic staff are perfectionists, so on the law of diminishing returns they spend a heck of a lot of time doing work that's not adding any real value to what they do and we've got</p>

<sup>103</sup> Exhibit 9 (Garton), [31]; Exhibit AHEIA 11 (Herberstein), [13]; PN6672-6675 (Picouleau); PN6823, 6904 (Freshwater); PN5036 (Rytmeister).

<sup>104</sup> Exhibit 9 (Garton), [25(e)], [33]; Exhibit 11 (Biggs), [32]; PN5232 (Biggs); PN6690 (Picouleau).

	to help them come back from that so that they can get the best value out of their time, but that's part of the training and mentoring process that any staff member has to go through. So the amount of time different people put into different activities is widely varied."
John Kenny	<p>PN6179</p> <p>"Do more experienced academics provide guidance to other colleagues on more efficient methodologies or approaches to undertaking their research?---That's actually written into the role descriptions of professors and associate professors to some degree are meant to do that. I mean it does vary a bit from I guess individual to individual how much they do that, but it is written in as part of the role of senior researchers."</p>

(See also Marnie Hughes-Warrington at PN4864 to PN4866)

- (b) how the university expects the academic's work to be received amongst the national and international community;

Simon Biggs	<p>PN5145</p> <p>...It's really not a simple thing where I can say a level D staff member should be producing more articles, for example, than a level B staff member. Even within a discipline, dependent upon your specialisation, that can vary quite a lot.</p> <p>PN5146</p> <p>...The major difference is how we expect their work to be received and their standing amongst their peers on a national or international basis. It's really not a quantification in terms of numbers.</p>
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and

- (c) how the academic's results compare to the results produced by his/her national and international peers:

Owen Coaldrake	<p>PN5624</p> <p>...An institution like ours does not do itself justice if it internally benchmarks its performance or its expectations. I think it is best always to benchmark your performance against what's going on nationally, what's going on in your discipline nationally and internationally. So I think you see that in the norms. ...Our promotional panels always have external representatives on them, and that helps us, in terms of national and international norms and benchmarks.</p>
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(See also Dr John Kenny at PN5910)

***The expectations are not based on one years' annual activity or performance.***

258. The nature of the expectations is that they include a range of qualitative expectations as well as some quantitative expectations and generally identify expectations to be achieved over 3 to 5 year periods.

***Even if the expectations were seen as determining rather than guiding discussion about the particular staff member's outputs (which is not the case) and set annual outputs (which is also generally not the case) the performance expectations do not prescribe the particular work or research that the staff member will conduct to meet outputs or how it will be done, as this would be seen as an infringement on academic freedom.***

259. The performance expectations do not determine or prescribe the actual research activities being performed to achieve any performance objective.

260. This is because the "work necessary" to, for example, publish an article (even if it is limited to a particular discipline) will vary very significantly depending upon the particular research that the staff member chooses to pursue. Similarly, where an output is not met, what constitutes an acceptable effort to achieve that output is not prescribed.

261. Against this background, it is the academic who suggests the research activities and any outputs the staff member intends to achieve. The role of the supervisor is to have regard to the employee's assigned teaching and administrative duties and reality test whether or not those activities and outputs are likely achievable, as well as review whether or not the employee is projecting towards an appropriate contribution over the relevant 3-5 year period.

262. The evidence given before the Commission was that academic staff tend towards ambitious objectives that cannot always be performed within the time allotted to research. The evidence of both NTEU and university witnesses - and in particular Messrs Michael Leach and John Kenny - was that it would be an infringement upon academic freedom to curtail this ambition, even though it might obviously result in the academic working long hours:

Michael Leach	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."
	PN6445 "Sorry. Say I came along and said I was going to publish six papers or write a book or something else that was that appeared to you to be in excess of that?--Yes, yes. Well I would be, you know, supportive of the staff member's ambitions. You know, I'd say look that's a weighty ambition and, you know, but I would probably have a chat with them about being realistic given their teaching

	load and I would say to them, look you've got a 10 per cent you're saying this person has 10 per cent, which is possible, a lot of people do. 10 per cent research allocation I would say you know the expectations on you for research outputs are not as great as somebody who has 40, you do understand that, you know? But of course ...They would be thinking I actually want 20 or 30 per cent...So in a sense it's self-directed but it's also an attempt if you like to get a better research allocation next time"
John Kenny	<p>PN5786</p> <p>"...the academic seeking to produce two pages says I'm planning to do this project, or continue this project with these activities. The supervisor says well that's going to take 500 hours. You can produce two publications by doing it in a shorter way with perhaps a slightly different research question and therefore I'm not going to agree to you performing the research that you want to perform. I put to you that that just doesn't happen in the sector and as you put it, it would be an infringement of academic approval?---I think it would be an unwise supervisor that went down that path. You know, rather than trying direct the research project which is really the realm of the academic, the self-managed part of their work. The supervisor would be more advised to support that work if they want outcomes, yes."</p>

***Further, the outputs cannot (other than perhaps in the broadest of senses), be equated to time.***

263. As supported by the above quotes from Messrs Leach and Kenny at paragraph 262 and evidence in the proceedings, the necessary work could take 100 hours or 500 hours depending upon what research activity the staff member determines to pursue and how they propose to pursue it.

264. The Full Bench heard much evidence in support of this view. The evidence set out above in respect of research demonstrated the breadth and variability of research that leads to outputs. Further, there was evidence that:

- (a) contemplative thinking is "an essential part" of conducting research<sup>105</sup> and, to that extent, academics would consider themselves to be working if they dash into the house whilst mowing the lawn to write down a great idea<sup>106</sup>; and
- (b) meeting suggested outputs is in many cases reliant on external factors such as the whim of granting authorities, and the publication cycles of specific journals. For example, an academic might spend months on an application for a national research grant that doesn't get granted.<sup>107</sup>

265. It follows that the outputs expected of academics are not, and cannot be, equated to time or estimated time.

<sup>105</sup> Strachan at PN4881 and PN4531. See also McAlpine at PN1207 and PN1208.

<sup>106</sup> Andrew Vann at PN5419 to PN5420

<sup>107</sup> Strachan at PN4485

Performance expectations are distinct from allocation of duties/time required	
Andrew Picouleau (Exhibit 12)	[29(b)(iii)] The standards are high level and do not determine what research activities the staff member undertake or how they will undertake them...the activities determined by the staff member to achieve the expected research output can vary enormously. Therefore the time undertaken or expected to be undertaken can also vary enormously.
Professor Garton (XXN)	PN4663 There may be expectations set in relation to research performance, but this is not necessarily relevant to the number of hours worked.
Professor Hughes-Warrington	PN4864 She says that the university does not decide the volume of work necessary to meet performance standards. The number of hours will vary from discipline to discipline.
	PN4870-4871 There are no codified standards for output. Performance is discussed with the relevant managers on a case by case basis.
Professor Biggs	PN5243 He states that there is no relationship between research outputs and time.
Professor Biggs (Exhibit 11)	[32] The fact that we have performance expectations, including in relation to research, does not mandate or dictate the number of hours of work required to be performed.
Andrew Picouleau	PN6687 There is no explicit link between performance measures and the particular amount of time an academic might devote to achieve outputs.
	PN6690 The EA does not tie research performance standards to the allocation of hours.
Professor Herberstein (AHEIA11)	[11] The workload model is not designed to measure performance or to capture every hour of activity... It is the responsibility of the academic (with support from the Head of Department) to design their work to fit within this time envelope and to manage their time wisely.
Professor Freshwater	PN6875 ... we don't estimate any time allocated to research tasks at all
Professor Garton	PN4794 And at the University of Sydney do you currently undertake such an ascertaining exercise?--- Absolutely not.
Professor Hughes-Warrington	PN4981-4982 None of the workload models ascertain research activities in hours and the university does not ascertain the numbers of hours academics spend on research.

	<p>PN4912-4913</p> <p>She says that the EA hours are assumed against an average; they are not ascertained in any way such that it would be possible to assign a time to particular activities.</p>
Professor Biggs (Exhibit 11)	[34] It is virtually impossible to be able to identify with confidence how long particular work should take.

266. To the extent that the NTEU might suggest that it is appropriate to equate research output to time or a fair average, the evidence includes a number of very strong statements made by both NTEU and university witnesses to the contrary.

Simon Biggs	<p>PN5247</p> <p>"COMMISSIONER JOHNS: Sorry, just for my own part then, Professor, why couldn't that process equally apply to the NTEU claim for ascertaining hours? I mean, if you're applying it every day in this way with flexibility and collegiately, why couldn't that be applied to the NTEU claim?--I think the challenge we have is the relationship between real time which is taken, so when we measure these research outcomes we're not describing the actual amount of time that a staff member puts in on that activity and that widely varies, which so one staff member may produce 30 papers of relatively low quality and get a certain number of points for those on an average allocation process. Another staff member might produce just one paper but that paper is so seminal in the field it changes the way we understand our own existence, for example. ... trying to say 30 times X is equivalent to one times X is a meaningless approach in such a rich and nuanced area as research."</p>
	<p>Exhibit 11, paragraphs 27 to 29</p> <p>Professor Biggs says it is "impossible" to allocate or determine in hours how long research activities and projects should take, and provides a number of practical examples of this from his experience.</p>
Stephen Garton	<p>"43. ... attaching a certain number of hours to the creation of new knowledge and measuring and monitoring hours dedicated to research is impossible and is also undesirable."</p>
	<p>PN4663</p> <p>.... there are certain expectations set, I would agree, with respect to research. But that is about assessment of performance, not necessarily a matter relevant to the hours worked."</p>
Owen Coaldrake	<p>PN5652</p> <p>In relation to performance measurement expectations, such as tier 1, 2 and 3 journals, and the number of publications over, say, three years, would the university quantify that in hours, in terms of its expectations of staff?---No, I don't know that you could. You tend to see things through achievement, not activity."</p>
John Kenny	<p>PN5719</p> <p>I can't just look to a particular output, such as a particular publication and determine from that, that that will necessarily take X amount of time?---That's correct.</p>
	<p>PN5720</p>

	That's the case even if I limit that question to within a discipline. ... ---It would be very difficult, yes.
	<p>PN5706</p> <p>Do you accept that if I put the bald question to you well how long does a research project take, you couldn't give me a sensible answer? ---Well, for any particular project, for any particular individual, no.</p>

Professor Andrews, a very experienced Chemistry Professor and long-standing NTEU Branch resident's answer to this issue, is also informative:

Philip Andrews	<p>"PN3250</p> <p>Well, you'd accept, and I think your evidence has been given, that to attach a particular number of hours to research, given the nature of research, is, at best, a broad guesstimate? ---Difficult.</p> <p>...</p> <p>PN3252</p> <p>You accept that? ---Yes. Research is a many varied wonderful thing."</p>
	<p>PN3181</p> <p>"There has been an attempt to try and quantify academic work on the basis of contact teaching and associated teaching practice; an attempt to quantify what would be expected within the service administrative and leadership component of workload. That has not been successful."</p>

(See also Exhibit 10 (Marnie Hughes-Warrington) paragraph 14; Exhibit 12 (Andrew Picouveau) paragraph 27)

267. Further, since research output and activities typically span a number of years, if one of the performance expectations is to achieve the minimum number of required publications over a five-year period, the hours that can be allocated to that cannot be confined to a smaller accounting period (e.g. 12 months), particularly in circumstances where allocated work (such as teaching) may be adjusted in subsequent years to assist academics to meet their research outputs.
268. Other compounding factors which were apparent on the evidence include:
- (a) staff can work across disciplines;
  - (b) the boundaries between some disciplines can be debatable;
  - (c) staff work in collaborative, cross disciplinary teams and in conjunction with multiple industry partners and other organisation; and
  - (d) the activities and research questions anticipated at the start of the year may evolve and develop significantly during the course of the year.

269. How the NTEU clause is meant to be applied in a practical way in the above circumstances and whether overtime would be payable is very unclear.

***The approach by the NTEU conflates allocation of workload with quality of performance. The performance expectations are directed primarily to the quality of the activities (research and teaching and service) undertaken by the academic, not to the volume. There are separate processes for managing performance and work allocation and these are almost universally reflected in separate provisions in the enterprise agreements.***

270. There is an accepted distinction between allocation of work and measuring performance and it is a conceptual mistake to combine those two concepts (as evidenced by Dr John Kenny, Professor Owen Coaldrake and Professor Stephen Garton.<sup>108</sup>).

271. The performance expectations are directed to achieving improved quality. They are not directed at increasing volume of working time. For example, one piece of high quality research will enable significant numbers of publications being accepted for publication in quality journals. Poor quality research, even if done over a very long period of time or involving several projects is unlikely to generate significant quality publications. Whilst numbers of outputs can have some bearing on volume in a broad sense, the expectations are based upon quality of the research effort.

272. Similarly, the teaching performance expectations are not about increasing teaching volume, but rather the focus and quality of the teaching activity.

273. This was reinforced, for example, by the evidence of Professor Garton as follows:

Performance management and workload allocation are separate	
Professor Garton	PN4802-4803 He states that workload allocation involves no performance criteria, because it is only about allocation of work. He says that performance is the quality of work done in those hours.
Professor Garton (Exhibit 9)	[33] The University's workload allocation mechanisms are separate to and distinct from performance standards and promotion (SG-6 and SG-7).

274. In cross-examination, Professor Andrews was taken through the various Monash enterprise agreements that he had been involved in negotiating for the NTEU, and affirmed that the management of performance and the clauses for academic workload allocation were always separate and were the subject of separate process requirements<sup>109</sup>.

<sup>108</sup> PN5717 and PN5771 (John Kenny); PN5618 (Owen Coaldrake); PN4802 - PN4804 (Stephen Garton).

<sup>109</sup>At PN3079.

275. There appears to be some concern that the performance expectations can be set at such a level that the staff member could not reasonably perform them without working unreasonable hours. There were three main points in response to this that are established on the evidence:

(a) The suggestion that the performance expectations are formulated based around time, or are arbitrarily set by the employer, was not supported. Rather, the evidence supports their development being a collegial process taking into account peer considerations. This is supported by the following evidence:

Based on international standards and collegiate discussions	
Professor Garton	<p>PN4795</p> <p>He says that actual research work activities are derived based on the minimum research expectations set by communities of peers in particular disciplines, but notes that academics are likely to want to pursue their research for as long as it takes.</p>
	<p>PN4725</p> <p>He states that the university has not determined itself what the expectations are; they were developed by people in the relevant discipline.</p>
	<p>PN4750</p> <p>In the case of research it is the people in the discipline who would set the norms, not the university.</p>
Professor Biggs	<p>PN5145</p> <p>He confirms that there are variations even within disciplines between what academics might do and what might be expected of them in relation to research.</p>
Professor Coaldrake	<p>PN5624</p> <p>He states that research outputs are benchmarked nationally and internationally, and the promotions panel has external representatives.</p>
Dr Kenny	<p>PN5803-5804</p> <p>He was involved in the development of academic research guidelines in a committee set up under the EA.</p>

(b) as indicated above at paragraph 226(b), the evidence showed that the performance standards are readily met by the vast majority of academic staff. For example, then asked about performance management of staff if they were not meeting the performance expectations, Professor Andrews confirmed that nearly everyone in his Faculty met the performance standards and, that for the two or three that may not have over his time, that would have formed a basis for discussion, rather than formal performance management;

PN3171

- - have you formally disciplined any of your staff who haven't met a metric? . . .

PN3172

...No. Nearly everyone in the school of chemistry meets or exceeds the minimum standards.

PN3173

Yes. But on the two or three you mentioned, ....We get traffic lights. I'm sure you're aware of these types of business knowledge outputs. We are given green, orange, red. We have very few staff who are ever on red. We have a number of staff who would be orange in research income and HDR supervision. The orange doesn't necessarily mean that they're doing something wrong and not meeting expectations, because, as you know, it's done on a three year rolling basis, and there are mitigating circumstances why certain people can't meet HDR or funding requirements. We do have an understanding, and I think this would be university wide and Provost Edwina Cornish has lamented on this several times, is that as long as the staff are prepared to apply for grants and actively seeking to have research income, are actively seeking to promote and supervise students, then we see that as part of the normal process of being a high functioning academic. So they don't necessarily have to win the grants. We know there's less than 20 per cent chance every year of winning the grant, but they at least have to be applying. They have to be competitive and they have to spend the energy making themselves competitive.

- (c) in discussing workload allocation, primacy is given to the discussion between the individual staff member and their supervisor, with the staff member suggesting the research activities and essentially a process of discussion and agreement<sup>110</sup>; and
- (d) lastly, if performance expectations were increased such that they could not be met, it would be dealt with and considered in the performance management. If the staff member had not met the expectations but because of the volume of workload and the level of expectations was unreasonable, the staff member would be protected in a number of ways against disciplinary action and ultimately dismissal (for example in accordance with the unfair dismissal provisions of the FW Act or a dispute notification about the reasonableness of their hours).

### ***Conclusion re performance expectations***

276. Accordingly a number of the "facts" cited in the NTEU submission regarding the role of performance expectations, particularly for research, as a mechanism to define required work and estimate time or "ascertained hours" which underpin the practical ability to apply their clause are not supported by the weight of the evidence.

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<sup>110</sup> as set out in paragraph 275(b). See also PN6910 (Herberstein) and PN5247 (Biggs).

**6.10 Problems with the NTEU's attempt to equate its clause and requirements with the current university EAs and processes for work allocation**

*Allocations to protect research time rather than allocate research activities with estimated time*

- 277. The NTEU seeks to rely upon parallels with the existing university enterprise agreement provisions and processes for allocation of workload to assert that its clause would not cause problems and that the universities already determine a fair average of time to undertake required research activities. These propositions are not supported by the weight of the evidence.
  
- 278. The difference between the current and proposed clauses was the subject of detailed evidence from both NTEU and university witnesses, the vast majority of whom supported the Group of 8's position. This evidence showed that, in practical terms, the current enterprise agreement clauses agreed to by Universities only attempt to regulate duties that can be meaningfully defined. That is, the number of lectures and tutorials taught, the number of assessments marked, the number of weeks they teach, administrative functions, and the like. In those cases, since the actual tasks are prescribed, a number of hours can more readily be ascribed to them:

Philip Andrews	<p>"PN3241</p> <p>...I think the notion of university requirement is a very, very difficult one. If I can indulge for a second the way that workloads have been managed is, as we've always understood it, and which we the framework within which we've operated is, teaching is countable. You can at least allocate and understand duties. You can understand contact time, whether it's face-to-face or whether it's development."</p>
Simon Biggs	<p>"PN5272</p> <p>There's no self-directed flexibility about the hours I need you to teach, the days I need you to be there."</p>

- 279. By contrast, as indicated above at paragraphs 238 to 247, the weight of evidence is that research activities are not so defined and cannot therefore be estimated in hours, arguably at all and certainly not with any precision. On this basis, the NTEU clause could not meaningfully apply to research work.
  
- 280. The evidence shows that the focus and the practical application of the provisions are directed at allocating and limiting the teaching and teaching related activities such that there is a period of time available to undertake research. Accordingly:
  - (a) the process for allocation is based around protecting research time, not allocating a "fair average" time to research activities, outputs, or performance expectations;
  - (b) the existing workload allocation processes are focused on the allocation of teaching and teaching-related activities;

- (c) the workload allocation is not an allocation of activities nor an allocation of outputs as such, but rather an allocation of research time, either;
  - (i) as a residual function of the allocation of time to the specifically directed activities of teaching and teaching associated duties (eg. Monash and the University of Sydney); or
  - (ii) as a proportion of an annual hours figure allocated upon previous/retrospective research outputs of the particular staff member, leading to a % allocation of annual hours, which then determines an allocation of time (eg. Swinburne and Deakin);
- (d) in neither approach does the process involve the universities determining, directly or indirectly, the research activities the staff member will undertake and then attaching or estimating or determining the amount of time that those activities will take.

281. Accordingly, the evidence was that the purpose of most of the clauses is to control the maximum number of required hours for teaching so that there is enough time "left" for research. It helps ensure the tasks necessary for the university to function (e.g. teaching, administrative, leadership, etc) are allocated equitably. Indeed Professor Andrew Vann spoke words to this effect at paragraphs PN5448 to PN5450, and his view is supported by a number of other NTEU and university witnesses. For example:

Philip Andrews	<p>PN3243; PN3261</p> <p>The union's objective when negotiating the current workload clauses is to "try and ring fence the teaching time and the service administrative leadership time to protect what we would understand would be the research time for the academics". Further, he states that "there wasn't even an attempt really to quantify research time, though the discussions would've been around protecting the time based on curtailing the other activities that make up an academic workload"</p>
Michael Leach	<p>The evidence of Michael Leach, whose role at Swinburne involves setting academic workloads with staff in accordance with Swinburne University's enterprise agreement, was that, as a teaching intensive university (PN6376), the allocation of research time is performance based. If the academic is able to demonstrate high performance over the previous 3 years (e.g. bringing in the income to fund the work, producing quality journals, etc), then a higher percentage can be justified. Conversely, if the academic is not a high performing researcher, then a lower percentage might be recommended. This assessment is necessarily conducted first at Swinburne so that the balance of the workload allocation can be filled with teaching and administrative duties (PN6366; 6408 - 6418; 6428). This enables the university to identify the staff with lesser research outputs and to allocate them a greater proportion of teaching, and to reward high performing research staff (PN6430). At no stage during that process do they attempt to determine whether the academic's research activities will fit within those allocated hours.</p>

Stephen Garton	<p>The evidence of Stephen Garton was that the purpose of the clause is to have proper oversight of the teaching and the service elements of the academic workload to ensure that there is at least 40% of the allotted hours available for research time. His evidence was that "Workload allocations set a limit on the hours worked in teaching and service. Academic staff are then free to use the remainder of their working week pursuing their research." (Exhibit 9, paragraph 45).</p> <p>He states that "there is no effort to quantify it [research time] and there is no request at the workload committee to quantify the issue of the research element" (at PN4683).</p>
Andrew Picouleau	<p>The evidence of Mr Andrew Picouleau was that, at Monash University, the enterprise agreement clauses deal with the allocation of teaching responsibilities, associated activities and perhaps administrative responsibilities (PN6765 - PN6767). The starting point is to identify what the requirements of the faculty or the organisational unit are in terms of teaching activities. The workload model is used to assist how they are to be distributed. Whilst as part of that process, regard is had for research activity the academic wishes to undertake (PN6768 to PN6770) and the academic's prior record of performance - e.g. if the academic is research intensive then less teaching may be allocated (PN6777), a head of school or supervisor does not supervise the research activities of academic staff (PN6785 - PN6785).</p>
Marnie Hughes-Warrington	<p>The evidence of Professor Marnie Hughes-Warrington was that the Australian National University does not allocate research activities to its staff. Such activities are determined by the academic. (PN4978 - PN4980)</p>
Simon Biggs	<p>The University of Queensland's academic workloads tool is used to allocate a weighted value to certain tasks - which ratings are determined internally within the team (PN5149 to PN5154, see also PN5168 - PN5174).</p> <p>The purpose of the tool is to have a record of research outputs, as well as tasks allocated to staff (i.e. lectures, administrative functions, etc). The two are then married up to get some kind of a picture that any staff member can look and use as a starting point for a conversation as to whether or not they have a fair workload when compared to other staff within the unit (e.g. if teaching allocations are being fairly allocated, proportionate to research output) (PN5195 to PN5198).</p> <p>The tool is not used more broadly than that, and is also not used as a definitive measure of evaluating a person's workload/performance (PN5199 to PN5202).</p> <p>Adopting this specific model is not compulsory provided that each unit has in place an alternative method for evaluating whether workloads are excessive (PN5199 to PN5202).</p> <p>Whilst research activities form part of a workload, they are not allocated. As part of their annual appraisal, academic staff members put forward what research activities they wish to achieve over the next 12 to 36 months and they have an "intelligent discussion" with their supervisor about whether or not these are achievable, whether they meet the needs of the university, and whether any measures need to be implemented to assist. them.</p>

282. The NTEU seeks to overcome this difficulty by pointing to the research expectations as dictating both required research work and also as a proxy for an estimate of time. As set out in the details at Part 6.8, when the evidence is properly considered neither of these propositions

is supported. Accordingly, to the extent that the NTEU says that the current clauses necessarily require universities to quantify the amount of time it must take to meet the research outputs it sets for staff within those allocated hours, the weight of the evidence does not support this view and as set out above, evidence further demonstrated that:

- (a) there is an accepted distinction between allocation of work and measuring performance and it is a conceptual mistake to combine those two concepts (as noted above at paragraph 271). In fact, the current clauses were specifically designed to exclude measures of performance, as indicated by Professor Stephen Garton and Mr Andrew Picouleau.<sup>111</sup>;
- (b) that the current workload models in enterprise agreements are set under a presumption of "assumed competence". This means that there is no calculation of the notional amount of hours it might take to perform tasks expected of an academic, and the amount of time it actually takes academics to perform those tasks is not ascertained in a detailed way<sup>112</sup>. If the framework was altered so that universities were required to look more closely at the amount of time it might take to produce a certain research outcome, they will be required to take a more hands on approach to regulating what these minimum standards are, and will need to step back from assuming competence and needing to first ascertain competence<sup>113</sup>, and this assessment will need to be made potentially before a person is employed. The view of Professor Marnie-Warrington is that the only way to achieve this would be to require the use of time sheets<sup>114</sup>;
- (c) as indicated above, research performance is measured retrospectively based on a qualitative assessment of what the academic has achieved over the past 3 to 5 years. It cannot be meaningfully assessed in periods shorter than that.

#### ***Other significant differences between the clauses***

283. Examination of the EBAs tendered in the proceeding, reinforced by consistent evidence showed that there are a number of important differences between the NTEU clause and the EBA provisions. Most obviously they do not:

- (a) contain prescriptive regulation about self-directed activities;
- (b) define "required work" to include hours of work that a staff member decides is necessary to meet performance and/or promotion expectations;

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<sup>111</sup> PN4728 (Stephen Garton); PN6685 - PN6687; PN6690 - PN6692; PN6709 - PN6713 (Andrew Picouleau).

<sup>112</sup> PN4915 (Marnie Hughes-Warrington).

<sup>113</sup> PN4953 (Marnie Hughes-Warrington).

<sup>114</sup> referenced below at paragraph 295.

- (c) provide for overtime;
- (d) require and are not based upon recording or monitoring academic staff hours;
- (e) impose a tight managerial approach;
- (f) contain concepts of "ordinary hours workload", "ascertained hours" or such constructions on which the NTEU clause is now built;
- (g) focus on achieving a balance within the activities allocated by the university which are required to be undertaken, being teaching and associated activities and some limited service activities, with the self-directed research and other activities of the academic staff member;
- (h) contain a process for staff to seek a review of, or otherwise dispute, a workload allocation, including on the basis that their workload allocation is inappropriate, unreasonable or excessive.

284. Ultimately, the fact that the NTEU have chosen to develop their own more complex clause and one that attaches additional entitlements such as overtime payments rather than seeking to adopt an existing provision from enterprise agreements further underlines that the approaches and provisions are significantly different.

***Very limited extent of intervention by supervisors***

285. Not surprisingly, the Full Bench heard evidence from a number of NTEU and employer witnesses that the supervision and management of academic staff is "light touch" outside of the realm of teaching allocation and agreed administrative duties, and that this 'hands off' management style is the expected norm:

Andrew Picouleau	<p>"PN6784</p> <p>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.</p> <p>PN6785</p> <p>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.</p>
Marie Herberstein (Exhibit AHEIA 11)	<p>"9. Apart from the annual meeting referred to above, I leave my staff to manage their own workload unless they approach me, as they sometimes do if they believe they require more support to achieve what we've agreed to as the workload allocation...."</p>

John Kenny	<p>"PN5787</p> <p>...if my supervisor tried to tell me what I could and couldn't research in my area my supervisor is not qualified or conversant with the science education literature, and so it would be unwise for her to try and direct what I do within that my research components or my teaching components of that as a matter of fact.</p> <p>PN5788</p> <p>Or indeed to tell you how long she thinks that that should take you?---That's correct."</p>
Philip Andrews	<p>"PN3248</p> <p>...And if the university went to you and directed you to stop researching, said to you, "You cannot research after you reach 38 hours or 40 hours a week", would you accept that most research active academics, to use that term, would resist that approach from the university?--</p> <p>-Yes, I don't think the university would do it, and I think you're correct that most academics wouldn't accept a directive to limit their research time...."</p>

286. The NTEU generally agreed with this proposition subject to its caveat that academics are required to operate within the parameters of the university's strategic objectives<sup>115</sup>, and by making the point that the University also benefits from this flexibility - though the NTEU submission that any flexibility favours the University (at paragraph A54 of its Final Submissions) is not supported by the weight of evidence.

## 6.11 NTEU Clause

287. There are significant problems with the NTEU clause. Mr McAlpine, the author of the clause, was also a witness in the proceeding and was the subject of detailed cross-examination in respect of the clause<sup>116</sup>.

288. It is not intended to repeat or detail here the issues identified through cross-examination. It is submitted the cross-examination demonstrated a number of very significant problems with the clause and its intended operation.

289. The evidence referred to above concerning the nature of academic employment, the self-determined nature of research, and the processes for allocation of activities, all reinforce the difficulties identified in the evidence about how the clause might operate, including concerning:

- (a) the breadth and ambiguity of "required work" as defined by the NTEU;
- (b) the complexity, uncertainty and likely difference of views in respect of "ascertained hours";
- (c) the complexity of the prospective calculation and subsequent monitoring required by the various provisions of the clause;

<sup>115</sup> See for example, the XXN of Mr McAlpine at PN1084,

<sup>116</sup> PN1427 - PN1844

- (d) having determined an overtime payment the requirement to reduce or withdraw the payment and/or increase the payment throughout the course of the year;
- (e) the problems with the various "defences" in the clause associated with uncertain and ambiguous provisions, such as 22.6 and 22.7 to the effect that:
  - (i) "errors made in good faith" in ascertaining the number of hours per week does not constitute breach of the award provided the employer has a "fair and rigorous system"; and
  - (ii) no procedural requirement for ascertaining hours needs to be complied with if the actual salary paid to the employee at all relevant times exceeds the sum of the minimum salary applicable under the award and any other overtime loading that would otherwise be payable (which we note is completely circular as this would not be known without undertaking the procedural steps identified in 22.5).

290. In and of itself, the complexity and length of the clause undermines the NTEU's position. The clause is clearly not simple, straightforward and cannot be said to introduce no more complexity than is necessary to achieve the modern awards objective. The NTEU clause and the substance of the variation that it represents, cannot sensibly be adopted by the Commission.

## **6.12 Evidence is that there will be adverse consequences**

291. The evidence clearly identified that if the clause were required to be applied it would have adverse consequences both for universities and for academia generally.

292. As noted above at Parts 1.8 and 1.9, the evidence clearly establishes that introducing an overtime payment necessitates determinations of "required work", "ordinary hours workload" and "ascertained hours" with a degree of precision that inconsistent with the employment and activities and would expose the universities to breach and/or significant dispute and/or additional costs.

293. Notwithstanding protestations of the NTEU about the "minimal" impact of the clause, the impact would be very significant. The regulatory burden and costs of having to apply the clause alone would be significant. The broader impact upon academic employment, culture and relationships between the universities and their staff would also be very significant.

294. The Full Bench heard consistent evidence from the senior academic witnesses about the likely effects of adopting this regulation, if it were applied, including that:

- (a) the consequences of having to ensure compliance with the clause would lead to much greater prescription by the employer on activities, including curtailing research that the staff member is approved to undertake, potentially imposing limits

on time permitted for research, both to comply with the clause and to limit hours to ensure that additional unfunded labour costs did not occur;

- (b) universities would be less acquiescent to ambitious research activities that academics may propose, in order to enable (in a practical sense) any real confidence in compliance with the NTEU's clause;
- (c) universities would have to record time or cap research allocation to meaningfully comply with the clause and would need to move from assumed effort to ascertained effort, such as time sheets (or other mechanisms) to measure work activity (or hours) in order to enable compliance;
- (d) the processes required under the clause would be divisive and undermine relationships of trust within the academy;
- (e) it would very likely lead to disputation, given differences of views about estimates of hours that a confident academic would take to undertake the particular activities the staff member is intending to undertake, together with disputation about whether particular activities were "required"; and
- (f) it would undermine innovation and potentially lead to a reduction in international attractiveness for academics and damage higher education – an important part of the Australian economy and Australia's second largest export industry.

295. For example:

<p>Professor Freshwater</p>	<p><a href="#">PN 6877</a></p> <p>...You were asked by Mr McAlpine about the concept of paying a higher salary. If you had to attach additional payment to an additional allocation based upon estimated time for research, what impact would that have on the academic work and academic work allocation at UWA?--Well, aside from the consequence of the additional payment, which would of course be very difficult for us to manage, we would have to impose more monitoring. We would have to impose, I think, much more explicit prescription of the activities that we would expect and we would have to be monitoring and measuring that much more closely. I believe that that goes against the ethos and the academic culture which not only the University of Western Australia espouses, but which is internationally one that's known and understood and again, as I say, makes it an internationally attractive proposition for all academics."</p>
<p>Professor Hughes-Warrington</p>	<p><a href="#">PN4953</a></p> <p>"So the cap on workloads that you currently have, if that continued, I put it to you it's impossible that if you are complying with the agreement, it is impossible that anyone at ANU would ever qualify for overtime, isn't it?---I disagree. That's an assumed average. If this were to come into force, we would have to move to an ascertained effort and time sheets and I believe that that would lead to contestation and dispute.</p> <p><a href="#">PN4954</a></p> <p>You are not suggesting, are you that the NTEU's proposal would require or even would require the use of time sheets, are you?---I am not sure how we would ascertain the effort in any other way.</p> <p><a href="#">PN4955</a></p> <p>COMMISSIONER JOHNS: I think that is what the witness is saying. That's what I heard the</p>

	<p>evidence</p> <p>PN4956</p> <p>MR McALPINE: So your view is that the NTEU's proposal requires the keeping of timesheets?---That's how I understand it.</p> <p>PN4957</p> <p>COMMISSIONER JOHNS: I think the witness has said that it would go from an assumed to an ascertained and there must be a mechanism for doing that and in answer to the question from the Vice President earlier, the witness agreed that time sheets would be required."</p>
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296. Such regulation would be fiercely resisted by academics:

Ken McAlpine	<p>PN1225</p> <p>...You'd accept that they'd be fiercely resistant to being required to monitor and record their time?---I think it would depend what the purpose of that was, but ... the idea that they were required to record their time the time they spent working on some sort of ongoing, regular monitored basis would be something that they, like we, the union, would consider to be absurd.</p>
Professor Vann	<p>PN5583</p> <p>...it's not something we've done as a management tool and the reason is academics hate it. They really feel they're being micromanaged if you try to capture the hours in that level of detail...</p>
Professor Hughes-Warrington	<p>PN4990</p> <p>Now, are you able to advise the Commission as to what issues or impact that might have at the Australian National University if you were required to apply that provision?---It would be twofold; that it would be seen a serious infringement upon the freedom and the autonomy of academics and they would see that as making their roles unnecessary interference in their work...</p>

297. Other witnesses gave similar evidence to similar effect.<sup>117</sup>

### 6.13 Problems with the BOOT

298. The NTEU's proposed clause will cause significant problems in relation to the application of the better off overall test (**BOOT**). Given that the BOOT requires an employer to satisfy the Commission that the enterprise agreement in aggregate results in all staff working under the agreement being better off overall than if they were employed under the relevant award and NES<sup>118</sup>, Universities would either need to:

- (a) adopt the NTEU proposed award clause in the enterprise agreement; or
- (b) prepare detailed data estimating the number of hours of work per week for academic staff at each academic level and in each discipline demonstrating that each staff member would not carry out "required work" in excess of the applicable BOOT threshold hours per week in any reasonably foreseeable circumstances. Further, given the NTEU clause requires the estimate to be applied to each

<sup>117</sup> Exhibit 10 (Hughes-Warrington), [14], [38], [58]-[59]; Exhibit 10 (Freshwater), [18]-[19]; Exhibit 11 (Biggs), [17], [38]-[39]; Exhibit 9 (Garton), [13], [47], [60]; Exhibit 12 (Picouleau), [27];[33]; PN4668-4670 (Garton).

<sup>118</sup> *Hart & AMWU v Coles Supermarkets* [2016] FCWFC 2887 at [6]; PN18311835.

academic staff member's actual activities, it is difficult to envisage how this could be achieved.

299. This would impose a substantial cost on universities and administrative complexity on university staff implementing the clause.

300. The alternative, as appears to be suggested, is to note the significantly higher enterprise agreement salaries and effectively ignore the clause altogether. If the purpose of the clause is simply to require higher enterprise agreement salaries, the award clause does not respond to problems identified by the NTEU, nor is this a sound and proper basis for the variation of the award.

#### **6.14 Other Issues - Part-time employment**

301. The NTEU submit that their variation needs to be adopted, as otherwise part-time employment cannot be accommodated as it is necessary to identify hours, such that the part-time staff member can understand their employment fraction. Whilst this is one manner in which part-time employment could be identified, the employment of part-time academics can and does occur and is based upon a notional number of days as a proportion of full time. Accordingly, a 0.6 part-time academic would work the equivalent of three days a week rather than five days a week and relevant work allocation regarding teaching would be adjusted accordingly. The University workload allocation processes can accommodate this.

302. It is not uncommon in employment for there to be a range of part-time employees (for example, part-time managers, part-time senior lawyers) and their employment can be administered, notwithstanding that there is no prescribed hours for a full-time staff member.

303. This issue identified by the NTEU does not justify the NTEU proposed variation as being necessary in order to achieve the modern awards objective.

#### **6.15 Modern awards objective**

304. For the reasons set out above, the NTEU has clearly not demonstrated that its proposed variation is a variation necessary for the award in conjunction with the NES to meet the modern awards objective. The variation does not constitute an appropriate set of minimum award regulation for academic hours and academic overtime payments.

305. It would be an extraordinary thing if the Commission were to adopt a provision that has no precedent, is a departure from the settled approach to academic regulation, both within Australia and internationally, and is also regulation inconsistent with the enterprise agreement outcomes that have been negotiated and effectively entrenched in the sector by the NTEU. It cannot be said that such a provision is the appropriate, fair and relevant safety net.

306. We have briefly commented below in relation to each of the elements of s.134(1) that are the matters that the Commission is required to take into account.

**Section 134(1)(a): Relative living standards and the needs of the low paid**

307. This does not appear to be relevant.

**Section 134(1)(b): The need to encourage collective bargaining**

308. The NTEU's claim for overtime payments is inconsistent with the need to encourage collective bargaining. Notwithstanding the NTEU's agreement that Universities have in place "wall to wall" enterprise agreements and that matters of this kind fall squarely within the types of matters that might be included in a log of claims, the NTEU has chosen to make its claim for overtime payments for the first time<sup>119</sup> in the context of this proceeding, rather than in the context of bargaining.

309. The basis upon which the NTEU seeks an amendment to the Award is to ensure a "fair and relevant floor for bargaining" and alleges that there is no current safety net from which to commence bargaining unless there is a limitation on hours of work of the kind they are now seeking.<sup>120</sup>

310. As set out above, the NTEU's position fails to recognise that the BOOT assessment is conducted not just against the award, but also against the NES and State laws. The existence of an annual award salary for professional, autonomous employees together with the NES does provide a fair and relevant safety net and enable the BOOT to be conducted. This is borne out by the multitude of enterprise agreements and their terms across the sector and for other employees with awards that do not prescribe detailed hours and overtime. Any future enterprise agreement also has to be approved by a valid majority of employees.

311. The various hypotheticals the NTEU relies upon have no basis in actual practice or reality. There was no evidence of such circumstances. Such hypotheticals are also not reflective of the enterprise agreements in the sector. As identified by the NTEU, the enterprise bargaining agreements provide significantly higher salaries and comprehensive benefits and do not and could not contain provisions limiting section 62 of the NES.

312. Further, as stated above, the NTEU's proposed clause will cause significant problems in relation to the application of the BOOT, at significant cost to universities.

**Section 134(1)(c): The need to promote social inclusion through increased workforce participation**

313. The NTEU submission that the introduction of overtime rates would help to eliminate or reduce discrimination in the workplace<sup>121</sup>, is a new submission.

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<sup>119</sup> PN1057 (McAlpine); PN5066-5070 (Rytmeister).

<sup>121</sup> NTEU Closing Submissions, [A52].NTEU's Closing Submissions

314. The Group of 8 disagrees that there is any evidence to support the proposition that introducing overtime rates would eliminate or reduce discrimination in the workplace. The evidence relied upon by the NTEU<sup>122</sup> is that its proposed clause will promote the fair allocation of teaching responsibilities in line with the employee's time fraction, in order to ensure there are enough hours left for research responsibilities.
315. The Group of 8's position is that the existing mechanisms already in place are sufficient for this purpose. The enterprise agreement provide and require fair and equitable allocation of teaching and associated activities. As noted above, the NES already protects employees from being assigned unreasonable work hours and it is noted that one of the factors determining whether hours are reasonable is the employee's personal circumstances, including family responsibilities (per section 62(3)(b) of the FW Act). Further, State and Federal discrimination laws prevent indirect discrimination in the workplace which of this were to result from workload distribution models or requirements.
316. Against this background, it is difficult to see how the NTEU clause adds any qualitative difference to the mechanisms already in place to protect employees from direct and indirect discrimination.

***Section 134(1)(d): The need to promote flexible modern work practices and the efficient and productive performance of work***

317. The NTEU's position is that its 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.*"<sup>123</sup> On this basis, the NTEU says the claim promotes "*modern, efficient and productive practices.*"<sup>124</sup>
318. Contrary to the NTEU's position, the Group of 8's submits that the NTEU's claim in fact does the opposite: it is ill-suited to the nature of academic employment and its activities and does not relevantly or fairly apply to academic employment and academic activities.
319. The hours of academic staff are therefore already very flexible. This flexibility, independence and ability to self-manage their work and time is reflective of the nature of academic work and highly valued by academic staff. It is an integral part of academic employment and the trust in the academic cohort and supports academic freedom and innovation. Universities don't "provide for [the] method of performing research and similar work." Further, the NTEU have elsewhere submitted that their clause does not impact the work the academic staff member undertakes and method they will use.

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<sup>122</sup> Exhibit NTEU AD, [27]; Exhibit AHEIA 11, [23].

<sup>123</sup> NTEU Closing Submissions, [A106].NTEU's Closing Submissions

<sup>124</sup> Ibid.

320. If the NTEU's proposed measures were implemented, the Full Bench heard consistent evidence that the universities approach to managing academic work include tighter control in relation to permissible research and time and measures to limit or otherwise record performance of work or hours, which would be fiercely resisted by academics and seen as highly excessive managerialism, would be divisive and undermine the relationships of trust within the universities (as noted above at paragraphs 294 to 297).

***Section 134(1)(da): The need to provide additional remuneration for employees working overtime; or employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts***

321. The primary basis upon which the NTEU says its claim should be accepted is in order to meet this component of the modern awards objective, and in particular the need to provide additional remuneration for employees working overtime.

322. The NTEU claims that 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.*"<sup>125</sup>

323. The Group of 8's position is that payment of overtime rates is **not** necessary and that the NTEU's claim should be rejected because:

- (a) as set out above at paragraphs 186 to 190, the annual salaries in the Academic Staff award already compensate employees for their role, including all the hours they can be lawfully asked or required to work under the National Employment Standards;
- (b) as set out above at Part 1.4 (paragraphs 196 to 205), the NES adequately protects employees from being required to work unreasonable additional hours and ensures that there is "internal equity" between employees who are asked to work an average of 45 hours per week when compared to one who works 38 hours per week, by virtue of section 62 of the FW Act;
- (c) under the existing framework, neither the FW Act or the Academic Staff award otherwise prevent an employee from agreeing to work additional hours in return for an additional benefit; and
- (d) there is no evidence that employees are required to work hours that are not already compensated by the annual salaries contained in the Academic Staff award. At its highest, the NTEU's evidence suggests that some employees are dissatisfied with

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<sup>125</sup> NTEU Closing Submissions, [A107].NTEU's Closing Submissions

the number of hours they work. The evidence does not support a conclusion that those employees are being required to work unreasonably long hours.

324. In relation to the "internal equity" point, it should be noted that the NTEU provision does not actually provide for additional payment based upon the employee being required to work more hours. The NTEU clause itself and the NTEU's submissions identify that the payments are paid irrespective of whether the staff member works any particular number of hours. Accordingly, an academic staff member who was efficient or was more productive than the estimated "competent academic" at level and discipline, receives additional payment even if they on average have only worked and been required to work 35 hours, in comparison with another competent academic who has undertaken the same activities took an average of 45 hours.
325. Further, under the NTEU clause whether an academic ends up achieving, say, 40 publications or 2, this payment is the same.

***Section 134(1)(e): The principle of equal remuneration for work of equal or comparable value***

326. As set out above at paragraph 190(a) and Attachment 1 to Exhibit 5, the current salaries of academic staff are set at rates which are consistent with the rates for employees whose roles bear some similarity to academics and the nature of the work that they perform.
327. It is abundantly clear that the introduction of overtime rates would set academic staff apart from these similar professionals which, significantly, includes academic teachers of private post-secondary education provides (the main competitor for Universities).
328. The Group of 8's submission on this issue can be compared and contrasted to the NTEU's various submissions which attempt to draw comparisons which do not make logical sense and should therefore be rejected. Specifically:
- (a) in Exhibit B, the NTEU compares academic staff and the rates that they receive with trades staff or closely managed/directed employees who perform fundamentally different work in a fundamentally different manner and enjoy none of the freedoms and flexibilities enjoyed by academic staff; and
  - (b) in the NTEU's Closing Submissions, the NTEU attempts to draw a parallel with other professionals who determine the amount of time that is spent on a task, but whose pay is regulated strictly by hours. The example used at paragraph A5 of the NTEU closing submission, is certain hospital doctors. This submissions is not based on any evidence led before the Full Bench and is any event contrary to the conventional understanding of the allocation of work performed by hospital doctors which is to use their skills to their fullest capacity over the course of each discrete

shift. It is not to produce certain outputs or pursue and develop research over the course of a more substantial period of time.

**Section 134(1)(f): The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden**

329. The NTEU's position is that its proposed claim is not likely to impose a significant cost or regulatory burden to employers, unless they have imposed fairly onerous workload requirements<sup>126</sup>, and that it is likely to "significantly improve productivity" compared to the existing award provision.<sup>127</sup>
330. The NTEU's position is not supported by evidence and is entirely inconsistent with the evidence led by witnesses who gave evidence on behalf of Universities, which was that (as indicated above at paragraphs 293 to 297):
- (a) the impact would be very significant;
  - (b) the regulatory burden and costs of having to apply the clause alone would be significant; and
  - (c) the broader impact upon academic employment, culture and relationship between the universities and their staff would also be very significant.
331. In respect of the NTEU submission that its proposed clause is likely to "significantly improve" productivity, there is no evidence of this. Rather, as stated above at paragraphs 294 and 297, the evidence presently before the FWC is that the NTEU's claim will reduce innovation as there is less scope for universities to support ambitious or complex research and a potential need to limit research time.
332. Further, as set out above at paragraphs 298 to 300, the NTEU's proposed clause will result in substantial administrative costs being incurred by Universities in order to establish to the FWC's satisfaction that enterprise agreements meet the BOOT.
333. To the extent that the NTEU implies otherwise on the basis that "*these are large employers with large technological and management capacity, used to measuring and accounting for most aspects of work systems*", this submission is superficial. It discounts the significance of the changes being proposed by the NTEU, evidenced by the fact that universities currently have no existing infrastructure for the obtaining, recording and quality controlling information about academic hours of work, except for casual sessional staff whose hours of work are more closely regulated and who submitted timesheets for payment.

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<sup>126</sup> NTEU Closing Submissions, [A108].NTEU's Closing Submissions

<sup>127</sup> Ibid.

334. Given that academic workloads are generally managed at the school level between individual staff members and their supervisors, it would inevitably direct funds away from the universities' core activities of teaching and research and would also, somewhat ironically, significantly increase the workload of academic supervisors and the administrative duties of all academic staff.

<p>Professor Biggs (Exhibit 11)</p>	<p>[37]... It will also impose a substantial burden on academic staff as it will require them to perform additional administrative duties - being the recording of their time and, in the case of supervisors (presumably) reviewing and approving timesheets and potentially supervising academic staff.</p>
<p>Professor Freshwater (Exhibit 13)</p>	<p>[19] The clause requires the recording of time and otherwise the imposition of systems and as an academic manager, would necessarily require a degree of managerial control to be adopted, including to avoid significant increases in additional labour costs.</p>
<p>Professor Hughes-Warrington</p>	<p>PN4909</p> <p>Surely, you would have to ascertain what the workload allocation was and simply say, "This is 120 per cent of a fulltime allocation, so we are going to pay you 120 per cent of the salary"? - - - Ascertaining the workload would be extremely difficult, aside from teaching, quantifying the research effort across all the discipline would be extraordinarily laboursome.</p> <p>PN4990</p> <p>Now, are you able to advise the Commission as to what issues or impact that might have at the Australian National University if you were required to apply that provision?---It would be twofold; that it would be seen a serious infringement upon the freedom and the autonomy of academics and they would see that as making their roles unnecessary interference in their work, and it would make us less competitive against our international competitors who I am not aware monitor hours. It would also mean significant cost for us in terms of monitoring the inputs and outputs of staff, and that would place excessive burden upon us.</p> <p>PN4993</p> <p>...and then there is a series of provisions as to how one goes about calculating that overtime loading. Can I ask you first, what impact would the potential for an overtime loading have on the Australian National University?---Twofold. It would, I believe, generate dispute. There would be staff who would wish to claim overtime and that would move us form assumed effort to ascertained effort and that would be seen, again, as an infringement upon academic freedom, but also impose significant costs upon the University to quantify the effort.</p>

335. Similar evidence was given by other witnesses, including Andrew Picouleau<sup>128</sup> and Professor Garton.<sup>129</sup>

***Section 134(1)(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***

<sup>128</sup> Exhibit 12, [34]-[37].

<sup>129</sup> Exhibit 9, [54]-[59]; PN4793.

336. The NTEU's position is that its proposed overtime clause is "*relatively easy to understand*", that it is "*broadly similar in principle*" to schemes that are currently found in existing enterprise agreements agreed to by Universities.<sup>130</sup>

337. These submissions are surprising given the substantial weight of evidence led to the contrary by both NTEU and university witnesses. It is quite clear that it is anything but easy to understand.

338. The clause is self-evidently complex and very difficult to follow, understand and apply. It clearly does not constitute a simple, easy to understand, stable and sustainable provision for the purposes of section 134(1)(g). Some of the problems with the NTEU's clause have been identified by all university witnesses as well as the Bench,<sup>131</sup> and are further evidenced by the number of changes that were made to the clause by the NTEU throughout the course of the proceeding.

339. Broadly, the clause is not capable of constituting a fair and relevant safety net as it seeks to impose unworkable binding obligations upon employers. The content of the clause is not meaningfully able to be complied with or applied and as noted earlier as required:

- (a) a fundamental paradigm shift from the way academic staff and their working hours operate - namely, introducing a system that does not reflect what occurs in the industry and is not relevant to current employment and academic practices i.e. setting their hours, requiring timesheets, recording their time, verifying their activities and closely directing their currently self-directed work; and/or
- (b) universities attempting to apply a number of complex and intersecting provisions which are unclear and which the evidence indicates would give rise to significant difference of views and disputation. As identified above, particularly troubling were the concepts of "required work", "ordinary hours workload" and /or "ascertained hours", which the majority of witnesses stated are unable to be meaningfully defined. This makes assessing those terms against some notional homogenous academic and then monitoring that work to identify whether an anticipated overtime loading should be paid, a cumbersome exercise. Compounding this is the need to implement an unspecified "fair and rigorous" system to ensure all of the above is met, in order to avoid the likely breaches of such provisions.

340. There was unanimous evidence from Group of 8 witnesses that the clause was unworkable and confusing:

Professor Biggs	[30] As well as being inconsistent with the nature of academic work, the Academic Hours of Work Claim is unworkable.
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<sup>130</sup> NTEU Closing Submissions, [A24-A28], [A109].NTEU's Closing Submissions

<sup>131</sup> PN1785.

(Exhibit 11)	
Professor Hughes-Warrington (Exhibit 10)	[56] The proposed variation uses terminology and definitions that are unworkable, impractical and/or undesirable. ...
Professor Garton (Exhibit 9)	[52] The Academic Hours of Work Claim is confusing. It is not simple or easy to understand and it will be extremely difficult for Universities to administer, assess, monitor and enforce. ...

341. See further evidence from Professor Biggs<sup>132</sup>, Professor Garton<sup>133</sup> and Andrew Picouleau<sup>134</sup>, where each witness points to the difficulties in understanding the clause, particularly in relation to undefined phrases that are used in the clause such as "*required work*", "*the specific duties and work allocated to an employee*", "*ordinary-hours workload*" and "*competent person*".
342. This provision is not assisted by the existence of the "defences in the clause". As previously noted in the Go8 opening submissions, the proposed clause attempts to recognise the significant difficulty with any possible meaningful compliance by providing two "defences". As noted by Deputy President Kovacic in the proceeding, these "protective" or defensive clauses have questionable validity. We presently make no further submission about that given the more fundamental issues associated with adoption of the clause.
343. The difficulties in the "defences" are manifest. For example the defence where an employer "*has a fair and rigorous system for ascertaining the ascertained hours*" will force employers to have complex systems, measures and processes for estimating/measuring hours required for academic staff to perform particular tasks, including all of the self-directed tasks with the inherent variability and difficulties in meaningfully ascribing hours. The clause does not identify or provide guidance on what such a "fair and rigorous system" looks like to enable compliance, it carries all of the problems identified above about a meaningful assessment of "ascertained hours"/"ordinary hours workload" .
344. The NTEU submission that it is "mischievous" to suggest that the clause requires employers to have a "fair and rigorous system" for ascertaining hours worked,<sup>135</sup> should be rejected.
- (a) the practical effect of the clause is that they will need to have such a system in place to practical apply it and also to avoid breach; and
  - (b) further, as acknowledged by Mr McAlpine in cross-examination, the defence does not mean that an overtime back payment would arise, and accordingly to avoid any

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<sup>132</sup> Exhibit 11, [31]-[36].

<sup>133</sup> Exhibit 9, [13], [48],[53].

<sup>134</sup> Exhibit 12, [27]-[37].

<sup>135</sup> NTEU Closing Submissions, [A71].

failures to apply over time, it would be necessary for some form of detailed system and processes to be put in place.

Concept of a 'simpler clause'

345. The NTEU states at paragraph A63 of its Final Submissions that its clause could be made simpler if "concessions" for employers were removed. This proposition is rejected and it is noted that whether or not a clause meets the modern awards objective is not viewed solely from the perspective of employees. For the reasons set out above, even if these provisions were deleted from the clause, it would necessitate the introduction of significant systems and impose significant regulatory burden upon universities and upon academic staff.

***Section 134(1)(h):The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.***

346. As identified by Professors Hughes-Warrington, Garton and Freshwater, each of whom have significant national and international experience, likely effects of adopting the NTEU clause, would be undermining the attractiveness of Australian employment and leading to loss of staff to the US and UK particularly, potentially stymying innovation and damaging Australian Higher Education its high quality research outputs and its role as a very important part of the Australian export economy.

347. The concept of recording or limiting hours of work that an academic can perform including their research and self-directed work or to pay overtime for teaching and research academics undermines and is inconsistent with the existing regulation and forms no part of the concept of academic employment in the UK, US or Australia.

<p>Professor Freshwater (Exhibit 13)</p>	<p>[11] If the NTEU's proposed clause is adopted, it has the potential to significantly undermine the international standing and research of Australian Universities in an increasingly globally competitive environment.</p> <p>[16] Consistent with the approach taken in Australia, in all UK research intensive Universities (and most US ones that I am aware of) academics do not have fixed working hours or anything that remotely looks like an apportionment of hours of work based on activities, they do not have any entitlement to overtime payments and are not required to complete timesheets or otherwise record their hours of work.</p>
<p>Professor Freshwater</p>	<p><a href="#">PN6878</a></p> <p>What impact would that have on the research that's undertaken by academics? - - Well, my view is that it would have quite a constraining impact on the nature and the type of research. By the very nature of that, it would put some parameters around the work that's being conducted and set some boundaries around that, and that would particularly impact the research. It may also impact the ability of the individual academic researchers to work across geographical boundaries and across different time frames.</p>
<p>Professor Hughes-</p>	<p>[58] The practical effect of the proposed variation is that academic staff will be required</p>

<p>Warrington (Exhibit 10)</p>	<p>to complete time and attendance records if a University was to have any meaningful confidence to avoid allegations of breach. This would be seen as an act of bureaucratic managerialism which curtails academic autonomy, and would make our employment context at odds with sectors in the United Kingdom, United States of America, Canada and Ireland, which operate without mandated work hours and effort reporting. It would antagonise staff who would then likely discourage their peers from applying for jobs in Australian Universities.</p>
<p>Professor Hughes- Warrington</p>	<p><a href="#">PN4842</a></p> <p>MR McALPINE: Sorry, paragraph 13. I'm sorry? - - -Your Honours we face incredible competition from overseas, so the university at which I work is ranked in the top 20 in one of the research rankings, but in the top 100 in the others and we are aware that the performance the research performance of universities overseas and other universities in Australia is continuously improving and we need to do the same in order to maintain our level of excellence.</p> <p><a href="#">PN4843</a></p> <p>Yes, but your statement there goes beyond that. It says "Universities" in the plural, "more than ever need to increase research outputs." Why is that at the sector level why is that? - - -Your Honours, universities represent the second largest export industry in Australia and the research rankings of those universities determines how many international students will come to Australia. So it's fundamental to our operating conditions that we maintain excellent research rankings internationally; all universities.</p> <p><a href="#">PN4990</a></p> <p>Now, are you able to advise the Commission as to what issues or impact that might have at the Australian National University if you were required to apply that provision? - - It would be twofold; that it would be seen a serious infringement upon the freedom and the autonomy of academics and they would see that as making their roles unnecessary interference in their work, and it would make us less competitive against our international competitors who I am not aware monitor hours. It would also mean significant cost for us in terms of monitoring the inputs and outputs of staff, and that would place excessive burden upon us.</p>

348. Similar evidence was given by Professor Biggs<sup>136</sup> and Professor Garton.<sup>137</sup>

## 6.16 Alternative hours of work clause

349. In our opening submission, in Exhibit 5, the Go8 identified at paragraph 111 that if it was satisfied that it must vary the award and considered additional regulation in relation to hours of work for academic staff in the award (which the Group of 8 very strongly submit is not necessary), then the NTEU clause and an approach that involves overtime rates clearly should not be adopted and a much simpler short clause adopted to supplement the NES would need to be considered.

350. Such as clause could be limited to identifying that "other relevant" matters under the NES include some factors that have to be taken into account for the purposes of reviewing whether

<sup>136</sup> Exhibit 11, [40]-[41].

<sup>137</sup> Exhibit 9, [20], [61].

additional hours are reasonable or unreasonable - which Mr McAlpine in XXN agreed would provide more guidance to supervisors about the reasonableness of an academic's workload, and could be a simpler way to deal with the issue raised by the NTEU<sup>138</sup>.

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<sup>138</sup> PN1842-1844

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## **7. NTEU B - Claim for Professional and Discipline Currency Allowance (Academic Staff Award)**

351. In summary the NTEU seek to increase the rates of pay for casual academic staff in the Academic Staff Award by:
- (a) requiring universities to pay 10 hours at the "other required academic activity rate" to each casual academic staff member who was engaged to deliver a series of 6 or more related lectures or tutorials in an academic unit of study. This 10 hours is payable again if the staff member has a further engagement after a break of a period of 12 months or more; and
  - (b) requiring that for each 4 hours of delivery of lectures or tutorials a staff member will be paid by the University an additional one hour's pay (at the relevant rate of pay for "other required academic activities").
352. The "other required academic activity rate" is currently \$31.65 per hour (or \$35.94 per hour if the academic holds doctoral qualification).
353. The NTEU has not previously sought policy familiarisation payment or discipline currency allowances during the award modernisation process, nor in any pre-reform award. As set out below, the evidence shows it has been the subject of enterprise bargaining negotiations.
354. The variation is a significant and substantial change to Academic Staff Award and the variations should not be made.

### **7.1 Issues for the Commission**

355. If the Commission were to accept the NTEU's claims it would need to be satisfied that that the adoption of each of those pay increases:
- (a) does not offend s.156(3) of the FW Act; and
  - (b) in the case of each of the two variations sought, that a substantial merits case has been made out that inclusion of the additional provisions is necessary for the Award to constitute a fair and relevant safety net of terms and conditions; and
  - (c) that the particular provisions sought by the NTEU would constitute variations only to the extent necessary to meet the modern awards objective and then exercise its discretion under s.156 to vary the awards in the manner sought.
356. For reasons set out below the Commission should not be satisfied that it is necessary to vary the awards in the manner sought by the NTEU.
357. The NTEU's claims, particularly the "discipline currency" claim constitutes an increase in the minimum rates of pay for casual academic staff when undertaking lectures or tutorials and has

not been supported by any evidence demonstrating a change in work value, which is a necessary precondition for such variation, contrary to section 156(3) of the FW Act.

358. Further:

- (a) the NTEU variations are not necessary to achieve the modern awards objective, nor are they variations only to the extent necessary;
- (b) to adopt the payment for policy familiarisation would be inconsistent with approach to award regulation in any other award or workplace in Australia including those with extensive policy requirements;
- (c) the claims are excessive; and
- (d) these are matters that have been and can continue to be pursued in bargaining.

359. If contrary to our submissions, the Commission considered that inclusion of payment in respect of policy familiarisation and/or discipline currency was necessary to meet the modern awards objective as a part of minimum terms and conditions, then the thresholds for eligibility and the quantum of the payments proposed by the NTEU should not be accepted. The Group of 8 would seek to address the Bench further on this issue if such approach were to be adopted by the Commission.

360. Whilst the two claims are discussed by the NTEU under the same banner, they are different claims in a number of respects and warrant separate consideration. Further, it should be observed that the vast majority of the material relied upon in the NTEU materials is essentially a complaint about the prevalence of academic casual employment within the higher education sector<sup>139</sup>, rather than primarily being a claim about award entitlements for casual academic staff.

361. Before turning to the problems with the two claims, given some of the matters raised by the NTEU, it is necessary to identify and confirm the current award safety net.

## **7.2 The current award regulation**

362. The Academic Staff Award provides for the engagement of casual employees (clause 13) and requires the employees to be provided with an instrument of appointment that identifies 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 (Clause 14.1(c)) and also states the other main conditions of employment (clause 14.1(e)).

363. The rates of pay for casual academic staff are set out in detail at clause 18.2 as follows:

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<sup>139</sup> NTEU Closing Submissions, [B16]

**Per hour (including the casual loading)**

\$

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**Lecturing**

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*Basic lecture (1 hour of delivery and 2 hours of associated working time)* 121.75

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*Developed lecture (1 hour of delivery and 3 hours associated working time)* 162.36

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*Specialised lecture (1 hour of delivery and 4 hours associated working time)* 202.94

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*Repeat lecture (1 hour of delivery and 1 hour associated working time)* 81.16

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**Tutoring**

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*Tutorial (1 hour of delivery and 2 hours associated working time)* 95.00

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*Repeat tutorial (1 hour of delivery and 1 hour associated working time)* 63.32

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*Tutorial (1 hour of delivery and 2 hours associated working time) (where academic holds Doctorate)* 107.82

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*Repeat tutorial (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate)* 71.86

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**Musical accompanying**

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*Musical accompanying (1 hour of delivery and 1 hour preparation time)* 63.32

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*Musical accompanying (1 hour of delivery and 1 hour preparation time) (where academic holds Doctorate)* 71.86

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**Undergraduate clinical nurse education**

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*Little preparation required (1 hour of delivery and 0.5 hours associated working time)* 47.50

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*Normal preparation time (1 hour of delivery and 1 hour associated working time)* 63.32

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*Little preparation required (1 hour of delivery and 0.5 hours associated working time) (where academic holds Doctorate)* 53.90

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*Normal preparation time (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate)* 71.86

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**Marking rate**

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<i>Standard marking</i>	31.65
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<i>Marking as a supervising examiner, or marking requiring a significant exercise of academic judgment appropriate to an academic at level B status</i>	40.59
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<i>Standard marking (where academic holds Doctorate)</i>	35.94
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<i>Marking as a supervising examiner, or marking requiring a significant exercise of academic judgment appropriate to an academic at level B status (where academic holds Doctorate)</i>	40.59
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**Other required academic activity**

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<i>If academic does not hold doctoral qualification or perform full subject coordination duties</i>	31.65
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<i>If academic holds doctoral qualification or performs full subject coordination duties</i>	35.94
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364. As for all modern awards, the quantum of these rates is set at a work value commensurate to the level of skill necessary to perform the inherent requirements of the role - which includes the need for "discipline currency" to the extent this is relevant.
365. Further, clause 13 of the award explains that the rate per hour for the casual employee is the equivalent rate for a non-casual employee in the relevant classification plus a casual loading of 25%. Clause 13.2 identifies the relevant classification comparator (Level A step 6 for tutorials and Level B step 2 for lectures) that is used for the calculation of the rates which appear in clause 18.2.
366. Accordingly, a casual academic undertaking a basic lecture is paid a rate that equates to one hour of delivery and two hours of associated working time based upon the rate for a continuing lecturer at the second step of level B, plus a 25% loading.
367. Similarly if that same casual academic undertook a tutorial they would be paid based upon one hour of delivery and two hours of associated working time at the rate that would have applied to a continuing staff member at the 6th step of the full time level A scale plus a 25% loading.
368. Three important conclusions can be drawn from these matters.
- (a) The first is that the rate for a lecture and rate for tutorial already include an amount of associated working time for preparation and associated activities.
  - (b) Secondly, the basic lecture and basic tutorial attract the same amount of time (one hour of delivery and two hours of associated working time) but the lecture attracts a higher rate, already reflecting and compensating for a higher level of skill and

knowledge in relation to the subject matter than in relation to the tutoring activity;  
and

- (c) Thirdly the rate paid to the casual academic already incorporates a 25% casual loading to compensate the benefits that casual employees do not receive.

369. Additionally, the casual rates in clause 18.2 provide for a rate ("other academic activity" rate) for activities that are not lecturing, tutoring or other specifically identified activities. While there is limited detail in the current award, the concept of "*other academic activity*" can include a range of other activities that the University requires an academic to undertake. Activities such as supervision, development of teaching and subject materials (such as preparation of subject guides and reading lists), basic activities associated with subject co-ordination and attendance at departmental and/or faculty meetings, were detailed in the pre-reform award.<sup>140</sup> If academic staff are required to perform particular additional work activities such as preparation of reading guides and contributing curriculum, there is already a provision that addresses this.

### 7.3 s.156 of the FW Act

370. What the NTEU application does (in relation to the delivery of the lectures and tutorials) is to increase payments to the staff member for delivering lectures and tutorials, to be familiar with associated university policies (in the case of the policy familiarisation payment), and keeping up to date in the chosen discipline of the staff member (in the case of the discipline currency payment). The NTEU asserts this on the basis that it is "*inherent to, or necessary for, the performance of their teaching [lecturing and tutorial] work*"<sup>141</sup>.

371. The effect of the discipline currency claim is that for every 4 hours of lectures an additional hour is payable, increasing the minimum salary payment required for delivery of the series of lectures, (up to a maximum of 40 hours per calendar year). Whilst there are exceptions built into the NTEU's claim (e.g. the allowance can be offset with other benefits to compensate the employee for maintaining discipline currency), the prima facie position is that the allowance is payable in full **unless** an exception applies.

372. The suggestion of Dr Camille Nurka (an NTEU witness) that the policy familiarisation claim constitutes a de facto payment for working time associated with lecture/tutorial delivery for students is also probative in this regard:

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... there's also this kind of pastoral care element. And understanding – like, being able to provide students with phone numbers and being able to tell them exactly what those services can give them, in a face to face context is much better for them because that's – they won't go and look it up themselves, basically. Yes, so that's kind of part of what we do but a lot of that pastoral care kind of work or labour is not paid and that's why we're here today. [emphasis added].

<sup>140</sup> Exhibit 5, Attachment 2.

<sup>141</sup> NTEU Closing Submissions, [B1].

373. Consequently, each of the proposed allowances is in substance a claim that would increase the minimum wages payable for undertaking a series of lectures or tutorials. The fact that the claim, in substance, is an increase in the minimum wage is recognised in the NTEU's closing submissions, submitting that the 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) ...*"
374. Further, the fundamental linchpin on the NTEU's claim is that the activities are an inherent part of undertaking lectures and/or tutorials (including performing necessary associated working time), in respect of which, as set out above there, is already a prescribed minimum rate.
375. Section 156 imposes an additional pre condition to such variations as follows:
- "(3) in a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons."*
376. There is no substantive evidence in relation to change in work volume and in particular the NTEU's evidence does not disclose any additional skills or responsibilities required of casual staff since the establishment of the minimum rates for lectures and tutorials in the Modern Award.
377. Section 156 is not otherwise addressed by the NTEU submissions despite us putting the NTEU on notice of this issue in our opening submissions. It follows that the Commission cannot be satisfied on the basis of work value reasons that the wages for undertaking a series of lectures should be increased through the NTEU variation.
378. Irrespective of the various other matters set out below, on that basis alone the NTEU's proposal for variation should be rejected.<sup>142</sup>

## **7.4 Policy Familiarisation**

379. It is acknowledged that employees of universities are required to comply with certain policy requirements and in particular policies concerning occupational health and safety, bullying, harassment and discrimination, basic code of conduct (where it exists) and certain policies that are related to the work that they are performing. It is also acknowledged that universities have a significant volume of additional policies and guidelines available to staff.
380. The NTEU has led voluminous evidence to seek to demonstrate that all staff including casual staff are required to comply with University policies. This is largely uncontentious. However it is observed that this is typical of the vast majority of Australian workplaces including many that have significant volumes of policies. Any compliance requirement also is not an award requirement and is imposed contractually. Varying the award safety net to address such a

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<sup>142</sup> As was the case in *Ports, Harbours and Enclosed Water Vessels Award 2010; Seagoing Industry Award 2010; Marine Towing Award 2010* [2017] FWCFB 1138 at [131].

contractual obligation is not a necessary variation and is a matter for bargaining, contract or policy.

381. Where the parties are apart are:

- (a) the extent the universities require of employees regarding policy compliance (including the degree of familiarity expected or required of the policies and what in a practical sense this means for staff);
- (b) whether or not an additional payment must be prescribed by the award in respect of that work in order to achieve the modern awards objective, including considering that this would be notwithstanding:
  - (i) that no other award provides for this; and
  - (ii) that if delivery of a series of lectures required policy awareness, this could form part of the preparation for lectures and is already compensated for, as outlined above; or
- (c) whether, if such a claim is pursued, it is more appropriately a matter for enterprise bargaining and/or policy provisions concerning induction or paid training (as has been the position of the NTEU at all times prior to this application and agreed in bargaining by the NTEU at a number of Universities).

### ***Evidence in these Proceedings***

382. It is acknowledged the evidence in these proceedings identifies that there are a range of policies that staff, including casual staff are expected to comply with. However, even if it is accepted that the expectations on staff with respect to policy familiarisation have increased since the creation of the Academic Staff Award, there is significant evidence that weighs against the granting of the NTEU application for the 10 hour payment for policy familiarisation and that instead supports the following:

- (a) the extent to which employees are required to be familiar with policies is overstated by NTEU witnesses and the NTEU, and is not supported by the evidence;
- (b) employees are already paid for policy familiarisation to the extent reasonably necessary, including through induction; and
- (c) a degree of policy familiarisation necessarily occurs prior to the commencement of employment either as part of the recruitment process, or because the employee is also enrolled as a student within the university.

383. The key evidence in relation to each of these submissions is set out below.

#### Extent of requirement to be familiar with policies

384. In relation to what the University requires of its staff there is a difference between policy awareness and policy immersion. Whilst some core policies are typically required to be read and understood (being policies regarding sexual harassment, discrimination, privacy, OHS and codes of conduct), the vast majority of policies are available for reference and would only need to be consulted if a particular circumstance arose. These matters are highlighted by the consistent evidence of University witnesses to this effect. Take for example the evidence of Professor Stephen Garton (Exhibit 9), who stated at paragraph 64:

*"(a) staff are not required to sit down and read every policy and procedure;*

*[and]*

*(c) the vast majority of policies and procedures do not directly relate to their activities and are a resource that is readily available on the staff intranet and could be accessed if a particular circumstance arose"*

385. When tested in cross-examination, Mr Garton maintained this position noting that *"..some [policies] would be irrelevant to many staff members, and therefore not need to be consulted at all"*.<sup>143</sup>

386. See also the evidence of Professor Simon Biggs (Exhibit 11) at paragraph 44, Professor Marnie Hughes-Warrington (Exhibit 10) at paragraph 64(a) and (b), Mr Andrew Picouleau (Exhibit 12) at paragraph 40 (and at PN6781), Mr David Ward (Exhibit 20) at paragraphs 30-32, and Ms Sue Thomas at PN4260.

387. This proposition was conceded by a number of NTEU witnesses in cross-examination, including Dr Camille Nurka, and Dr John Kenny, as follows:

Dr John Kenny	<p>PN6163</p> <p>Are not required to read all of the University of Tasmania policies?---No, no, that's right. I think most wouldn't probably.</p> <p>...</p> <p>PN6165</p> <p>You yourself haven't read all of the policies?---I've read the ones that I think are pertinent to me, the pot plant policy doesn't necessarily interest me for example.</p>
Dr Camille Nurka	<p>PN8699</p> <p>I take it from your answer that you accept that you don't have to read every one of these policies and, indeed, you didn't read every one of these policies during your six years at the University of Melbourne?---No.</p> <p>PN8700</p> <p>So, you accept that?---I accept that, yes.</p> <p>PN8701</p>

<sup>143</sup>PN4785.

	<p>And do you also accept that there are some policies that might be called key policies or core policies?---Yes.</p> <p>PN8702</p> <p>For example, discrimination, harassment and bullying, occupational health and safety, intellectual property and privacy and responsible conduct or a code of conduct. And do you accept that they're might what be called core policies that you are expected and required to be familiar with?---Yes.</p> <p>PN8703</p> <p>And you can compare those with other policies that are essentially just a reference that are there if you need to look at something and, indeed, in your employment. There may be ones that logically you'd never have to look at?---Yes, probably</p>
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388. As suggested by the Bench during the cross-examination of Dr Camille Nurka, a number of these policies contain similar elements across institutions and at their core are largely common, particularly as they relate to well understood concepts such as equal opportunity, safety or bullying:

<p>PN8723</p> <p>DEPUTY PRESIDENT KOVACIC: But in terms of things such as responsible conduct, responsible conduct of staff, which you refer to at Melbourne uni, sort of the conduct expectations across institutions would be fairly similar though there might be some elements of difference which, at their core, they'd be very common?---Yes, yes.</p> <p>PN8723</p> <p>MR PILL: And you'd accept, Dr Nurka, that's also true of policies such as discrimination, sexual harassment and even matters like privacy where there's common elements across the sector?---Yes.</p>
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389. Evidence was also led from Ms Sue Thomas to the same effect<sup>144</sup>:

<p>It should also be noted that the policies, procedures and other induction material predominately contain content which is common to many employers, particularly other universities. For example, policies on workplace health and safety, equal employment and diversity and codes of conduct are based on legislative material or labour standards for being a responsible employee. Therefore in many instances these staff should already be familiar with the general content of these documents and the claim that 10 hours is required to become familiar with them is excessive.</p>
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390. The NTEU claim that staff need to review the entire list of policies in order to determine which policies are pertinent to their employment. When questioned about this in cross-examination, university witnesses consistently explained that this was not the case and that casual staff are directed to the policies they were obliged to know either as part of induction procedures or within the university Code of Conduct:

<p>Professor Hughes PN4961</p>
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<sup>144</sup> Exhibit AHEIA 8, [20].

Warrington	Okay. I would have to look at those policies, however, to decide which ones were relevant to me?--No, the University outlines for both casual, continuing and contract staff which of the most important policies to look at and which ones they are obligated to know about.
Professor Stephen Garton	PN4785 ... the Code of Conduct spells out [policies] that you might want to look at ...

This is also evident on the face of the various codes of conduct tendered as evidence in the proceeding. See, for example, the University of New South Wales Code of Conduct.<sup>145</sup> Also see also paragraphs 402-409 below regarding induction procedures.

391. Further, to the extent that policies refer to or incorporate other guidelines or legislation:

- (a) it was acknowledged by both NTEU and University witnesses that the university does not require its staff to read these documents and legislation, nor do employees actually do so;<sup>146</sup> and
- (b) this is in any event a common feature of all policies, is in fact a "best practice" recommendation in guidelines issued by the Australian Human Rights Commission with which employers are expected to comply in order to discharge their statutory obligations in relation to bullying and harassment behaviours.<sup>147</sup>

392. In circumstances where a policy may be relevant to the work of an employee, there are significant resources and supports provided at each university for staff, including casual staff, enabling them to perform activities or to deal with issues in a way that would be in compliance with the university's policies or guidelines. This includes guidance from the academic supervisor/unit co-ordinator, the availability of HR and well-being advisors and a range of other people that staff can simply call or email and seek guidance from as and when required.

393. Evidence in support of this proposition was given by Professor Simon Biggs<sup>148</sup>, Professor Stephen Garton<sup>149</sup>, Professor Hughes-Warrington<sup>150</sup>, Mr Andrew Picouleau<sup>151</sup>, Mr David Ward<sup>152</sup>, and Ms Sue Thomas<sup>153</sup>. It was also supported by a number of NTEU witnesses in cross-examination, including Mr Ken McAlpine, Dr John Kenny, Dr Caron Dann, and Dr Camille Nurka, as follows:

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<sup>145</sup> MFI 45.

<sup>146</sup> PN8730-8731 (Dr Nurka); PN6780 (Mr Picouleau); PN6163-6165 (Dr Kenny).

<sup>147</sup> As discussed generally in *Richardson v Oracle Corporation Australia Pty Ltd and Tucker* [2014] FCAFC 82.

<sup>148</sup> Exhibit 11, [44].

<sup>149</sup> Exhibit 9, [64(d)], PN4787,4811 .

<sup>150</sup> Exhibit 10, [64(c)].

<sup>151</sup> Exhibit 12, [40], PN6782.

<sup>152</sup> Exhibit 20, [32].

<sup>153</sup> Exhibit AHEIA 8, [18], PN4260.

Mr Ken McAlpine	<p>PN1874</p> <p>You would accept that there are other resources available to all staff in the university that they can access and obtain information from, if necessary? If they've got a question about an HR issue, there are HR hotlines and the like?---Yes.</p> <p>PN1875</p> <p>There are advisers?---Yes.</p> <p>PN1876</p> <p>If I have got an issue with a student who is not coping, I don't go and read all the policies on how to assist students that aren't coping. There are experienced people in faculties and welfare areas within universities that are available to me to pick up the phone to and ring. Do you accept that?---Often there are, yes. ...</p>
Dr John Kenny	<p>PN6166</p> <p>Now it's also the case that if a matter that was covered by a policy arose, there's a variety of supports that are available to you as a staff member, to potentially deal with the issue. You don't necessarily have to go and find the policy and read the policy. So to give you an example, an issue a health and safety issue might arise, there are health and safety advisers in the university?---Yes, there are some available within the university, yes.</p> <p>PN6167</p> <p>There's, for example, student and wellbeing advisers?---Yes..</p> <p>PN6168</p> <p>If it relates to employment issues, there's HR both within your faculty and centrally?---Mmhm</p>
Dr Caron Dann	<p>PN8516</p> <p>My question to you, Dr Dann, is there are things beyond the policies that are available to you. There are supports available to you?---Mm.</p> <p>...</p> <p>PN8518</p> <p>Relevant members of the faculty you can ask about - - -?---Yes.</p> <p>PN8519</p> <p>As well as formal support mechanisms?---Yes.</p> <p>PN8520</p> <p>There's Health and Wellbeing Centre, I might have the terminology wrong, at Monash University. There's dedicated HR hotlines?---Yes.</p> <p>PN8521</p> <p>And so there's various things that are available to you, which you're much more likely to access than to spend time reading through policies on the intranet. You accept that?---Yes.</p>
Dr Camille Nurka	<p>PN8709</p> <p>And there's also contact officers that are available to staff?---Yes.</p> <p>PN8710</p> <p>And, similarly, if you were confronted with a safety issue you could logically pick up the phone OH&amp;S adviser?---Yes.</p>

	<p>PN8711</p> <p>And in addition to those dedicated support functions, you also have essentially access to other staff in the faculty?---Yes.</p> <p>PN8772</p> <p>So the university has people who are specifically employed - - -?---Yes.</p> <p>PN8773</p> <p>To provide student support services - - -?---Yes.</p> <p>PN8774</p> <p>And to provide the sorts of pastoral care that you've just referred to?---Yes....</p> <p>PN8775</p> <p>And Dr Nurka, these include people who are qualified chaplains, people who are qualified financial advisors, people who are aware in depth of the supports that are available to students?---Yes.</p> <p>PN8776</p> <p>Do you agree with that?---Yes.</p>
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394. Dr Nurka also led evidence that she has used such support mechanisms in the past:

<p>PN8708</p> <p>You accept that. And so to use the example that you've given over the page about a discrimination and harassment policy, if you were confronted with a discrimination or harassment issue, you'd contact HR?---Yes.</p>
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395. In relation to policies directed at academic teaching (for example, plagiarism, policies regarding special consideration, and similar policies), each casual staff member has an academic supervisor or subject coordinator who is ultimately responsible for such matters, and who is in most cases a non-casual staff member. This was confirmed by a number of witnesses, including Dr Michael Dix, Professor Stephen Garton and Ms Sue Thomas:

<p>Stephen Garton</p>	<p>PN4812</p> <p>So if I'm a sessional staff member and I was confronted with an issue of student academic misconduct at the University of Sydney, how would that be dealt with by me as the sessional academic staff member?---Under normal circumstances, I would expect the sessional academic to consult the unit of study coordinator, who would normally be a fixed-term or continuing academic staff member and they would then take the matter in hand and deal with it through the normal policies and procedures framework.</p>
<p>Dr Michael Dix</p>	<p>PN9336</p> <p>To the extent that they [casual staff] have to deal with student complaints and misconduct and so on, do they generally seek guidance from you or from HR or student services if that arises?---They seek guidance from me or from someone more senior than myself.</p>

Sue Thomas	<p>PN4046</p> <p>I put it to you that sessional academics are expected to deal with plagiarism on a fairly frequent basis, and that they are not able to refer that work off?---It's not my area of expertise but I would expect that they would get assistance from a more senior academic.</p> <p>PN4048</p> <p>That would be a way of complying wouldn't it, to seek information about the policies?---Yes, or to get assistance for someone to handle that for them.</p> <p>PN4051</p> <p>What their obligations are?---Correct, and someone who may handle the whole situation for them.</p>
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The role of the supervisor was also supported by the evidence of Professor Simon Biggs<sup>154</sup>, Professor Marnie Hughes-Warrington<sup>155</sup>, Mr Andrew Picouleau<sup>156</sup> and Mr David Ward<sup>157</sup>.

396. It follows that matters which may require a more detailed knowledge of policies (such as the setting of curriculum, reading guides, examinations and marking guides, and dealing with student misconduct) are, in the significant majority of cases, undertaken by non-casual staff. Where casual staff such as Dr Dann and Dr Nurka undertook subject co-ordination, this is not typical of the majority of casual staff. For example, Dr Dann acknowledged in cross-examination that her role had been created under an unusual arrangement whereby a continuing staff-member had obtained an ARC grant to fund her employment.<sup>158</sup>
397. Nevertheless, the evidence shows that where casual staff undertake duties such as unit coordination or preparation of reading guides or marking guides, they receive additional payment for it under the "*other academic activity*" rate. See for example:
- (a) clause 18.2 of the Academic Staff Award (referenced above at paragraph 363);
  - (b) the various pay-scales set out in the enterprise agreements tendered as evidence in the proceeding (e.g. page 84 of the Monash University enterprise agreement, attached to the witness statement of Andrew Picouleau (AP-1 to Exhibit 12); and
  - (c) the claimable hours schedules to the supplementary witness statement of Dr Caron Dann (Exhibit NTEU AP), which included an allocation of 30 hours for subject coordination duties.

<sup>154</sup> Exhibit 12, [44].

<sup>155</sup> Exhibit 10 [64(c)].

<sup>156</sup> Exhibit 12, [40].

<sup>157</sup> Exhibit 20, [32].

<sup>158</sup> PN8373 to PN8377. Also see Exhibit 9, [30(e)], where Professor Stephen Garton explains arrangements of this type.

398. Dr Dann also acknowledged in cross-examination that she receives a separate payment for such work.<sup>159</sup>

#### NTEU claim is overstated

399. Against this background, the NTEU witnesses overstate what is required in the context of policy familiarisation and time. The evidence in fact identifies a number of reasons why they undertake activities in relation to reading policies over and above what is actually required, which need to be taken into account in considering their evidence of spending significant time familiarising themselves with policies. For example:

- (a) the evidence of Dr Caron Dann was that she spends at least eight hours a year refreshing her knowledge of university policies. However, in cross-examination she clarified that when circumstances arise such as a student being in distress or needing special consideration, she would consult the policy on each occasion "to make sure that [she's] got it right"<sup>160</sup>. She conceded that she did this notwithstanding there being existing university resources and support systems of which she was aware, to which these matters could be deferred;<sup>161</sup> and
- (b) the evidence of Dr Camille Nurka was that "students respond much more positively when you speak to them yourself" and that it's "better for them because .... they won't go and look it up themselves".<sup>162</sup> Dr Nurka accepted that by doing so she was assuming a more hands on role:

PN8777

And as a lecturer on duty you've chosen to approach your role in a particular way in relation to support services?---Yes.

PN8778

A very hands-on way to do a lot of the digging yourself?---Yes.

PN8779

Do you accept that if a student presented you with – for example, if they mentioned that they were having financial difficulties in relation to their housing, you could just refer them to the student services representative, or indeed contact the student services representative and say, can you contact this student?---Yes.

Further, she suggests that one of the reasons why she may spend so much time checking policies is due to her poor memory, not because of University requirements:

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<sup>159</sup> PN8377.

<sup>160</sup> PN8524.

<sup>161</sup> PN8512-8521.

<sup>162</sup> PN8769.

PN8728

"...Well, there you go. So, that's - my memory is crap, so that's why it's important for me to refer back to policies when I encounter them or when I feel I should make myself familiar with them."

400. In both cases, the evidence suggests that spending 8 hours a year re-checking policies is not a requirement of their role, but to meet their personal high standards of service delivery. This undermines the estimates provided by these witnesses of the time they spend familiarising themselves with university policies as they are not based upon work required of them.

401. It also calls into question the estimates provided by the various NTEU "experts" such as Robyn May (to the extent such evidence can be relied upon given the issues noted above, and that the views are based upon research of only 22 out of 23,000 casual academics employed at the time her research was conducted<sup>163</sup>) who, for example, says in her report that "[t]he amount of time which might realistically be required to establish a knowledge of and familiarisation with university policies upon initial appointment varies from workplace to workplace but would rarely be less than ten hours."<sup>164</sup>

#### Induction and training

402. In relation to the payments made to employees for policy familiarisation, the evidence shows that, at the enterprise level, universities and particular departments or schools provide for induction for their staff which covers key employer policies and work requirements and which is sufficient for employees to discharge their obligations to students and the university.

403. For example, the evidence of Professor Simon Biggs<sup>165</sup> was that, at the University of Queensland:

... we conduct induction sessions for all of our casual academic staff. During induction, we tell staff what our expectations are, what we expect them to be doing and how we expect them to do it. This can include identifying specific policies and procedures that they need to familiarise themselves with so that they are aware of their responsibilities and the University's expectations in that regard. For example, I insist that health and safety forms part of induction for all casual academic staff so that they are aware of their responsibilities to themselves, to their colleagues and to students.

The Faculty pays all staff for time spent on induction training. The costs are split between the Faculty and the University. All tutors in my Faculty must attend 4 hours of training before they are able to be employed to deliver tutorials. The training covers relevant policies and procedures that they are required by the *University to adhere to during their employment.*"

404. Similar evidence<sup>166</sup> was also led by Professor Stephen Garton<sup>166</sup>, Mr Andrew Picouleau<sup>167</sup>, Mr David Ward<sup>168</sup> and Ms Sue Thomas.<sup>169</sup> Further, at paragraph 16 of her statement, Ms Thomas

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<sup>163</sup> PN2132-2139.

<sup>164</sup> Exhibit NTEU L, [13].

<sup>165</sup> Exhibit 11, [42]-[43].

<sup>166</sup> Exhibit 9, [64(b)].

indicated that the University of Wollongong has an 89.7% completion rate of its induction procedure amongst its casual workforce<sup>170</sup>.

405. These propositions are also supported by documentary evidence, including:

- (a) Attachment DW-1 to Exhibit 20 (witness statement of David Ward), which is a template offer of employment form for UNSW which includes a checklist of "Important Policy and Procedure" documents to be explained to employees during onboarding procedures;
- (b) Exhibits 17 and 18, which are the casual employment contracts of Dr Camille Nurka for her time at UNSW, showing that all the content in the checklist had been completed (even though she could not remember signing the contract);
- (c) MFI 17 - a printout of an online induction session for the University of Wollongong, covering matters including workplace health and safety responsibilities; incident and hazard reporting procedures; responsibilities of lecturers, tutors and demonstrators; emergency procedures; working environments (e.g. laboratories); privacy and disclosure obligations; equal opportunity obligations; records management; drug and alcohol policies, and the like; and
- (d) Attachment 2 to Exhibit AHEIA 8 (witness statement of Sue Thomas), which is an outline of the content included in an employee orientation session for casual academics within the faculty of law, humanities and the arts (conducted in addition to university induction processes).

406. The prevalence of detailed induction procedures was not otherwise substantially challenged by the NTEU or evidence led by the NTEU. To the contrary, after being asked in a number of different ways about whether or not the University of Wollongong's induction procedures sufficiently cover all core policies<sup>171</sup>, Ms Thomas' unwavering conclusion was that:

PN4043

I stand by my statement that says in our induction we do cover the essential elements for sessional academics ... So they are able to conduct their duties adequately without recourse.

407. The breadth and nature of induction procedures was also acknowledged by NTEU witnesses cross-examined on that topic. In particular, Dr Camille Nurka confirmed that she attended paid induction sessions for all the universities at which she worked, being UNSW, University of

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<sup>167</sup> Exhibit 12, [39], t PN6841.

<sup>168</sup> Exhibit 20, [33].

<sup>169</sup> Exhibit AHEIA 8, [11]-[19], PN3988-3992.

<sup>170</sup> Exhibit AHEIA 8, PN3918-3920.

<sup>171</sup> PN3988-4043.

Melbourne, La Trobe University, University of Sydney, and Western Sydney University, and that they covered all the "core" policies she was required to know.<sup>172</sup> She also believed she was notified of changes to policy that occur from time to time, either by email or speaking to university support staff.<sup>173</sup>

408. Dr Michael Dix's evidence was that sessional staff are required to undertake mandatory compliance training.<sup>174</sup>
409. Whilst the evidence might suggest that such induction sessions are not sufficient to meet the self-imposed personal service standards of sessional staff, there is no evidence indicating that the induction sessions do not sufficiently arm employees with the information required to perform the requirements of employment- if this were the case, then the same would be true of virtually any service industry.

#### Policy familiarisation also occurs prior to employment

410. In addition to being paid to attend induction sessions, the evidence also shows that policy familiarisation often occurs prior to acceptance of employment, both for continuing and casual staff. For example, under cross-examination, the evidence of David Ward was that:

*"A number of [university] policies would be referred to in our letter of offer that we send to employees or send to successful candidates who we would like to employ, so presumably they would read that in their own time as part of consideration of the offer of employment. The code of conduct is one example of that."*<sup>175</sup>

411. In response to questioning from the Bench, Dr Nurka also gave evidence in support of this view, stating that *"there are things you want to find out before you start teaching at a new university"*.<sup>176</sup>
412. Familiarising oneself with key policies and procedures is a sensible due diligence measure and is no different to employees considering the terms of the university's employment contract or enterprise agreement prior to commencing employment - which in the ordinary course would be far longer than the combined aggregate of all the policies with which the employee would be expected to be familiar.<sup>177</sup>

#### Students are a significant cohort of casual staff

413. As noted below in more detail in relation to the NTEU's discipline currency claim (at paragraphs 486-488), there was significant evidence identifying that a large proportion of

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<sup>172</sup> PN8804-8807.

<sup>173</sup> PN8714.

<sup>174</sup> PN9335.

<sup>175</sup> PN9223.

<sup>176</sup> PN8714.

<sup>177</sup> As evident from the enterprise agreements tendered as evidence in the proceeding, see footnote 19 above.

casual sessional staff are concurrently or recently students, including PhD students who are tutoring or lecturing on a casual basis concurrently with their studies.

414. The evidence of university witnesses, in particular Professors Stephen Garton<sup>178</sup> and Marnie Hughes-Warrington<sup>179</sup> was that, as students of the university, they would already be familiar with the various behavioural and academic policies which apply, particularly those regarding equal opportunity, OHS and academic misconduct, and have greater familiarity with requirements concerning assessment and similar policies.
415. The proposition also received some support from NTEU witnesses such as Dr John Kenny<sup>180</sup>, Dr Anne Junor, and Mr Ken McAlpine. See for example the following extracts from transcript:

Ken McAlpine	<p>PN1858</p> <p>If I take an example, and I accept it is perhaps a low watermark example, but if I take an example of a typical PhD student who was doing six hours of tutes?---</p> <p>....</p> <p>PN1868</p> <p>Is it the case that they actually have to read the policies to receive the money?---No, they don't have to read the policies, no. They may have already read them.</p>
Anne Junor	<p>PN2646</p> <p>... students have to comply with such policies?---Yes....</p>

### ***Response to particular issues raised by the NTEU***

#### NTEU criticism of employer witnesses

416. The NTEU suggests at paragraph B20 that the Bench should prefer the evidence of its casual employees over university evidence from Andrew Picouveau, Susan Thomas and David Ward who were not personally familiar with administration of casual staff.
417. The Group of 8 disagrees with this proposition. Whilst university witnesses gave evidence that they were not directly involved in the induction of casual staff, as senior employees they are aware of university performance requirements and in particular the extent to which casual staff are expected to be familiar with university policies both generally and on commencement of employment.
418. Further, it is noted that parts of the evidence on which the NTEU relies is outdated. For example, the evidence of Michael Hamel-Green (relied upon at paragraph B19(e) of the NTEU's Closing Submissions) is predicated on his understanding at the time he was a Dean

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<sup>178</sup> Exhibit 9, [64(e)].

<sup>179</sup> Exhibit 10, [64(b)], PN4962.

<sup>180</sup> PN6169.

at Victoria University. Since that time, the university has changed its induction procedures including by instituting a paid induction program for academic sessional staff and Professor Hamel-Green was not aware of this.

PN6261

You might not be aware that relatively recently the university has instituted a paid induction program for academic sessional staff to provide them with the essential information and training necessary to assist them to be inducted in VU's values and integrated into the broader VU workforce, which comprises an online compliance module, an induction to teaching and learning, and that staff are paid three hours at the all other duties rate. So you probably weren't aware of that ? ---Yes, I'm not aware of that. That wasn't in place certainly when I was the dean and it was a major problem that sessional staff were not paid for induction processes of that nature.

419. A further example is the evidence of Dr Camille Nurka, one of the main witnesses relied upon by the NTEU in relation to its policy familiarisation claim, who conceded in cross-examination that she was not aware that the University of Melbourne was in the midst of a process to reduce its policies.

PN8706

Well, are you aware that there's currently a policy program being undertaken at the University of Melbourne to reduce the number of policies by approximately 80 per cent?---No.

***Policy familiarisation allowance is not necessary to achieve the modern awards objective***

420. Taking into account the above matters the Commission should not be satisfied that the variation to provide 10 hours pay for policy familiarisation is necessary to meet the modern awards objective.
421. Inclusion of such a payment as a minimum Award condition is not a necessary part of the fair and relevant award safety net. This is supported by the evidentiary matters set out above, but is also reinforced by consideration of the following matters:
- (a) the absence of any equivalent allowances for policy familiarisation in any other award, despite policy compliance being an accepted norm within all industries in Australia;
  - (b) the absence of any evidence supporting the NTEU's proposition that policy familiarisation requirements have increased since the creation of the Academic Staff award; and
  - (c) the criteria set out at section 134(1) of the FW Act and in particular the need to encourage collective bargaining, the need to promote flexible workplaces, and the likely impact of the claim on university business and productivity, as well as its cost and regulatory burden.

No other award pays for policy familiarisation

422. The NTEU's claim boils down to a recognition that in performing certain work, casual employees need to be aware of certain policies and requirements of the employer. This is an inherent part of any employment in any workplace and is appropriately dealt with through induction.
423. The NTEU asserts that nevertheless higher education providers (unlike any other award), should pay their employees separately for being familiar with policies because there are a number of policies directed at student facing functions (lecturing, assessment, student welfare etc.). However, these matters are reflected in the significant rate that is paid for the undertaking of a lecture and the associated working time.
424. An analogy can be drawn with a specialist casual who is performing technical work for an engineering company. That casual would undergo induction and would need to be familiar with and perform their work in accordance with various standard operating procedures and other policy or procedural requirements of the engineering company.
425. Labour hire workers or agency nursing and teaching staff who routinely work across multiple work locations would also be required to familiarise themselves with a range of different policies and procedures.

Argument that policy familiarisation requirements have increased over time

426. The NTEU argues that its policy familiarisation clause is necessary to achieve the modern awards objective on the basis that the requirement to read and understand university policies has "*grown considerably*."<sup>181</sup> As noted above at paragraphs 418 to **Error! Reference source not found.**, the NTEU's submission partly relies upon outdated evidence but also is based upon a contractual or policy obligation. It is not an award obligation.
427. Whilst there was some limited questioning of witnesses in relation to increases in policies "*over the last 20 years*"<sup>182</sup> the responses provided by university witnesses is that the expectation has not substantially changed. See for example the comments of Mr Andrew Picouleau on cross-examination:

PN6624

That there have been changes in the terms of appointment for staff to expressly impose an obligation on employees to comply with university policies. That's a new feature in the last 20 years?---I think there's always been an obligation to comply with university policies. Perhaps it's been made more explicit.

428. There is not otherwise any conclusive evidence suggesting that the number and volume of university policies or requirement to comply has increased since the Academic Staff award was made.

s.134(1)(b) the need to encourage collective bargaining

<sup>181</sup> NTEU Closing Submissions, [B19.e], which refers to Exhibit NTEU L, 25 and NTEU AR, [8]-[9].

<sup>182</sup> PN6623 (Mr Picouleau).

429. Issues concerning induction, paid training, policy familiarisation and the level of payment are matters for enterprise bargaining, and it is noted that similar claims to what are now pursued in the award review, have been pursued by the NTEU in enterprise bargaining.<sup>183</sup>

430. It should also be noted that where enterprise agreement clauses have been negotiated, the NTEU have agreed in those clauses to a lower level of payment - generally at half a day (approximately 4 hours)<sup>184</sup> but less in some instances - e.g. the University of Wollongong provides for a 2 hour induction.<sup>185</sup>

431. As indicated by Ms Sue Thomas at paragraph 21 of her witness statement (Exhibit AHEIA 8), this shift is likely to cause difficulties for Universities who have already agreed to paid induction sessions as part of bargaining based on a lower assessment:

*"If the NTEU's claim were to be granted, I can foresee difficulties for the University. Firstly, it would be difficult, or even impossible, to assess this for purposes of the Better Off Overall Test ('BOOT') under the Fair Work Act 2009 in respect of subsequent enterprise agreements. The University allows for 2 hours of paid induction for all casual academic staff. Some casual academic staff also receive further induction or training as set out above, but it would not be possible to say at the time of considering the BOOT whether all casual staff would be entitled to such further induction or training and if so how much. This is further complicated by the fact that the enterprise agreement salary rates are higher than those in the award."*

134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work

432. The NTEU states at paragraph B61(d) and B61(e) that its policy familiarisation claim promotes the efficient and productive performance of work by encouraging employees to do what is "*manifestly necessary*" in relation to their work, and to incentivise employers to provide induction sessions.

433. This submission is not based upon any evidence and to that extent is entirely speculative. Further, as noted above, the weight of evidence is that employers already provide induction sessions to staff and have dedicated support systems in place to facilitate compliance with relevant policies.

134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

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<sup>183</sup> PN1008-1011 (Mr McAlpine).

<sup>184</sup> Exhibit 12, [38]-[39].

<sup>185</sup> Exhibit AHEIA 8, [11].

434. Despite not having any evidence to support its position, the NTEU submits at paragraphs B61.g. and B61.h of its Closing Submissions that its policy familiarisation claim would only impose a minor administrative and financial cost on employers.

435. This contradicts the volume of evidence in support of the Group of 8's position that the claims will in fact impose significant additional costs and regulatory burden on the employer.

436. In relation to the regulatory burden, as set out at paragraph 121 of Exhibit 5, universities would need to monitor and record:

(a) whether the employee is undertaking 6 or more lectures or tutorials, including identifying whether those classes are "*related*" and whether they are "*within an academic unit or study*"; and

(b) if an employee has previously been engaged by the University and whether it occurred more than 12 months earlier;

which information is not currently recorded by University systems.

437. Once this information is obtained, universities would also be required to "*reprogram*" their payroll systems to account for such additional payments.<sup>186</sup>

438. In relation to the cost, as set out at paragraph 122 of Exhibit 5, the estimates from universities are that the costs would be in the order of \$30 million at award rates and \$40 million dollars at enterprise agreement rates.

439. It is accepted that these figures cannot be accepted as definitive and these estimates are necessarily inconclusive, as no data is presently available in relation to a number of variables built in to the NTEU's proposed clauses. However, even if the figure was conservatively halved then it would clearly be a significant cost.

440. at significant cost associated with the claims was supported by Professor Hughes-Warrington from the ANU<sup>187</sup> and Ms Sue Thomas from the University of Wollongong<sup>188</sup>, whilst acknowledging that a specific calculation had not been conducted.

441. What is clear therefore is that the cost estimates provided by university witnesses, whilst they cannot be accepted as a definitive figure, are nonetheless considered attempts to cost each of the claims and indicate a significant cost would likely arise.

## **7.5 Payment for Discipline Currency**

442. The NTEU's discipline currency claim is for an additional payment of up to 40 hours' wages per calendar year as compensation for work performed "maintaining discipline or pedagogical

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<sup>186</sup> Exhibit AHEIA 8, [22], PN4093 (Ms Thomas).

<sup>187</sup> (Exhibit 10), [64(d) and [65].

<sup>188</sup> Exhibit AHEIA 8), [22].

currency". The claim is framed as an allowance payable to casual academic staff who perform a minimum of 6 or more related lectures or tutorials in an academic unit of study, unless:

- (a) their primary paid employment is in a profession or occupation to which that teaching directly relates; or
- (b) they have received payment in the same year for the same discipline or pedagogical currency work from another university.

443. As set out above, the claim constitutes a de facto increase to the minimum wage of a particular class of casual sessional staff and, to that extent, is not supported by sufficient evidence of the work value reasons why the claim ought to be accepted (as required by section 156 of the FW Act). The claim should therefore be rejected on that basis.

444. Further, the NTEU clause, if implemented, would require universities to pay for activities undertaken by sessional academics during periods where the academic is not employed by the relevant university. For example, a sessional academic may be engaged for semester 2 at a University and finishes in November and during the period from December onwards undertakes a range of activities, keeping up to date and broadening knowledge of a discipline and is then offered and accepts a further casual appointment in June for lecturing in Semester 2. The NTEU clause, in substance imposes an obligation on the university to pay for activities undertaken during a period that the sessional academic is not engaged by the university and has no employment contract with the University. This is not an appropriate part of an award safety net prescribing employment entitlements.

445. The Group of 8's position is that payments to maintain discipline currency are not otherwise necessary to achieve the modern awards objective because:

- (a) casual sessional staff are skilled professionals who are recruited specifically for their existing expertise and knowledge in the same way as the engagement of any skilled, licensed or highly qualified casual employee in other industries;
- (b) discipline currency does not diminish over the course of a semester and is otherwise assisted by preparation for the lectures or tutorials and that preparation is paid;
- (c) casual staff are employed to deliver set course material with developed reading guides and assessment/marking guides and are not required to undertake work over and above what is already paid to them by way of preparation time for each teaching session (and if a casual staff was required to be involved in curriculum development, they are separately paid for it);
- (d) there is significant diversity of casual academic engagements both in relation to their period of engagement (e.g. for 1 semester only), their concurrent employment status (e.g. whether they work at multiple universities or as an industry professional), and their relationship to the university outside of the relevant teaching

work (e.g. whether they are existing or recent PhD or Masters students of the university); and

- (e) the claim would likely result in additional cost impost and administrative burden on university staff and may result in less pedagogical opportunities being made available to PhD students.

***Evidence in these Proceedings***

446. The key evidence in relation to each of the Group of 8's submissions is set out below.

Engaged because they have the requisite skills, knowledge and expertise

447. At the commencement of any teaching engagement (typically at the start of a semester) casual academic staff are recruited to teach into particular subjects, undertake tutorials or undertake other academic activities on a research basis specifically because they are a person that has the relevant expertise and knowledge or experience in the relevant subject or research area.

448. This proposition is clearly supported by the evidence - see in particular the evidence of Professor Simon Biggs<sup>189</sup>, Professor Marnie Hughes-Warrington<sup>190</sup>, Professor Stephen Garton<sup>191</sup>, Mr Andrew Picouleau,<sup>192</sup> Professor Andrew Vann<sup>193</sup> and Dr Anne Junor<sup>194</sup>. The following excerpts are particularly illustrative:

Andrew Vann (Exhibit AHEIA 9)	8... If casual staff are delivering only one or two lectures, it is likely to be because they are professionals who are being recruited specifically for their existing expertise and discipline currency. If casual staff are delivering a term's worth of lectures they will have adequate time for scholarship and discipline currency in relation to their field of teaching.
Andrew Picouleau (Exhibit 12)	42.... It is intrinsically about using people who are currently available and appropriate and have the necessary skills and expertise and knowledge in the discipline in the same way as the engagement of any skilled, licensed or particularly qualified casual employee. In that context, the responsibility to hold a particular level of expertise or to maintain a particular level of currency is the responsibility of the particular individual.
Anne Junor	PN2763  All right. You'd accept that the outside industry experts perhaps are keeping up with the industry developments?--Well, one would certainly hope so because one would think that that was why they were brought into the university.
Marnie Hughes-Warrington	63 .... It is expected that any appointed academic would be current in their field or discipline. As a matter of practice, I do not believe that the ANU would appoint an academic staff

<sup>189</sup> Exhibit 11, [45].

<sup>190</sup> Exhibit 10, [63].

<sup>191</sup> Exhibit 9, [65], PN4777.

<sup>192</sup> Exhibit 12, [41]-[42].

<sup>193</sup> Exhibit AHEIA 9, [8], PN5394.

<sup>194</sup> PN2763.

(Exhibit 10)	member who could not demonstrate appropriate and current knowledge and skills.
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449. Dr Junor, giving evidence of her direct experience as an academic supervisor, also confirmed that an employee's existing expertise has been a relevant factor in respect of the casual sessional staff she has engaged:

PN2670  
 And when you looked at their CVs and decided to offer them some casual work, did you take into account their qualifications and experience?---Yes, of course.

PN2671  
 And did so having regard to what you were going to engage them to teach or to tutor in?---Yes.

450. This is also true of any skilled casual employee employed in any industry, where the reason they are offered the casual appointment rather than another person is because they have the relevant knowledge, skills and experience, and that such expertise does not require casual academic staff to maintain discipline currency beyond the confines of the work they have been employed to do - e.g. teaching an existing subject syllabus. As set out at paragraphs 127 and 128 of Exhibit 5, parallels can be drawn with an engagement of casual staff in other industries. The examples provided include:

- (a) casual teachers or casual nurses, who are required to hold particular registrations and undertake continuing education to maintain those registrations. They are employed as casuals on the basis that they have those registrations, knowledge, training and skills to undertake the particular casual teaching or nursing work for which they are being engaged. The hospitals or schools employing those casual employees are not required to pay for the casual employee to have the training or skills, or maintain their capacity to be employed as a casual employee in those particular industries; and
- (b) a specialist crane driver who is engaged casually as they have particular licencing and qualification requirements is not paid by the casual employer to hold those qualifications and keep up to date on developments in safe and effective crane operation or new equipment (even when it regularly engages him or her as a crane driver over many projects or years). Rather the decision is made to engage that particular person to perform the work because they have the particular knowledge of the subject area and expertise to undertake the particular work (which in this case, is particular lectures or tutorials)".

451. These parallels were also supported by Dr Junor, whose evidence in cross-examination was:

PN2800  
 ...And will you accept that the concept of being current in your discipline also applies to other professions and professionals, so nurses. They need to maintain currency in their discipline?---Yes. And I would further say that one of the ways in which that's done is the role of universities in contributing to the establishment of communities of

professional practice, and accrediting such professional practice.

PN2801

Would those same comments also be true of teachers; they need to maintain professional discipline, currency and universities also play a role in that?---Yes. Yes.

PN2802

And IT professionals?---Yes.

PN2803

HR, human resources professionals?---Yes.

PN2804

Other health workers?---Yes.

PN2805

Psychologists?---Yes.

PN2806

Early childhood education providers?---Yes

452. It follows that casual academics are already knowledgeable in their discipline prior to being employed. Further, they would be likely to have an interest in their discipline, irrespective of whether they're being paid to deliver lectures or not.

Discipline currency does not diminish over the course of a teaching engagement

It is common ground that the period of engagement over which a sessional academic varies may be employed is typically over half a semester or a semester - somewhere between 6 or 13 weeks. This is reflected in the CV of Dr Camille Nurka tendered as evidence in the proceeding (Attachment CN-1 to Exhibit NTEU AR) which generally references engagements aligned to specific semesters

**Tutor, School of Social and Political Science, University of Melbourne  
(March 2008–July 2010)**

*Knowing Nature* (undergraduate Interdisciplinary Foundation program,  
Semester 1, 2010)

*Gender, Bodies, Borders* (undergraduate, second year, Semester 1, 2008–2009)

453. It was accepted in evidence given by a number of witnesses that the work required to stay up to date necessarily varies from discipline to discipline<sup>195</sup>. It follows that whilst there may be some disciplines (or sub-disciplines) that are subject to rapid change, there are others that have not substantially changed for a number of years.

454. This was accepted by Dr Caron Dann in cross-examination:

<sup>195</sup> NTEU Closing Submissions, [B31(c)].

PN8336

That inherent in media, that it is time critical, it's constantly changing. We have daily news. In comparison - to take an extreme comparison with ancient Egyptian history, that's largely set in stone, no pun intended?---Yes. There would be new - and there would also be new research coming up all the time on journalism, and new critiques, and that sort of thing.

455. It follows that discipline currency does not necessarily evaporate between successive engagements or during the course of a semester. Professor Andrew Vann gives the following evidence in cross-examination:

PN5374

... discipline currency, depending on which discipline you're in, doesn't necessarily evaporate over a space of about 12 weeks. Some disciplines move very quickly but others don't. The tax law is often mentioned as an area where things can change quite rapidly but for example ...

PN5375

...if I was teaching solid mechanics, as I used to, and if I was teaching that casually, you know, that hasn't changed much for 150 years, probably.

456. This was also supported by evidence from a number of NTEU witnesses. For example:

- (a) Dr Michael Dix gave evidence that he has taught the same "Critical Thinking" subject for many years on multiple occasions each year, and that on each occasion the content was the same;<sup>196</sup> and
- (b) Dr Caron Dann gave evidence that media and communications courses she coordinates, whilst at the "high watermark" of an area that is constantly changing and needing to be constantly reviewed,<sup>197</sup> generally remain consistent in successive years:

PN8435

...But generally, of course, you know, the bones of what I would want to say are there, and it wouldn't be as much as - when you first take a unit, you know, you can spend two weeks writing one lecture, you know, to get it right. Whereas, you know, definitely further down the track adjusting doesn't take that long.

457. The NTEU's claim and its relevance to a 'fair and relevant safety net' must necessarily be viewed against this background.

#### Casual staff are generally paid to deliver, not develop, course content

458. As set out above at paragraph 396 and in the witness statements of Professors Simon Biggs<sup>198</sup>, Marnie Hughes-Warrington<sup>199</sup> and Stephen Garton<sup>200</sup>, the development of course or

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<sup>196</sup> PN9357-9358.

<sup>197</sup> PN8335-8337.

<sup>198</sup> Exhibit 11, [46]-[47].

<sup>199</sup> Exhibit 10, [63(d)].

subject architecture, co-ordination of the course and the over-arching determination of the material for inclusion in course materials (such as reading guides and preparation of marking guides) are predominately done by non-casual academic staff.

459. Whilst there are some exceptions (for example, Drs Caron Dann and Camille Nurka), the evidence was that unit coordination was generally undertaken by continuing employees and casual sessional staff are predominately employed for a narrower purpose - namely for delivery of the lectures and tutorials based upon the architecture and course materials developed by the unit/course coordinator.
460. Consequently, if casual staff are expected to remain current in their discipline (having been employed in the first place because of their expertise), this is only required as part of necessary preparation time for delivering a lecture or tutorial, including to the extent that employees might be required to familiarise themselves with the allocated readings in the discipline to enable them to perform the work.
461. Under clause 18 of the Academic Staff Award (replicated above at paragraph 363) preparatory work is already incorporated into the casual rates of pay and includes reading in preparation for a tutorial or lecture. This was supported by the evidence of Professors Simon Biggs<sup>201</sup>, Marnie Hughes-Warrington<sup>202</sup> and Stephen Garton<sup>203</sup>, and also Andrew Vann<sup>204</sup>. For example:

PN4780

And is it fair to say that under the existing enterprise agreement, at least, there is no requirement upon the university at the moment to make any payment to casual academic staff for doing that work? --- There are implicit preparation hours involved in the casual and sessional payment, to allow them to prepare for those classes.

462. It was suggested that academics may be required to look beyond course materials to ensure they are aware of changes that may affect course delivery (e.g. legislative change, key reports being published, the imminence of court decisions being handed down). The evidence of Professor Andrew Vann was that such changes should be anticipated by course coordinators and would in his experience be incorporated into the subject materials:

PN5393

"...if I were planning a lecture series I would be hopefully not leaving it till delivering the individual lecture but you would be thinking about where there's concepts at play, so, you know, certainly if you really want to make your teaching interesting it's really good to be able to refer to something that's come up in the week but you would also plan, I would think, around things that had happened in the last 12 to 18 months as examples to draw on, so in my view, at least, discipline currency would be something that you would be freshening up as part of lecture preparation, as much as anything else."

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<sup>200</sup> Exhibit 9, [65(c)].

<sup>201</sup> Exhibit 11, [48].

<sup>202</sup> Exhibit 10, [63(c)].

<sup>203</sup> Exhibit 9, [65(d)], PN4780.

<sup>204</sup> Exhibit AHEIA 9, [8], PN5385.

463. Further, where disciplines or sub-disciplines may rapidly and routinely change without warning, Professor Vann notes that the course outline would be sensibly designed to counterbalance this issue - e.g. in the case of tax law, he suggests that there is greater value in teaching students how to interpret the law as it changes, as opposed to teaching the law at that point in time.<sup>205</sup>

464. In this respect, the evidence of Drs Dann and Nurka, in relation to the performance of course-coordination duties (for which they were separately paid), is somewhat atypical of the ordinary experience of casual sessional staff. Whilst the NTEU attempts to rely upon this evidence to suggest that there is no qualitative difference between maintaining discipline currency as a casual versus continuing academic staff member, and that the direct evidence of NTEU witnesses was not consistent with there being a difference between them<sup>206</sup>, this is not in fact correct. For example, the evidence of Dr Michael Dix was that sessional staff are not allowed to coordinate courses, presumably for this very reason:

PN9333

As sessional staff, they're not required to convene the subjects they teach, are they?---No longer, no. In the past as a sessional they convened almost every offering that Swinburne has in Philosophy.

PN9334

But that's no longer the case?---It's not allowed, no.

465. To the extent that sessional staff are required to have discipline currency, the weight of evidence supports the conclusion that the relevant knowledge is directed to the subject matter within the particular subject. This contrasts to the breadth of disciplinary knowledge required of teaching and research academics, which cuts across the entire discipline and involves preparation of course materials and lecturing across a range of subjects.<sup>207</sup>

#### Sessional staff employed as course-coordinators are separately paid for that work

466. In relation to evidence from casual staff about needing to have and maintain discipline currency in order to perform course-coordination work. As indicated above at paragraph 397, the evidence shows those academics are separately paid for this work at the "*other required academic activity*" rate for course coordination duties, which is also a higher pay-rate that recognises that the employee will require deeper knowledge of the relevant discipline in order to develop and coordinate a course.

#### Work performed to maintain 'discipline currency' is not required work

467. Whilst it is acknowledged that much of the evidence led by the NTEU suggests that casual staff spend significant amounts of time reading to maintaining discipline currency, the evidence

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<sup>205</sup> PN5463.

<sup>206</sup> NTEU Closing Submissions, [B42].

<sup>207</sup> Exhibit 10, [63(e)].

shows that this work is not required by universities except where the academic is paid to prepare for the delivery of the lectures or tutorials.

468. The submission that it is an inherent requirement of their casual engagement to maintain their discipline beyond the scope of course delivery (including preparing for lectures and tutorials) was not supported by the weight of evidence. Further, the estimates of such activities were unreliable.

469. The best example of this is Dr Caron Dann who gave detailed estimates of the number of hours she spends maintaining discipline currency over and above preparation for her teaching work<sup>208</sup>:

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. ...

470. On cross-examination, however, Dr Dann's evidence was that she consults all of the books in her library (an estimate of 125 books) to prepare for lectures and tutorials, and she could only provide a "guess" of the number of online sources she consulted for such preparation:

PN8488

So can you estimate an annual figure for me?---I really can't. I don't know. I would be making it up.

471. This then led to an incongruous scenario whereby Dr Dann was unable to particularise the documents or number of hours spent preparing for course delivery, yet she maintained her estimate of the documents consulted outside of course preparation in order to lend support to the NTEU's claim:

PN8492

So you're able to estimate for the purposes of your statement all of the documents that you have looked at outside of preparation, but you've been unable to estimate those that you looked at for the course preparation?---Yes.

PN8493

But you've accepted, I think, at least in relation to the books, that you've accessed all of your textbooks in the course of actually preparing for the lectures?---Yes.

472. When pressed further about whether or not she accepted that her preparatory work for lectures substantially maintained her discipline currency and does not require further work, her response was that she "would have to be on top of things apart from the lecture" in order to adequately teach a tutorial:

PN8497

...And, as I say, tutorial questions can come out of left field. Particularly from Master's students. A lot of the Master's

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<sup>208</sup> Exhibit AO, [28]

students are actually working as professionals in the media field already. So they're not young, green, students who don't know anything about the working world....

...

PN8497

Any spare time I do have has to be really useful time spent watching programs that might help me be informed for my students, for example. So, you know, Four Corners, and that type of program.

473. Subsequent questioning from the Bench then demonstrated that the work she was performing was clearly going above and beyond what is required of her by her employer:

PN8498

VICE PRESIDENT CATANZARITI: Dr Dann, you can't actually prepare for the left-field question, can you?---True.

PN8499

....But you can try.

474. Dr Dann also acknowledged that she is not required to maintain membership of professional associations or attend international conferences to perform the requirements of her role, and that the majority of continuing staff who can apply for funding to pay for these expenses have as part of their role dedicated research activities that may necessitate those benefits.<sup>209</sup>

475. The evidence of other NTEU witnesses was generally consistent with this. For example, Dr Camille Nurka agreed that activities such as journal editing, writing articles, publishing in her field, and attending conferences are not required of her by her employer.<sup>210</sup> Dr Michael Dix who was in a teaching only role undertook his own research and also conceded in cross-examination that all of the activities referenced on pages 8 to 13 of his witness statement (Exhibit NTEU AU), which he cites as evidence of maintaining discipline currency, were directly referenced in research publications he wrote in his spare time in the previous 3 years (which includes time as a casual sessional academic), and were not required reading for his teaching work:

PN9328

A fair amount of that reading was for the purpose of your own research leading to the publication that you refer to?---All of that was directly referred to in publications that I've made in the last three years, yes.

PN9329

So that's as opposed to being required for your teaching when you were teaching as a sessional?---That's correct.

476. Whilst it logically follows that there must be reasons why academics are performing the reading and other "discipline currency" activities that they do, there is no objective evidence to suggest that this work is required of the academic to prepare for the delivery of sessional

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<sup>209</sup> PN8506-8510.

<sup>210</sup> PN8894-8896.

teaching work, particularly in circumstances where the preparation extends to broader areas of interest beyond the scope of the relevant course content.

477. Contrary to the NTEU's position, the weight of evidence supports a number of different reasons for the performance of this work.

478. First, that the work is performed to meet the high service standards of the academic. This is evident from the above analysis of Dr Dann's cross-examination and reflects the consistent evidence of a number of witnesses regarding service delivery generally as discussed above at paragraphs 399 and 400.

479. Secondly, that the work is being performed for professional advancement, either by improving their chances of subsequent engagements by universities, or increasing their professional profile within the broader academic community. This proposition is also supported by the evidence, for example:

(a) Dr Nurka accepted that the additional work maintaining her discipline currency benefits her academic profile and general standing as an expert in her field:

PN8878

MR PILL: You mentioned reading more broadly for context?---Yes.

PN8879

And I'm paraphrasing. Having done so, you'd accept that there are benefits that result to you from that in terms of your employability at other universities?---Yes. Okay, yes. I'll accept that.

PN8880

And your general standing as an expert in your field?---Yes.

...

PN8894

Do you accept that your sessional university employers have not directed or required you to attend conferences?---No. But it is part of the community of – see, there's a way of doing academia and being in academia that involves – that involves knowledge work...

(b) Dr Dann gave similar evidence, acknowledging that she is not required to attend international and national industry conferences to perform her duties as a casual sessional academic, but she does so for career development purposes and to enhance her academic profile.<sup>211</sup>

(c) Dr Michael Dix also gave evidence about the research he published in his spare time, giving evidence he has progressed from a sessional academic to a teaching intensive academic, and noting that he now has a "strong application" for conversion to a "teaching and research" role<sup>212</sup>; and

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<sup>211</sup> PN8509.

<sup>212</sup> PN9318-9320.

- (d) Dr Glenda Strachan agreed that academics looking for career advancement would be pursuing a raft of activities to do that - albeit in the context of pursuing an academic research career.<sup>213</sup>

480. Finally, that the work is otherwise performed because of their interest in the discipline. Evidence in support of this proposition was provided by a number of witnesses, for example:

- (a) Dr Linda Kirkman gave evidence that she maintains discipline in her currency by spending an hour a day, on most days, reading online articles and journals because she "*is a bit of a nerd*"<sup>214</sup>;
- (b) Professor Hamel Green agrees that staff would be maintaining discipline currency regardless of whether it is required for work, as a function of being passionate about their discipline<sup>215</sup>, and that the passion for a particular field doesn't cease when you retire<sup>216</sup>;
- (c) Dr Caron Dann agreed that she is a "*lifetime passionate follower of journalism and media*"<sup>217</sup>; and
- (d) Professor Andrew Vann gave evidence that the types of people hired to work on a sessional basis are industry professionals who are already active within their discipline, and are therefore "*intrinsically motivated*" to have an interest within it, irrespective of whether or not they are being paid to deliver lectures or tutorials within it.<sup>218</sup>

481. Whilst it is not suggested that the tendency to exceed the expectations of the university, or that the work ethic of academics warrants criticism of any kind, it is clear that their depth of reading and activities well exceeds what is required of them by the University to conduct the teaching and course coordination duties of their role.

482. Against this background, it would not be appropriate, nor would it be consistent with the modern awards objective, to increase the rates payable to casual sessional staff to compensate them for that activity.

#### Sessional casual staff are a diverse cohort

483. As is evident from the NTEU's repeated criticisms of the use of casual employees within the higher education sector (see for example paragraphs B13 and B16 of its Closing Submissions), the NTEU's claim for discipline currency payments focuses on the percentage

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<sup>213</sup> PN4530.

<sup>214</sup> PN8613-8614.

<sup>215</sup> PN6257.

<sup>216</sup> PN6223-6225.

<sup>217</sup> PN8330-8331.

<sup>218</sup> PN5394.

of casual academics they refer to as long-term or "career" casuals who aspire to life-long careers in academia by rising up the ranks from sessional teaching to teaching and research roles (along similar lines to the experience of Dr Michael Dix - described above at paragraph 479(c)). Specifically as noted above at paragraph 444 it aims to compensate "career casuals" for their ongoing need to maintain discipline currency between successive engagements.

484. To support its position that a significant number of casual academics are routinely engaged on successive engagements, NTEU appears to primarily rely upon the evidence of Drs Junor, Strachan and May to support this submission, notwithstanding that these witnesses conceded during cross-examination that their data regarding the length of casual employment does not reliably indicate whether or not the employment was "continuous" or "broken":

Anne Junor	<p>PN2774</p> <p>And that question, "How long have you worked as a casual in your current university?", how did it distinguish between whether that was continuous employment, or whether a respondent answering that question would simply reference when they first worked at the university until the current day?---It didn't.</p>
Robyn May	<p>PN2154</p> <p>You accept that that could just be the period from their first engagement to the date that they do the survey?---Yes.</p> <p>PN2155</p> <p>Irrespective of whether there were breaks where they didn't work that would just be December, January, February?---Yes.</p> <p>PN2156</p> <p>Or indeed a more significant break?---Potentially, that's right.</p>

485. Regardless, the NTEU's claim does not adequately recognise the significant diversity amongst casual academics and that there is no singular or predominant archetype of the casual academic. As reflected in the evidence of key university witnesses, there is significant variance in:

- (a) the number of lectures, tutorials and subjects the academic is employed to teach, including the number of disciplines over which the teaching may be spread, and the period over which the relevant teaching is conducted (e.g. over one semester each year);
- (b) the academic's experience either as a current/recent student or an industry professional;
- (c) the qualifications of the academic including whether or not the academic recently was awarded their a PhD in the discipline;
- (d) the reasons why the academic works at the university - e.g. to supplement his/her primary income, or to initiate a longer academic career; and

- (e) the number of concurrent jobs held by the academic including whether or not academia is the main source of income for the academic.

(See for example the witness statements of Professors Marnie Hughes-Warrington<sup>219</sup>, Stephen Garton<sup>220</sup> and Mr Andrew Picouleau<sup>221</sup>),

486. Whilst the NTEU acknowledges approximately 25% of sessional staff are industry professionals who maintain discipline currency by virtue of their primary employment (and who they exclude under their proposed clause from entitlement to the proposed allowance)<sup>222</sup>, the NTEU's claim fails to exclude the very significant proportion of casual academic staff who are PhD students who, by virtue of their studies, already maintain discipline currency.

487. According to Drs May and Strachan, such students represent approximately 55% of the workforce.<sup>223</sup> Mr David Ward also gave consistent evidence from the perspective of UNSW as follows<sup>224</sup>:

Many of our casual academic staff are students, generally postgraduate students. Based on a review of the payroll and student databases, 54% of our casual academic staff in 2015 were students at the UNSW. They are offered casual teaching opportunities because they have usually completed an undergraduate degree and/or they are currently studying in the discipline. ...

488. The use of current PhD students for casual teaching is also demonstrated by the following evidence:

- (a) the evidence of Michael Dix was that "nearly all" sessional staff are PhD students: "*There are usually plenty of applicants and we can pick and choose*";<sup>225</sup>
- (b) the evidence of Ken McAlpine was that it is common for PhD students to be given short-term casual roles to assist with tutes and marking<sup>226</sup>; and
- (c) both Linda Kirkman and Dr Camille Nurka also recalled in cross-examination their experience of working as a casual sessional academic concurrent to their PhD coursework: in the case of Dr Nurka, between 2000 to 2003,<sup>227</sup> and in the case of

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<sup>219</sup> Exhibit 10, [63].

<sup>220</sup> Exhibit 9, [65(b) and [66].

<sup>221</sup> Exhibit 12, [43].

<sup>222</sup> NTEU Closing Submissions, [B15].

<sup>223</sup> PN2163-2168, 2758-2764, 4958.

<sup>224</sup> Exhibit 20, [34].

<sup>225</sup> PN9331

<sup>226</sup> PN1856.

<sup>227</sup> PN8965.

Dr Kirkman, between 2009 to 2014 (after previously being employed for 4 years on the same basis as whilst completing her Masters coursework).<sup>228</sup>

(See also the cross-examination of John Kenny at PN6169 - PN6170; and Dawn Freshwater at PN6858).

489. The weight of evidence before the Full Bench is therefore that approximately 80% of all casual sessional staff maintain their discipline currency through either their primary profession (approximately 25%) or their current studies within the relevant discipline (approximately 55%).
490. This means that the NTEU's proposed clause, as currently worded, leads to an inequitable scenario whereby short-term casuals (e.g. those engaged to deliver lectures and tutorials for as little as 1-2 weeks) and students who are already current in their discipline, are eligible for the same allowance as "career" casuals who, as noted above, are performing work far above what is required of them.
491. For example, as set out in Exhibit 5 at paragraph 131, the NTEU's claim would require the University to fund currency discipline for a staff member who comes in and delivers say, 3 x 2 tutorials in one subject, or 4 tutorials and 4 repeat tutorials in one subject. Such a casual staff member would then be paid:
- (a) 12 hours for the 4 tutorials (being 4 contact hours and 8 hours' preparation);
  - (b) 8 hours for the repeat tutorials delivered within 7 days of the original relevant tutorial (being 4 contact hours and 4 hours' preparation); and then
  - (c) in addition to those 20 hours pay, the university has to pay a further 2 hours' discipline currency allowance.

#### Cost and regulatory burden

492. As noted above in respect of the policy familiarisation claim, the NTEU submits at paragraphs B61(g) and B61(h) of its Closing Submissions that the introduction of a discipline currency allowance would only impose a minor administrative and financial cost on employers. There is no evidence advanced in support of this position.
493. This again contradicts the contrary evidence indicating that the claim will in fact impose significant additional cost and regulatory burden on universities.
494. With respect to its cost, as set out at paragraph 140 of Exhibit 5, the estimates from universities are that the costs would be in the order of \$50 to \$60 million at award rates and \$80-\$90 million at enterprise agreement rates.<sup>229</sup> It is acknowledged that cross examination identified that a number of adjustments or assumptions need to be included to obtain a more

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<sup>228</sup> PN8588-8589.

<sup>229</sup> Picouveau (Exhibit 12) [46] and David Ward (Exhibit 20) [35].

accurate estimate of the costs and that the figures provided could only be considered broadly indicative and that the actual costs may be lower. Nevertheless, the Commission can note based upon the "mathematics" of the claim that there is an additional hours payment for every four hours of delivery and whilst the rate is at the "other academic activity rate" for an eligible employee it increases the costs by approximately 25%. This estimate is based upon the evidence of Messrs Andrew Picouleau and David Ward, who both sought internal advice on the likely cost of the claim to their respective employers.

495. The fact that there would likely be a significant cost impost of the claim was in any event supported by Professors Marnie Hughes-Warrington (as set out above at paragraph 440) and Andrew Vann<sup>230</sup>, against the background of their significant experience.

496. In addition to the cost impost of the NTEU's proposed claim, as noted at paragraph 141 of Exhibit 5, there would be an additional regulatory burden as the university would need to:

- (a) monitor and record which of its employees are employed to undertake the requisite number of teaching hours triggering the payment, and implement processes to administer the payment; and
- (b) ascertain, on an ongoing basis:
  - (i) which of its employees undertake "primary employment" with a different employer;
  - (ii) which of its employees are paid the allowance from a different employer;
  - (iii) which of its employees are otherwise paid to attend development, academic or professional conferences and calculate any relevant adjustments; and
  - (iv) which classes taught by the employee directly relate to his/her profession.

497. University systems do not identify and record such information.

498. If not carefully monitored, it is possible for employers to be in breach of the award in circumstances where, unbeknownst to them, the requirement to pay an allowance is triggered due to, for example, the employee ceasing primary employment elsewhere.

### **Response to specific issues raised by the NTEU in its submissions**

#### *Assertion that non-casual staff are paid for maintaining discipline currency through research*

499. The NTEU notes at paragraph B36 of its Closing Submissions that teaching-and-research staff have greater opportunities to maintain currency through the performance of research, the

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<sup>230</sup> Exhibit AHEIA9, [9].

suggestion being that continuing staff are paid for maintaining their discipline currency, whereas teaching focused staff (such as casual sessional staff) receive no such compensation.

500. Whilst it is acknowledged that undertaking research contributes to the maintenance of discipline currency, continuing staff are paid for maintaining their currency through the payment of their salary. In relation to their research activities they are not paid for maintaining their currency, rather they are paid for undertaking the research outputs that they produce. There is no separate or incorporated payment.
501. As noted above, teaching-and-research staff are employed to shape and innovate the discipline in which they are employed. This necessarily involves a more sophisticated understanding of the discipline as a whole. Where they undertake and pursue research for the University to further the advancement of the discipline, the payments they receive are in exchange for producing research outputs. The payments are not made to maintain discipline currency.
502. The NTEU relies upon the ACU Workload Policy (MFI 48) to support its position that the conduct of research constitutes a payment for maintaining discipline currency<sup>231</sup>. There is no primary evidence from the ACU about the reasons why it allocates a lower time allocation for discipline currency maintenance to teaching-and-research staff when compared to teaching focussed staff. This is notwithstanding that the NTEU had an opportunity to make such an inquiry of Ms Diana Chegwidan during her cross-examination - noting that Ms Chegwidan is the "Responsible Officer" for the policy<sup>232</sup>, and the person through which the document was marked for identification.<sup>233</sup> In the absence of such evidence, any conclusions drawn about the meaning of the policy are necessarily inferential.
503. It is also noted that the policy is specific to the ACU and, as acknowledged by the NTEU, underscores the ACU EA which is a negotiated agreement between that university and the NTEU having regard to the industrial and strategic objectives of those organisations and the ACU's employees. This approach is not identified in the other enterprise agreements tendered (that we have been able to identify). The ability of the Commission to draw parallels to the broader higher education sector based upon this document are therefore limited, given that the clause is atypical and does not reflect the arrangements of other universities in evidence in this proceeding.
504. Against this background, there are a number of equally plausible explanations as to why the policy provides for a higher time allocation of discipline currency maintenance / scholarly activity to teaching-focussed staff when compared to teaching-and-research staff (other than an acknowledgement that teaching-and-research staff are already paid for discipline currency

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<sup>231</sup> NTEU Closing Submissions, [B35]-[B39].

<sup>232</sup> Exhibit AHEIA 14, [1]; PN9425; and page 1 of the policy - the "Director, Human Resources" is the Responsible Officer.

<sup>233</sup> PN9471-9473.

through their research). For example, the disparity may arise because the ACU simply agreed to a claim from employees or the NTEU that built in a higher allowance for teaching-focused staff. Alternatively, it may be the case that ACU places a higher emphasis on the maintenance of discipline currency amongst its teaching focussed staff to ensure high standards of teaching - particularly since the development of units and courses is listed at clause 5.2.3 of the ACU EA as a "teaching and scholarship of teaching" activity rather than a research activity.

505. Such an interpretation is also consistent with the phraseology of "Academic Career Pathway" which is used within the ACU Academic Workload policy, which implies the policy is as much about shaping the career trajectory of continuing academic staff (e.g. by nurturing career development) as it is about setting the employee's immediate workload.

*Assertion that casual employment is far cheaper than non-casual employment*

506. The NTEU references and relies upon the principles expounded in the *2000 Metals Casuals Case*, however:

- (a) the case was decided almost 20 years ago and was confined to casual employment within the metal industry and in particular the decision to introduce casual conversion to that industry; and
- (b) as acknowledged by the NTEU at paragraph B47 of its Closing Submissions, casual employment in the metal industry is on an hour for hour basis, which differs from the higher education industry which provides for a system of swings-and-roundabouts payments.

507. On this basis, the reliance upon the *2000 Casuals Case* should be given little weight.

508. In any event, the NTEU's suggestion that employment of casual teaching staff in the higher education sector is "cheaper (by a lot)"<sup>234</sup> is not supported by any evidence in the proceeding.

*Sessional casuals are employed for long periods of time*

509. At paragraph B31 of its closing submissions, the NTEU references a history of universities reengaging casual employees for more than a single teaching period and in particular the evidence of Ann Junor that such arrangements date back to 2002. This longevity of employment is couched as an evasion of employer responsibilities to pay for the maintenance of discipline currency.

510. The suggestion that Universities are taking advantage of casual staff is rejected and is not supported by the weight of evidence. For example, the evidence of Mr Andrew Picouleau<sup>235</sup> was that:

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<sup>234</sup> NTEU Closing Submissions, [B40].

<sup>235</sup> Exhibit 12, [44].

Whilst it is recognised that some of these staff are engaged on a sessional basis for a number of teaching periods over a number of years, this is not the preferred approach of the University. There are a significant number of sessional staff who are not so engaged. ...

511. Further, NTEU witnesses who give evidence about being employed for long periods as a sessional academic (e.g. Dr Michael Dix) confirm that they work at a number of institutions concurrently and do so to increase their academic profile so that they can progress to other roles within the university. As recognised by Dr Dix during cross-examination, academic progression can require either a surge in student numbers within the discipline or an internal departure<sup>236</sup> - which might take some time. It does not however alter the fundamental character of sessional casual work, which is to assist continuing academic staff to deliver lectures or tutorials.
512. To the extent that sessional employment is couched in negative terms, this proposition is not to the point. Further, as indicated above, sessional academics include a significant number of students who, by virtue of their engagement, are provided a source of income and development opportunities within which to further their general experience in the relevant discipline. It also provide opportunities for staff, building a relationship and gaining exposure with the employer and other academic staff providing a pathway to potential future employment as a continuing academic staff member.
513. This operates against the background of:
- (a) casual employment being a legitimate form of employment under the Academic Staff Award; and
  - (b) the casual rates of pay having been considered to meet the modern awards objective upon creation of the Academic Staff award.

**Discipline currency allowance is not necessary to achieve the modern awards objective**

514. Taking into account the above matters, the Commission should not be satisfied that the NTEU's claim to introduce a policy familiarisation allowance is necessary to meet the modern awards objective for the following reasons:
- (a) the absence of any equivalent allowances in other awards, despite there being a number of awards covering skilled casual labour;
  - (b) the absence of any evidence supporting the NTEU's proposition that discipline currency requirements have increased since the creation of the Academic Staff award; and
  - (c) the criteria set out at section 134(1) of the FW Act and in particular the need to encourage collective bargaining, the need to promote flexible workplaces, and the

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<sup>236</sup> PN9323-9324.

likely impact of the claim on university business and productivity, as well as its cost and regulatory burden.

515. Further consideration of the indicia listed at section 134(1) of the FW Act is set out below.

134(1)(a) relative living standards and the needs of the low paid

516. The NTEU's position at paragraph B61.b. of its Closing Submissions is that the "relative living standards" of casual employees (as low income workers) weighs in favour of making the changes proposed. Its submission is based upon the evidence of Robyn May, Glenda Strachan and Anne Junor.

517. Putting to one side the reliability the "expert" evidence of these witnesses (for the reasons set out above at paragraph 76-89), even if the evidence is taken at its highest, it does not strongly support a conclusion that sessional academics are low paid.

518. For example, the evidence of Robyn May was that the nature of sessional work is that it is "juggled" with work at other universities or outside work, and that "a significant minority" depend solely on their casual earnings for their livelihood.<sup>237</sup> Notwithstanding this, as was admitted by Dr Junor during cross-examination, the estimates of casual earnings per semester that were led into evidence did not take into account earnings such as PhD, stipends, scholarships or earning from other employment.<sup>238</sup>

519. The suggestion that minimum awards rates in excess of \$30 for academic work (\$35 if a doctorate is held) constitute low-paid work should not be accepted is otherwise unrealistic and without proper basis.

134(1)(b) the need to encourage collective bargaining

520. Issues concerning discipline currency are potentially matters for enterprise bargaining, and it is conceded by Mr McAlpine that similar claims to that which are now pursued, have been pursued by the NTEU in enterprise bargaining.<sup>239</sup>

521. Similar evidence was also given by Professor Hughes-Warrington and Mr David Ward as follows:

Professor Hughes-Warrington (Exhibit 10)	69. I am informed by Nadine White that a number of the claims now made by the NTEU for variation of both the Academic Staff Award and the General Staff Award have been made in enterprise bargaining and have been the subject of negotiation with the ANU in the past. This includes:  (a) In 2008, the NTEU seeking a range of benefits for casual academic staff, including a clause for a "Discipline Currency Allowance" (which was not agreed to) in the following terms:
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<sup>237</sup> PN2232.

<sup>238</sup> PN2775-2777

<sup>239</sup> PN1004-1008

	<p>"1. This clause shall not apply to occasional or guest lecturers or to casual staff engaged in conduct demonstrations, or routine and simple marking.</p> <p>2. A staff member employed on a casual basis to undertake teaching or marking duties shall be entitled to an additional payment of five hours' pay per subject, in recognition of the time required to maintain currency in their academic discipline.</p> <p>3. The payment payable under 2. above shall be reduced by one hour for each hour of paid attendance at academic conferences or structured academic staff development activity within the relevant academic discipline."</p>
<p>Mr David Ward (Exhibit 20)</p>	<p>16. .... a number of claims that are now being sought by the NTEU in respect of both the General Staff Award and the Academic Award have formed part of the log of claims by the NTEU in enterprise bargaining (in varying forms), and have been the subject of negotiations with the UNSW. In particular:</p> <p>(c) ... in the most recent round of bargaining for the 2015 Academic EA a discipline currency allowance in similar terms to the present Discipline Currency Claim. Again, this clause was not agreed to by the UNSW.</p>

522. It is matter that can and should be left for bargaining.

134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work - both claims

523. The NTEU states at paragraph B61.d and B61.e that both of its claims promote the efficient and productive performance of work by encouraging employees to do what is "manifestly necessary" in relation to discipline currency, and to incentivise employers to provide staff development opportunities.

524. This submission is not based upon any evidence, and in any event (as noted above at paragraph 511-512), casual employees who wish to continue to be employed to teach at universities are already incentivised to maintain discipline currency in order to assist in being offered future appointments in the higher education industry for future appointments.

134(1)(e) the principle of equal remuneration for work of equal or comparable value

525. As noted above in relation to the NTEU's policy familiarisation claim, part of the NTEU's submission is that casual work is "cheaper (by a lot)" when compared to corresponding full-time members. Aside from there being no evidence led to support this conclusion, casual academic staff are generally employed in narrower roles which are fundamentally different in overall character to those of continuing academic staff (except in limited circumstances).

Further the salary for a continuing staff member who undertakes research and thereby maintains their currency is being paid for the research (not for discipline currency)..

526. This claim is otherwise predicated on the ability of the Full Bench to draw a comparison between the conditions of employment under the enterprise agreements underpinning the employment conditions of casual staff, and the conditions of the Academic Staff award that would otherwise apply. To that extent, the NTEU attempts to downplay the relevance of employees already being paid far in excess of the award rates at paragraph B50 of its Closing Submissions.

527. Whilst the Group of 8 agrees that the conditions applicable casual staff under an enterprise agreement (including the workloads that correspond to their salary under an enterprise agreement) are not relevant to whether or not the Academic Staff award meets the modern awards objective, employers who pay casual staff rates significantly higher than award rates are entitled to expect more of their employees when compared to those employed on minimum award wages.

134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden - both claims

528. This is discussed above at paragraphs 434-440 and 494-496.

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## 8. NTEU C - Academic Salaries, Promotion and the MSALs (Academic Staff Award)

529. The NTEU seeks to alter clause 18 which deals with the minimum standards for levels of academic staff (**MSALs**) to qualify the existing provision as follows:

*"The MSALs 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 should be classified at that classification for which the MSAL best describes the work of the employee."*

### 8.1 Preliminary Comments

530. There are a number of areas of common ground in relation to this claim, namely that:

- (a) all universities currently have in place academic promotion systems based on academic merit;
- (b) that academic promotion based upon academic merit is the appropriate process for advancement in Universities;
- (c) academic promotion is generally based upon the employee's standing within the national and international academic community, as determined by the employee's peers. It is not tied to the performance of specific duties in a traditional sense<sup>240</sup>; and
- (d) academic promotion is not regulated by awards nor has it even been<sup>241</sup>;
- (e) there have been no disputes brought by the NTEU regarding the classification of academics under the Academic Staff Award or its predecessor instruments<sup>242</sup>
- (f) some academic promotion policies have eligibility criteria or exceptions<sup>243</sup>. These can include employees on probation, employees on fixed-term contracts of a short length, employees who might hold a particular fellowship that is appointed at a particular level, and employees who are subject to a formal disciplinary process, serving a minimum period before becoming eligible for academic promotion.

531. As became evident during the course of the proceeding, the NTEU's claim is predominantly concerned with employees who are not eligible for promotion under existing academic

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<sup>240</sup> NTEU Closing Submissions, [C26]; PN1714.

<sup>241</sup> NTEU Closing Submissions, [C32].

<sup>242</sup> PN1956 (Mr McAlpine).

<sup>243</sup> NTEU Closing Submissions, [C24]; PN364-365 and 1885.

promotion policies currently in place. The following exchange between the Bench and Ms Gale (that occurred during the cross examination of Mr Andrew Vann), is informative:

PN5512

VICE PRESIDENT CATANZARITI: ... This is this clause on one view is a person who is externally funded, which is the sort of example I had before me in a dispute, where the academic knew that they were only there for that period when they were funded, so that was the position. When that funding went when that grant went they'd have to look for another job somewhere else.

PN5513

MS GALE: Indeed.

...

PN5520

VICE PRESIDENT CATANZARITI: Okay, and you say that picked up by the variation you are seeking?

PN5521

MS GALE: Yes. We say that the clause in relation to classification of academic staff applies to all academic staff, regardless of the source of funding. The award applies to all academic staff, regardless of the source of funding and so does that clause of it.

PN5522

VICE PRESIDENT CATANZARITI: Notwithstanding people who are in these positions have accepted their positions on the classification that they took their position in the first place. You are now saying they should be allowed to be promoted, these limited externally-funded positions, which is again the dispute that I had before me.

PN5523

MS GALE: No. We're not saying they should be able to be promoted, your Honour. ...

PN5525

MS GALE: ... we are saying that they should have access to an entirely different concept which is reclassification and that is a question of the work that they are doing.

PN5526

VICE PRESIDENT CATANZARITI: But their funding in those positions is based upon the classification they got the position in. You say they should be reclassified while they are in that funded position. It is a bit of a chicken-and-egg situation, because these very people are people that came in on a particular basis. The funding was, "You are researcher 1" or whatever it is. That's it. There is no ability to move.

532. The Group of 8's position is that there is no compelling reason to introduce such a change, particularly having regard to the requirements of the FW Act, the existing award provisions and the absence of any disputation in relation to the current framework.
533. The NTEU have not established a merit case supported by probative evidence.
534. The award already provides requirements and obligations for employees to be appropriately classified upon appointment and the fact that a small cohort of employees are not eligible for promotion when they are on probation, or employed on a relatively short fixed term contract, or appointed to an externally funded fellowship attaching to a particular level is not basis to conclude that the award variation proposed by the NTEU is a necessary variation to the award.

There are good reasons why such employees are not eligible for promotion at a number of universities.

## 8.2 Reasons why the NTEU's claim should be rejected

### The claim is inconsistent with the history of the current clause

535. The history of the current provision is set out in detail at paragraphs 146-149 of Exhibit 5 which, whilst not repeated in these submissions, is relied upon in full. As a broad summary, the clause was the subject of contested arbitration by the Commission in 2002, during which it was recognised by the Commission that the appropriate process for advancement between academic levels was merit based promotion based upon peer review and that the inclusion of the MSALs in the Award was not intended to undermine that position nor to compete with academic promotion.
536. As a result, the parties to the arbitration (which included the NTEU) consented to the statement that "MSALs will not be used as a basis for claims for reclassification by an employee". Accordingly, the position now sought by the NTEU departs from the specific basis upon which the MSALs were included in the Award, following a specific and lengthy arbitration by the former AIRC.

### Academic standing is not capable of sensible industrial regulation

537. The use of the MSALs as a basis for reclassification would create a tension with the current framework which involves peer-based academic promotion based upon merit, taking into account academic standing and their demonstrated capacity to make the contribution at the higher level. This requires comparison not just with the MSALs but with their peers (both nationally and internationally) and their overall capability.
538. This proposition is supported by the (limited) evidence given in the proceedings about this issue. See for example the following evidence of Professors Andrew Vann and Owen Coaldrake:

Andrew Vann (Exhibit AHEIA 9)	14. The ability for staff to apply to an external industrial tribunal would completely undermine this system founded on peer review and would likely lead to universities having to be far more rigid about rewarding staff achievement – that is, universities would probably have to develop a more structured approach to seniority and require staff to apply for more senior positions rather than allowing them to apply for promotion in position. As with the other proposals, we believe this would serve to undermine the sense of professionalism for academic staff.
Owen Coaldrake (Exhibit AHEIA 10)	21. The Australian promotion process of peer review rather than reclassification is also the process used internationally, particularly in the United Kingdom, the United States, Canada and New Zealand. As with the introduction of regulation of hours in an industrial award, a system whereby an industrial tribunal could determine the classification of an academic staff member would put Australia significantly out of step with its international peers.
Owen Coaldrake	PN5624  Our promotional panels [at QUT] always have external representatives on them, and that helps

us, in terms of national and international norms and benchmarks.

The existing safety net is sufficient

539. The MSALs contained in the Award together with clauses 14 and 18 of the Academic Award already require that an employee be appropriately classified at the time of appointment:

**14. Requirement to state terms of engagement**

**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:

(a) for employees other than casual employees, **the classification level** and salary of the employee on commencement of the employment, and the hours or the fraction of full-time hours to be worked...

(emphasis added)

**18. Classification of academic staff**

.... 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.

(emphasis added)

540. This operates against the background of uncontested evidence from senior university academics that conducting an analysis of the requirements of a role and correlating it to a corresponding MSAL is not a difficult exercise:

PN5497

...going back to the discussion that we had about appointment and also constructing grants, usually when you are putting these things together, you have a pretty good idea of the level of work you are going to require from someone to discharge the functions of the grant. So I think the expectation would be that you don't get that badly wrong and you don't accidentally employ a professor at the level A, or something.

541. The NTEU suggests that the safety net is deficient because there is no "enforceable right" to be reclassified after initial appointment. As is evident from a plain reading of Clause 18, if the employee acquires extra skills and does work at a higher level and increases their academic standing during the course of their employment, the employee could not be required by the employer to utilise or fully utilise those additional acquired skills unless appointed to the higher level and the employee can choose to remain at their current level and to perform work at this level.

Not a required term

542. Under the FW Act, awards must contain certain terms (required terms) and otherwise under section 139(1) may include terms about certain matters (permitted terms) including "skill-based classifications and career structures". It is not therefore mandatory that a modern award must include terms about all of the matters listed in section 139(1).
543. Accordingly, in considering the references in section 134(1) and section 3(b) of the FW Act to "*the Commission ensuring that modern awards provide a fair and relevant minimum safety net of terms and conditions*", there is no statutory requirement that a classification structure in an award must also subsequently provide for progression through the classification structure.
544. The NTEU's proposed clause is not therefore necessary to meet the modern awards objective.
545. Further, it was acknowledged by Mr McAlpine that the in case of an employee who may have a number of sequential fixed term contracts, that they are employed on a new instrument of appointment in respect of each contract and accordingly clause 18, already requires that the position be offered at the appropriate classification.

PN1952

It describes the MSALs and then in the second paragraph there, "An academic appointed to a particular level" so if I pause there, do you accept that under the existing award regulation, upon appointment or engagement it's necessary for the staff member to be appointed to the particular level that accords with the MSALs?---Yes. I think that's more probable than not. I don't think it has ever been tested, but I think that is a reasonable interpretation.

PN1953

Yes. If I simplify that, the clause requires appointment to the correct classification upon appointment, but it doesn't have a particular mechanism in the award to progress through the classifications?---Yes, that's right.

PN1954

That first obligation applies upon each engagement or appointment. Do you accept that?---Yes.

### **8.3 Response to particular matters raised by the NTEU**

Disputes about reclassifications

546. The NTEU argues that the "framework has changed" since it agreed to the current wording of this clause (on the basis that disputes about reclassifications can no longer be resolved through the general Commission dispute processes)<sup>244</sup>. As noted above:
- (a) the clause was been included in award since 2002 during the life of the *Workplace Relations Act 1996* (Cth); and
  - (b) notwithstanding this, the NTEU could not recall any disputes about employee classification raised in the last 30 years<sup>245</sup>.

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<sup>244</sup> NTEU Closing Submissions, [C11].

547. Any suggestion that it is necessary for employees to be able to dispute their classification (in accordance with formal dispute resolution procedures) to achieve the modern awards objective is without proper basis.

548. In any event, as the Commission would be aware, there are a whole range of matters that are not regulated by modern awards or specifically regulated by modern awards that are now solely in the province of enterprise bargaining. This is one of the key objects of the FW Act and is not unique to reclassification disputes.

Operational factors should have no bearing on classification

549. The NTEU suggests at paragraph C14 of its closing submissions that "*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*". There is no evidence that universities take such matters into account except where:

- (a) the position is tied to a grant or external funding; or
- (b) the employee agreed to be classified at a specified classification for a fixed term, and in those instances it is appropriate to draw a distinction between the employee's capability, and the requirements of the role (which is to perform work at a specific classification in accordance with the terms of the grant or for a specified period of time).

The BOOT test

550. The NTEU suggests that an enterprise agreement that implements a "promotion freeze" during its operation could pass the BOOT test because under the Award there is no entitlement to promotion. This is again not unique to the Academic Staff Award and there was no evidence of such a situation occurring or likely to occur.

Academics currently have significant market power

551. Contrary to the NTEU's suggestion that academics are otherwise not entitled to an appropriate minimum wage commensurate to the work value of their capabilities, the evidence of senior university staff was that these categories of staff are highly sought after commodities and, as such, have significant bargaining power at the time of their appointment. See for example the following evidence given by Professors Andrew Vann and Owen Coaldrake:

Andrew Vann (Exhibit AHEIA 9)	13. It is also the case that successful academics in the research space (who are typically those on fixed-term contracts) are able to bargain for increased pay at the time of appointment or reappointment. In recent times we have seen staff being poached by other universities when the Excellence in Research Australia exercise is conducted so it would seem that successful academics have significant market power.
Owen	22. Australia's universities compete with each other for the same resources: students, research

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<sup>245</sup> PN1956 (Mr McAlpine).

Coaldrake (Exhibit AHEIA 10)	grant money. They also compete for the talent pool of academics. Skilled academics can, and do, make rapid advancement via the promotion process. If a university abandoned its promotion process, it would lose talented staff to other institutions.
Andrew Vann	PN5538  .... to echo his Honour's comments from earlier on, these contracts are renegotiated, successful researchers are highly marketable commodities and often grants are written with them in mind, so they are often actually able to bargain themselves up between contracts. So if what you say is technically correct, but if the issue is whether the overall system is fair and affords opportunities for staff to be appropriately paid, I am still pretty comfortable that it does.

552. In any event the position is required to be correctly classified under the award at commencement.

s134(1)(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

553. Notwithstanding that NTEU's concession that all employers within the sector currently have academic promotions policies that are compliant with its proposed clause, the clause itself is ambiguous and amenable to disputation. In particular:

- (a) there may be uncertainty over what constitutes a "bona fide academic promotion system based on academic merit";
- (b) "academic merit" is defined in paragraph 5 as being the 'academic standing of the employee's teaching, service and research'. This appears to exclude the possibility of teaching focused staff, of which there is a significant cohort, being promoted entirely on an assessment of their teaching quality and capability; and
- (c) as indicated above, the clause does not appear to accommodate fellowships such as ARC and NH & MRC fellowships, a number of which are specifically tied to a particular classification level and provide the fellowship salary funding at that level.

554. The clause is not therefore practical and would potentially be difficult to implement.

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**9. NTEU D - Changes to the Sessional Rates Schedule (Academic Staff Award)**

555. The key issue in contention which was the NTEU's application to seek to make changes to provide certain higher rates which attach to employees who hold a PhD also attached to any employee who performs subject co-ordination duties, not only in respect of the subject co-ordination duties but in respect of any casual academic task they perform even those unrelated to the subject co-ordination duties.
556. The Group of 8 note that the NTEU is now not pursuing that part of the variation.
557. The NTEU changes now seek insertion of some definitions for "lecture", "tutorial", "repeat lecture" or "repeat tutorial" and "associated working time".
558. Whilst it is arguable that such changes are not necessary, it is acknowledged that such wording was part of the pre-reform awards. This is evident from the marked attachment that we prepared and relates to Attachment 2 to Exhibit 5. It also commonly appears in enterprise agreements.
559. In the interests of efficiency in the proceedings and as it further reinforces our general submission that there is settled, fair and relevant industrial regulation in this sector the Group of 8 do not oppose the addition of the proposed definitions which appear at D15 of the NTEU closing submission.

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## 10. NTEU E - General Staff Working Hours and Overtime (General Staff Award)

560. The NTEU has sought two changes to Part 5 of the General Staff Award. The first is relatively minor and the second group of changes are more substantive.

### 10.1 Changes to clause 21

561. The first of the NTEU's claims is to insert the following words into the start of Clause 21:

21.1 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.

This in place of:

21. Ordinary hours may be worked in a manner agreed over a four week cycle.

Category of staff employees	Ordinary hours	Spread of hours (non shiftworkers)
Building services staff	38	6.00 am – 6.00 pm Monday – Friday
Catering and retail staff	38	6.00 am – 7.30 pm Monday – Sunday
Security staff	38	6.00 am – 6.00 pm Monday – Sunday
Children's services staff	38	6.30 am – 6.30 pm Monday – Friday
Storage services staff	38	7.00 am – 5.30 pm Monday – Friday
Building and maintenance staff	38	6.00 am – 6.00 pm Monday – Friday
Trades staff, including plumbers	38	6.00 am – 6.00 pm Monday – Friday
PACCT staff	36.75	8.00 am – 6.00 pm Monday – Friday

562. If the proposed changes have no operative effect beyond the existing award provisions they are not necessary to achieve the modern awards objective. If they do have an intended change in operative effect this has not been identified by the NTEU and no merit based case has been put forward for the variation.

563. To be accepted, the Full Bench must be satisfied that the General Staff Award does not currently meet the modern awards objective, and that the proposed variations are necessary to achieve the modern awards objective, on the basis that the "ordinary hours" should be expressed "as a maximum", and the term "spread of hours" should be defined (as alleged at paragraph E2 of the NTEU's Closing Submissions).

564. While on one view this is effectively a drafting matter for the Commission, the Commission should note that:

- (a) the effect of the proposed change is already reflected in the existing clause. The proposed change is therefore unnecessary and the existing provision is sufficiently clear;
- (b) there is no evidence that the clause has been misunderstood or the subject of confusion - for example, there are no reported disputes in relation to the operation of the clause;
- (c) there is no suggestion that the clause is "ambiguous" as having been interpreted in being capable of more than one meaning; and
- (d) given that the very large majority of employees covered by the General Staff Award are covered by enterprise agreements (and do not therefore refer to the General Staff Award), the clause is in practice only reviewed in the context of conducting the BOOT analysis and for that purpose the meaning of the clause is well understood.

565. The claim should therefore be rejected.

566. If contrary to this submission, the Commission considered "spread of hours" at the top of the table is unclear because it does not reference "ordinary" hours (other than by obvious implication), it could simply be amended to state "spread of ordinary hours".

***Insertion of new clauses 23.2 and 23.3***

567. In addition to its change to clause 21, the NTEU claims that it is necessary for two additional clauses to be inserted into clause 23 as follows:

**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, 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.

568. The NTEU in opening states that the existing clause has "one simple flaw", which was that it "speaks of overtime and TOIL being available in the case of authorised work".<sup>246</sup>
569. Both claims should be rejected. The insertion of the NTEU clauses should not be adopted as:
- (a) they extend beyond permitted matters, contrary to s.139;
  - (b) they are not variations necessary to achieve the modern awards safety net, nor are they variations only to that extent; and
  - (c) the NTEU submissions and evidence fall well short of the substantial merit case necessary to demonstrate the imposition of their novel award clause.

## 10.2 Preliminary comments

570. The addition of clauses 23.2 and 23.3 is not a necessary variation to achieve the modern awards objective. The existing General Staff Award provision already clearly specifies an entitlement for employees to be paid overtime and the circumstances in which it arises providing for overtime "*for all authorised work performed outside of or in excess of, the ordinary or rostered hours as follows:...*".
571. The NTEU variously submits that this existing provision "*facilitates the working of unpaid overtime, facilitates staff cuts, facilitates non-employment of sufficient staff*"<sup>247</sup> and "*authorises the employer to benefit at the expense of employees*"<sup>248</sup> including by being "*wilfully or negligently remaining ignorant of whether additional hours of work are being worked*".<sup>249</sup>
572. With respect, the submission by the NTEU is over-blown. The award provision does not authorise or facilitate or endorse any such matter. Nor do the myriad of other awards that provide the same or similar formulations, entitlements and protections in relation to payment of overtime and access to TOIL.
573. The existing clause 23 is a standard award formulation and it is in similar or identical terms to a large number of award provisions that provide an entitlement to overtime. Attached at **Attachment 3 to the Previous Submissions** is a list of over 20 awards across a range of industries containing identical or similar clauses regarding overtime. No award clause that we have been able to identify has the equivalent of the proposed clause 23.2 or 23.3.

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<sup>246</sup> PN199.

<sup>247</sup> NTEU Closing Submissions, [E33].

<sup>248</sup> NTEU Closing Submissions [E34].

<sup>249</sup> NTEU Closing Submissions [E32].

574. To the extent that to be entitled to overtime the work needs to be "authorised work" is unexceptional. Many of the existing award formulations only attach an entitlement where additional hours are "directed by the employer". The NTEU clause seeks to shift the clause from a standard overtime payment situation where the employee claims the overtime or TOIL to one where the onus is on the employer to take reasonable steps to "ensure" that employees are otherwise prevented from working. This is not a fair and relevant safety net of minimum conditions.
575. The NTEU's submissions affirm that the purpose of the clause is not to ensure that authorised work performed additional to or outside hours receives overtime payments. The existing clause already provides for this and the evidence shows that where authorised overtime work is undertaken that that work is paid for.<sup>250</sup>
576. The stated effect<sup>251</sup> of the NTEU variation is to compel the employer to take steps and put in place policies, systems and processes. However, again, those policies, systems and processes are not to authorise work, to make overtime payments, or provide TOIL (all of which already exist). Rather, they are policies, systems and processes to prevent employees from undertaking other work, being work outside of or in addition to their ordinary hours that is not authorised.
577. The nub of this claim is the position of the NTEU that - if the award does not impose a positive obligation on employers to have policies, systems and directions (amongst other potential steps) to prevent the performance of unauthorised and unpaid overtime - the award has to be varied as it is otherwise not a fair and relevant safety net of terms and conditions.
578. Accordingly, the appropriate question for the Commission in considering this NTEU claim is as follows:
- "Is it necessary to achieve a fair and relevant safety net of minimum conditions that awards include provisions that impose obligations on employers to prevent employees from undertaking work outside of or in addition to their ordinary hours without specific authorisation?"*
- The answer to which must be "no".
579. As stated by the NTEU advocate, Mr McAlpine, when cross examining a number of witnesses, the claim is essentially to insert into the General Staff Award an obligation to demonstrate "good management practice".
580. Once the purpose and operation of the proposed clause is identified in that manner and the question for the Commission articulated, even if all of the NTEU assertions about staff working hours for which they are not authorised and/or do not claim overtime or TOIL are made out,

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<sup>250</sup> See paragraphs 594-602 below.

<sup>251</sup> NTEU Closing Submissions, [E3].

those submissions do not demonstrate that the variations sought by the NTEU are necessary and only to the extent necessary to meet the modern awards objective.

581. The variations should therefore be rejected.

### **10.3 Permitted matter under s.139?**

582. On its face it is difficult to identify how the proposed provision is a permitted term under s.139 of the FW Act.

583. It is accepted by the Group of 8 that the existing clause 23 is clearly a provision about overtime rates (falling with s.139(1)(d)). However, the two proposed provisions (22.2 and 22.3) are not about overtime rates or arrangements for when work is performed (s.139(c)) and could not sensibly be said to be described by other subsections of s.139. Rather they are about imposing on an employer obligations to take various steps to prevent other work not covered by authorised overtime occurring.

584. The existing clause is a clause that provides an overtime payment entitlement, and requires overtime rates to be paid for authorised work performed outside of, or in excess of, the ordinary or rostered hours. The NTEU clause does none of those things and the NTEU's own submissions identify that "*the new Sub-clause creates no entitlement to be paid 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*".<sup>252</sup>

585. The NTEU states that the purpose of its clause "is to ensure additional work is not being performed".<sup>253</sup> Such provision is not about overtime rates or about arrangements for when work is performed.

586. It is arguable the clause is an "incidental" provision<sup>254</sup> to the existing overtime rates clause, however, the clause is not to take reasonable steps to ensure that the term is being applied or reasonable steps to ensure that authorised work attracts the overtime payment. The intended operation and purpose of the clause is in respect of preventing other work.

587. Further and more significantly, the NTEU clause falls well short of demonstrating or satisfying the legislative requirement in s.142(1)(b) that it is "*essential for the purpose of making a particular term operate in a practical way*".

588. As the evidence referred to below shows, the existing clause can and does operate in a practical way. Where authorised work is performed outside of, or in excess of, the ordinary or rostered hours, employees have an entitlement to overtime, supported by policies, systems and processes that result in overtime payments or TOIL being provided.

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<sup>252</sup> NTEU Closing Submissions, [E3].

<sup>253</sup> NTEU Closing submission, [E4].

<sup>254</sup> *Fair Work Act 2009* (Cth), s.142.

589. Similarly clause 23 refers to incidental and limited phone calls or access of emails outside hours. Even if this was accepted as being incidental to overtime rates, it manifestly fails to meet the threshold of being *"essential for the purpose of making a particular term operate in a practical way"*.

590. As clauses 23.2 and 23.3 are not permitted award matters under s.139 and not incidental terms caught by s.142, the NTEU variations cannot therefore be made.

#### **10.4 Evidence - Existing entitlements, processes and support**

591. The NTEU's evidence, is not evidence of the application of the award clause or employers and employees operating under it, but rather it is evidence about the operation and practices at a number of universities under their relevant EA provisions and policies. There was no evidence that the award clause imposed difficulties or problems in negotiating EAs or in having them assessed and approved by the Commission.

592. Nevertheless, the clear weight of the evidence demonstrates that:

- (a) Where an employee undertakes authorised work performed outside of, or in excess of, the ordinary or rostered hours, the employees already have an entitlement to relevant benefits (for example overtime or TOIL/flexi-time). These arise under enterprise agreements negotiated and put in place with the NTEU and supplemented by policies;
- (b) Universities also have in place policies concerning overtime, flexi time and TOIL together with appropriate forms and on-line mechanisms to support those policies, enabling employees to claim the relevant entitlements;
- (c) Employees are aware of the entitlements and that they can have additional work authorised and claim overtime and TOIL using the relevant forms and on-line mechanisms;
- (d) While some employees gave evidence that they did not feel they were able to claim overtime and/or felt that they should not make claims as they were concerned about possible negative implications of doing so, the weight of the evidence shows that such concerns are not founded on objective evidence and the evidence further shows that:
  - (i) the employees correctly acknowledged that the issues they identified were effectively issues of ensuring that the enterprise agreement is applied and is a question of enforcement, rather than any deficiency in the entitlements or access to the entitlements that the employees already have;

- (ii) several of the NTEU witnesses gave evidence about existing entitlements and processes and that they were satisfied with their working arrangements and access to flexi-time/TOIL/overtime;
  - (iii) where an employee claims overtime to which they are entitled, it is paid;
  - (iv) universities are not discouraging staff from claiming overtime or TOIL that they are entitled to (and it would be unlawful to do so);
  - (v) senior managers gave clear and credible evidence that they do not support performance of unpaid overtime;
  - (vi) there was no actual evidence of staff being adversely treated for claiming overtime or TOIL (and doing so would constitute adverse action contrary to the *FW Act*);
- (e) at some universities, the NTEU has bargained for particular provisions about administration of overtime and TOIL provisions and/or particular steps to be taken by universities in enterprise bargaining. Further, in some instances the parties have agreed to include particular provisions and in other enterprise agreements have agreed not to include any such provisions. There is one instance as referred to below of the NTEU and Monash University agreeing in bargaining to the clause now sought by the NTEU to be included in the Award.

593. The above matters are supported by the totality of the evidence and some of that evidence is highlighted below in support of these matters.

***Existing entitlements to overtime and TOIL***

594. A number of enterprise agreements (or sections of enterprise agreements) were tendered or marked for identification in these proceedings and invariably include overtime and TOIL entitlements for employees (other than more senior/managerial employee, e.g. at HEW 8 and above).

595. For example, clause 75 of the *Monash University Enterprise Agreement (Academic and Professional Staff) 2014* provides for overtime and TOIL entitlements.<sup>255</sup>

***Universities have policies or procedures in place to support the entitlements***

596. Both witness and documentary evidence clearly shows that universities have in place policies and procedures, (supported by forms and systems) that provide for overtime and/or TOIL, and

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<sup>255</sup> Similar provisions are contained in the *University of Melbourne Enterprise Agreement*, clause 57; *The University of Western Australia Professional and General Staff Agreement 2014*, clause 24 and Schedule E; *The University of Queensland Enterprise Agreement 2014-2017*, clause 70; *University of Sydney Enterprise Agreement 2013-2017*, Schedule 4; *The Australian National University Enterprise Agreement 2013-2016*, clause 28; *University of Adelaide Enterprise Agreement 2014-2017*, clause 3.6; *UNSW Australia (Professional Staff) Enterprise Agreement 2015*, clause 28.

enable employees to claim those entitlements. This was acknowledged by a number of witnesses (including NTEU witnesses) in cross examination:

<p>Stephen Adams</p>	<p>PN2485</p> <p>...</p> <p>The university has a system that enables a submission of paid overtime?---That's correct.</p> <p>...</p> <p>You're aware that in addition to the enterprise agreement there's also a policy regarding overtime?---Yes.</p> <p>PN2561</p> <p>And that it reinforces essentially the provisions of the overtime clause including process requirements, are you aware of that?---Yes.</p> <p>PN2562</p> <p>And that university policies are available on the university intranet?---Yes.</p>
<p>Karen Ford</p>	<p>PN3547</p> <p>And there is a process for seeking approval and claiming overtime at the University of Wollongong?---Yes, there is.</p> <p>PN3548</p> <p>And that can include seeking verbal approval or written approval?---Yes.</p>
<p>Simon Biggs</p>	<p>PN5210</p> <p>Okay. So if a staff member is working authorised additional hours at the University of Queensland, depending on their classification, they're entitled to paid overtime or time off in lieu, or if they're in more senior positions they're entitled to time off in lieu, is that correct?---I think typically on the professional staff side that'd be correct.</p> <p>PN5211</p> <p>Yes. And so if a staff member is working those additional hours, that work and the working at that time needs to be authorised, doesn't it?---Yes, so normally that would come through the management structure and if necessary, up to the faculty Executive Manager who would make a decision about whether that work was required or not required.</p>
<p>David Ward</p>	<p>PN9111, Exhibit 22 – "Uni of NSW Extra Hours Claim"</p> <p>If I'm a professional staff member and I work overtime, can you just tell the Commission how I go about claiming a payment?---You complete this form with the relevant date and times worked; you submit it to your supervisor who then endorses the claim and it's countersigned by the head of school or delegate.</p>
<p>Susan Thomas</p>	<p>PN4202</p> <p>What systems do you have in place to ensure that such staff are compensated, either through overtime or TOIL or flex time?---Well we have a number of policies as you can see that provide that opportunity for staff to have that time recognised.</p> <p>PN4266</p> <p>You indicated in relation to a question about the hours of work worked by professional staff, that they are able to make claims for payment for overtime or TOIL. How do they make such</p>

	claims?---There are forms that can be completed, so in the case of overtime a form for those hours and of course that needs to be prior approval from a supervisor. If all else fails they could email through and that would be verified with the supervisor.
Andrew Vann	<p>PN5357</p> <p>So what proactive steps does Charles Sturt take to make sure that people are either claiming overtime or receiving their time off in lieu or flex time? We do our best, as I'm sure all universities do, to make sure people are aware of the provisions of the enterprise agreement. We spend a lot of time training our managers to understand that and to attend appropriately to things like workload allocation. We have an extensive budgetary system, of course, which allows us to make decisions about where effort gets directed, so I think as with any large organisation we have a budgetary system, we have a system of management, we have an enterprise agreement that people are expected to comply with and we certainly reinforce the message that we you know, we've put a lot of effort into wellness at Charles Sturt University. 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.</p>
Andrew Picouleau (Exhibit 12, AP-4)	<p>[52] Further, there are processes and mechanisms in place at Monash to enable its professional staff to claim overtime and/or TOIL in accordance with the provisions of the 2014 Monash EA...</p> <p>[53] Copies of the Overtime and TOIL Policies, TOIL Record and Additional Hours/Overtime Time Sheet are attached to this statement and marked AP-4.</p>

597. There is also direct evidence from witnesses called by the NTEU that they have made use of or been granted TOIL or overtime and that where they have done so it has been approved:

Anthony Wilkes	<p>PN832</p> <p>So the system that you've been applying of accessing TOIL, you've given evidence that the system was working for you. Is it your preference to take TOIL rather than to access the paid overtime? - -Yes, for me personally I absolutely prefer the TOIL. I like the flexibility it affords me.</p>
Stephen Adams	<p>PN2533</p> <p>Have you ever refused their overtime when it's bounced to you through the system? No, I have not.</p> <p>PN2563</p> <p>As a staff member you have access to that [overtime]?---Yes, well I've been instructing my staff to use the overtime clause and they've been doing that.</p>
Karen Ford	<p>PN3547</p> <p>And there is a process for seeking approval and claiming overtime at the University of Wollongong? - -Yes, there is.</p> <p>PN3548</p> <p>And that can include seeking verbal approval or written approval? - -Yes.</p> <p>PN3549</p>

	<p>And you can submit an overtime form? - - Yes.</p> <p>PN3550</p> <p>And there's circumstances in which you've done that? - - Verbal and written, yes.</p> <p>PN3551</p> <p>Yes. And has your overtime been approved? - - I haven't I yes, I've put in for overtime twice that I can recollect.</p> <p>PN3552</p> <p>Yes? - - And it was approved.</p>
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598. Contrary to the suggestion of some witnesses, universities have made substantial overtime payments and evidence from some witnesses to the contrary was clearly based upon generalised or impressionistic assumptions that their employer would not do so, rather than based upon actual knowledge and were wrong:

Professor Hamel-Green	<p>PN6254</p> <p>So it wouldn't surprise you to know that over the last three years from 2013, VU has paid over \$3 million in overtime? - - To what level of</p> <p>PN6255</p> <p>Well, I think that the bar stops at HEW 7? - - Yes, yes, yes, well, that's perfectly consistent with my experience, yes.</p>
David Ward (Exhibit 20)	<p>[22] ...the total amount of overtime paid to professional staff in 2015 was \$1,745,567 representing an average of \$3,443 paid to each employee that was paid overtime.</p>
David Ward	<p>PN9144</p> <p>Do you have any idea of what proportion of your professional staff are on flexitime arrangements?---I don't have a specific number. I mean I would say that it's the large majority of the university's professional staff, at levels 1 to 9 would have access to such arrangements.</p> <p>PN9145</p> <p>The remainder presumably have access variably to paid overtime and TOIL arrangements?---That's right. I mean as do the people who work flexitime as well if they are required to work the additional hours.</p> <p>PN9146</p> <p>When you say "additional hours" do you mean hours outside the span?---That's right.</p> <p>PN9147</p> <p>Because you can work additional hours inside the flex span and get no overtime or TOIL penalties, is that right, you just get flexitime?---Yes, I mean - so it can be not as straightforward as an either/or - well, I suppose it is either/or - so in some circumstances where the university might direct a person to work and recognise that there won't be an opportunity to take - you know, as part of a flexitime arrangement then overtime would be applied.</p> <p>PN9160</p> <p>You had about 500 staff in 2015 who claimed paid overtime, according to the data you've</p>

	given us from Ms Tsagouris?---Yes.
Andrew Brown	<p>PN3863</p> <p>So you're not aware, Ms Brown, that the university pays in the millions of dollars for its overtime? - - - I wouldn't be aware that they pay millions of dollars of paid overtime, no.</p> <p>PN3864</p> <p>Nor would you be aware that they paid in excess of 1300 hours of TOIL over say 2013 to 2015? - - - I haven't got access to those figures, no.</p>
Andrew Picouleau (Exhibit 12)	[54] The total amount of overtime paid to professional staff in 2015 was in excess of \$1.6 million and employees who received overtime received an average of \$2,400 for 2015

599. The NTEU suggests that there is a general culture of working long hours, or that staff are fearful of claiming overtime or TOIL. This stated fear was not supported by objective evidence:

Andrew Giles	<p>PN6502</p> <p>As set out in your attachment AG1, for the last 10 years of your employment at Deakin, you were employed at level HEW10; is that correct?---Yes.</p> <p>PN6530</p> <p>So you refer to working until 1 am on one occasion, but you only refer to one occasion on which you worked until 1 am; is that right?---Yes, that was an example, yes.</p> <p>PN6531</p> <p>That was 2004?---Yes.</p>
Andrea Brown	<p>PN3859</p> <p>Do you accept this proposition, Ms Brown, that as a manager managing an area that where a staff member comes to you and asks you about working additional hours, if the manager ... wishes to explore that with you the sorts of issues that you've identified are reasonable and appropriate issues to discuss?---Well, to an extent but my experience told me at the time that that level of scrutiny, that level of questioning and why can't you do it at this time or that time or some other time, and why can't you fit it in here or there, or something along those lines, for example, was at times very intimidating and to me essentially the message was don't come back and do this again. Don't come back and do this anymore. The implicit at least implicit message was we don't want to approve additional hours so you will then be seeking approval for TOIL. You're expected to manage your workload within your existing hours, that's what's expected of you at that level.</p> <p>PN3860</p> <p>Ms Brown, you've just given evidence it was implicit. Can I take it at least that the evidence that you have given about intimidation, about those sorts of issues, that's not an expressed statement that's been made to you. You weren't told that you can't raise these issues or discuss TOIL. Do you accept that?---I accept that I don't recall being told explicitly you cannot raise that subject.</p>
Susan Thomas	<p>PN4206</p> <p>Do you accept that the extent to which an employee might feel able to make a claim for paid overtime depends on the personal work relationship between them and their supervisor?---</p>

	No, because I think that a number of staff are aware that they may apply for overtime. If they have difficulty with their supervisor, then there are opportunities for them to pursue it in different ways. The Supervisor's supervisor, human resources, we have a grievance policy, there are a range of ways that they can go about having their voice heard if it was an issue.
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600. At its highest it identifies an enforcement issue and is also undermined by other evidence:

Andrea Brown	<p>PN3825</p> <p>The issues that you raised in your statement are in your view that the university was not properly applying the terms of the enterprise agreement in respect of those entitlements?--- I'm implying that, yes.</p>
Andrew Giles (Exhibit AG)	<p>[21] Whether staff who work on Open Days were offered paid overtime or TOIL was highly variable, and dependent on the practice of the local manager.</p> <p>[22] It is only exceptional managers who ensure that staff get the compensation they are entitled to.</p>
Professor Hamel-Green	<p>PN6252</p> <p>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.</p> <p>PN6253</p> <p>So in relation to the more junior staff up to HEW 7, you say that they did receive overtime? - - - Up to HEW 6, yes, yes. Overtime up to HEW 6, yes. So long as they applied for the overtime in advance. I mean there was a strong esprit de corps in the whole faculty at the time I was the dean and there was a general willingness to work overtime but in the case of junior staff, there was an effort to compensate for that, yes.</p>

601. There was no substantive evidence of staff being adversely treated for claiming overtime or TOIL (and in any event doing so would constitute adverse action contrary to the FW Act).

602. In relation to submission of culture of long hours and "velleity" of the employers as asserted by the NTEU, there is clear messaging from senior staff that working uncompensated overtime is not expected, required or encouraged and is not accepted as satisfactory:

Diana Chegwidden	<p>PN9516</p> <p>Do you agree, as a question of general principle that if overtime is worked by - sorry, if additional hours are worked by an employee then subject to the terms of the enterprise agreement they should either be authorised and compensated on the one hand, or shouldn't be worked. Do you think that's a fair position?---I'm not sure that that's - if that's a question, but in terms of if somebody works additional hours if authorised, they should be compensated, or not authorised, they shouldn't be worked.</p>
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Susan Thomas	<p>PN4200</p> <p>You've given evidence that there are workload peaks from time to time that mean that additional hours need to be worked. As things operate at the moment, when extra work needs to be done some people might raise that with their supervisor and either have the work reallocated to someone else or get approval for overtime or TOIL or flex accumulation. Is that right?---Correct.</p> <p>PN4201</p> <p>There are others who may simply do the additional without raising it with their supervisor. Is that the case?---It's possible but we would encourage them to have that discussion.</p>
Professor Hughes-Warrington	<p>PN4970</p> <p>So what if it hadn't been authorise? (sic) What if they were just doing it on a regular basis? What would you do about that?---Then we would say to the staff member we would have a discussion with the staff member to see whether the work was required. If it were not required, we would suggest that the staff member not engage in those activities.</p> <p>PN4974</p> <p>your Honours, the critical thing is that the staff who are able to claim overtime I deemed to have less autonomy than staff who are at more senior levels. So their determination of what they engage in should be subject to the supervisor.</p> <p>PN4975</p> <p>Yes, and because they've got less autonomy, they are going to have less control over the workflow of the work that is coming to them?---That is correct, but also their supervisor should instruct them went to work and when not to work.</p>
Anthony Wilkes (Exhibit F)	<p>[27] My supervisor (Dr Rachel Norris) has certainly encouraged me to finish work as soon as I can after 5pm, but I've never been specifically directed to go home</p>
Anthony Wilkes	<p>PN836</p> <p>... Would you benefit from being directed specifically to go home or to not work through your lunchbreak. Is that something you'd prefer to see happen?---Not really, no. The going home, we'd finished practicals and Dr Rachel Norris is usually in the practicals, and she would say how long are you going to be, try to get out as soon as you possibly can.</p>
Simon Biggs	<p>PN5215</p> <p>Yes, but what if they had done the work and it wasn't authorised that it be done on Sunday?-- -Well, there are some serious management issues then that need to be addressed and that's why there's occupational health and safety issues and a variety of other issues so if it's unauthorised work, I'd want to understand clearly why the staff member felt they needed to come in on a Sunday and do this unauthorised work.</p> <p>PN5217</p> <p>Yes, and if it's not authorised it shouldn't be being done, should it?---It shouldn't be being done outside of hours,</p>

## 10.5 Response to other particular issues raised by the NTEU

603. The NTEU relies upon a factual claim that keeping records of time worked is not widespread in universities for general staff. First, the NTEU's evidence on this issue was very limited and did not establish this. Further and in any event, given that the majority of professional staff employed in Universities have standard hours, the absence of time recording would be unexceptional. The evidence shows that forms and online systems are available for recording of additional time.<sup>256</sup> This issue does not provide support for the NTEU's claim.

### Uncertainties of a "reasonable steps to ensure" formulation

604. The NTEU defend the imposition of language of "reasonable steps" and assert that it is not either vague or uncertain and nor would lead to disputes.

605. It is acknowledged that formulations of "reasonable steps" can and do appear in industrial regulation.

606. The difficulty in this context is the breadth of the issue and the obligation to which the "reasonable steps" obligation attaches. The NTEU relies on clause 12.3(a), which states "*the employer must also take reasonable steps from time to time to inform casual employees of the conversion provisions of this Award*", which is a discreet and reasonably ascertainable task. However the obligation that would be imposed here applies to a much broader subject matter and is an obligation to take reasonable steps to "ensure" something (i.e. reasonable steps to make something "certain"). This is self-evident noting that the obligation sought to be imposed is not that the employer must take reasonable steps from time to time to inform employees of eligibility for overtime or TOIL (which would be a comparable obligation to clause 12.3). Rather, the clause is an obligation to take reasonable steps to ensure that employees are not performing work outside of hours or additional hours "without seeking authorisation".

607. The proposed clause, based upon "reasonable steps to ensure" in respect of such a broad issue as a binding award obligation, creates a degree of uncertainty and ambiguity. To expose an employer to a civil penalty for contravention of such an obligation specified in such terms is not appropriate.

608. The difficulty is crystallised by the NTEU's opening submissions (Exhibit B) at paragraph 29 where it acknowledges that a "legitimate question" arises as to what might constitute the taking the reasonable steps but should include matters that have "*a rational or natural tendency*" to ensure that work is not being done which is uncompensated and then goes on to list at paragraph 30:

- *the adoption and promotion of appropriate policies;*
- *clear and direct instruction to supervisors and employees, with measures taken to deal effectively with breaches of those directions;*

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<sup>256</sup> Exhibit 12, [52](d) ; Exhibit 20, [21]; Exhibit 22; PN2486 (Mr Adams).

- *the re-organisation of work flows to deal with bottle necks;*
- *the recording of time worked including by technological means where feasible;*
- *the inclusion in training of the importance of work life balance and specifically the impropriety of working unpaid overtime.*

If any such activity or any particular part of such an "imagined" list was not adopted then as a starting point presumably the employer is in breach of the award based upon the NTEU's formulation. This highlights the problems with the addition, and in and of itself shows the proposed variation is not a necessary variation only to the extent necessary to achieve the modern awards objective.

609. It is acknowledged that one enterprise agreement (Monash University) in the sector contains an obligation in similar terms to that proposed by the NTEU and further, that upon examination, Mr Picouveau accepted that the provision had not imposed "*an unreasonable administrative burden*" on Monash University.<sup>257</sup> However, the evidence and examination of the clause<sup>258</sup> goes on to set out particular identified activities to be undertaken to provide some clarity and certainty for the university about what is required. Further it was a matter for enterprise negotiation and for that particular university to choose whether it agreed or didn't agree to include such a provision to supplement the minimum terms and conditions at the time reflected in the award. It is also noted that it is not a feature of any of the other enterprise agreements that we have been able to identify. If it was an essential and necessary provision for overtime or TOIL provisions to have practical effect one would reasonably assume it to have been an item the NTEU insisted upon including in all enterprise agreements it endorses.

## **10.6 Not necessary to achieve the modern awards objective**

610. As noted above the existing clause provides a standard formulation for overtime payments. It is similar to or in identical terms to a large number of award provisions that provide an entitlement to overtime. This was evidenced in **Attachment 3** to **Exhibit 5**.

611. By contrast, no award clause that we have been able to identify has the equivalent of the proposed clause.

612. For the reasons set out above in the preliminary comments and supported by the evidentiary matters identified:

- (a) in conjunction with the other provisions of the award and the NES, the current clause meets the modern awards objective; and
- (b) the NTEU variations to 25.2 and 25.3 are not necessary, extend beyond a minimum set of terms and conditions, and impose a positive obligation of uncertain scope not

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<sup>257</sup> PN6635.

<sup>258</sup> Exhibit 12, AP-1, clause 5.2.

directed at ensuring the overtime clause is properly applied, but rather to ensure that work that is not authorised does not occur.

613. Further, as set out above, universities have in place policies concerning overtime, flexi time and TOIL and provide appropriate forms and on-line mechanisms for employees to record time and to submit relevant documentation for approval. Where an employee claims overtime to which they are entitled, it is paid.

614. As set out above, the issue identified by some witnesses of the NTEU to the effect that they don't feel able to claim overtime or feel that there is no point, is effectively one of ensuring that the award is applied and a question of enforcement.

#### Redefines the concept of overtime

615. In relation to the new clause 23.3 this clause, whilst presented as a qualification or clarification, it is a de-facto claim for overtime. If an employee is required to work outside of hours then they have relevant entitlements to claim overtime or TOIL/flexitime, subject to the provisions of clause 23.

616. If introducing a basis for claiming overtime is not the purpose of the clause it is difficult to see how the inclusion of such a clause in the award is necessary to provide a fair and reasonable safety net.

### **10.7 s.134 matters to take into account**

617. For the reasons set out above the Commission should not conclude that the current clause is "unfair" or that it is not a relevant entitlement as part of the minimum terms and conditions.

#### 134(1)(b) - the need to encourage collective bargaining

618. Making the proposed NTEU variation would not encourage collective bargaining.

619. If the NTEU wishes to pursue a particular mechanism to assist in the practical application of overtime or TOIL or particular positive steps to be taken or processes to be put in place by an employer, these are matters for enterprise bargaining, and otherwise are matters for policy.

620. This is again demonstrated by the position adopted by the NTEU in pursuing similar claims in bargaining<sup>259</sup> and in some instances agreeing to include particular provisions (e.g. Monash University) and in other enterprise agreements agreeing not to include provisions (e.g. Australian National University<sup>260</sup> and the University of New South Wales<sup>261</sup>).

#### 134(1)(c) - the need to promote social inclusion through increased workforce participation

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<sup>259</sup> PN1005 (Mr McAlpine).

<sup>260</sup> Exhibit 10, [66].

<sup>261</sup> Exhibit 20, [16(d)], [18].

621. Contrary to the NTEU's submission the proposed variation does not promote increased workforce participation or promote such an inclusion through doing so.

134(1)(d) - the need to promote a flexible modern work practices and the efficient and productive performance of work

622. The existing provision provides for overtime payments for "authorised work" and in doing so helps ensure that staff focus on the performance of efficient and productive work during their ordinary hours as they otherwise need to seek authorisation to perform additional work or work outside of hours to receive additional remuneration.

134(1)(da) - the need to provide additional remuneration for ... employees working overtime

623. The existing provision provides for additional remuneration for employees working overtime. Overtime in this context means authorised work.

134(1)(f) - the likely impact of any exercise upon an award powers on business, including on productivity, employment costs and regulatory burden

624. The NTEU acknowledges that the clause will increase the regulatory burden for employers. The nebulous scope and formulation makes it very difficult to identify the exact nature and extent of the steps that the employers would need to undertake. Whilst the NTEU at various points has sought to gloss over the requirement and present it as simply a requirement to have a policy or to direct employees not to work, the obligations imported by the clause are clearly more onerous. The example given in the NTEU's list of activities "*the reorganisation of workflows to deal with bottle necks*" identifies this. The NTEU variation effectively seeks to take the award from the realm of base line minimum conditions into a world of good management practices and policy administration.

134(1)(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

625. The imposition of a novel provision altering and departing from the equivalent and similar provisions in a range of other modern awards does not support stable and sustainable modern awards system. Further it makes the award more complex and the obligations in it more difficult to understand, rather than ensuring that they are minimum conditions that are simple and easy to understand.

626. Finally, the attempt by the NTEU to bolster its position by describing the obligation as "*not onerous, nor as excessively prescriptive*" does not assist their position as this is not the relevant test or necessity that is required to be considered by the Commission.

627. Accordingly, the variation to include clauses 23.2 and 23.3 should not be accepted by the Commission.

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## 11. NTEU F - Link Wages to Classifications (General Staff Award)

628. The NTEU's claim is that the General Staff Award does not provide for the necessary link between the rates of pay ascribed to each HEW Level Classification (Rates of Pay) and the definitions of each HEW Level Classification (Classification Definitions). Without such a link, the determination of Rates of Pay is not conditional upon identifying the appropriate classification in accordance with the Classification Definitions, which is counterproductive to the objectives of the Modern Award and the Minimum Wage under s.134 and s. 284 of the FW Act respectively.

629. To effect this link, the NTEU proposed the inclusion of the following clause into the General Staff Award and which was and is not opposed by the Group of 8:

### **15.3 Classification Levels**

*The Higher Education Worker Level classifications standards set out in Schedule B - Classifications 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 skill and responsibilities required to perform that work.*

630. As indicated by the NTEU, the change sought has now largely been resolved by the inclusion of this proposed clause at clause 8.1 of the current exposure draft released by the Commission on 3 June 2016.

631. The only remaining issue to be resolved is whether clause 8 of the current exposure draft should also include the following:

*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.*

632. The NTEU's position is that clause 8.2 should be excluded on the basis that:

- (a) in so far as the words of the clause had been included in the pre-reform awards, such inclusion was made without submissions from the parties and contrary to the agreed position the parties reached in respect of the construction of the clause in linking classifications to rate of pay;
- (b) the words of clause 8.2 are not necessary to achieve the purpose of the Modern Award as required by section 138 of the FW Act as they do not regulate, nor are they incidental to regulating, the determination of an employee's classification; and
- (c) clause 8.2 effectively permits the employer to prosecute employees for refusing to perform a duty, which is matter already regulated by common law contract and which has no basis in the objectives of the Modern Award.

633. The Group of 8 refers to and relies upon its Previous Submissions in relation to this claim, specifically, **Part 10 of Exhibit 5** and says in response to the Closing Submissions of the NTEU:

- (a) clause 8.2 is uncontroversial. Despite having been included in pre-reform awards, it was omitted in the Academic Staff Award without any submissions by the parties nor commentary by the Commission. In that regard, the Group of 8 considers that were it not for its submissions in this Modern Award review, the inclusion of clause 8.2 would have gone unopposed;
- (b) clause 8.2 is neither prohibited nor offensive to achieving the objectives of the Modern Award under section 138 of the FW Act. Consistent with section 142 of the FW Act, it addresses matters which are incidental to the duties which form the Classification Definitions and which clause 8.1 outlines "accurately reflects the work performed by the employee as required by the employer" (emphasis added). Clause 8.2, which then goes on to require employees to perform those duties which define a certain classification under the award, is clearly incidental to the matters envisaged by clause 8.1;
- (c) the clause speaks to the requirement of the employee to perform those duties which define the employee's classification as set out in the Schedule. Were, for example, a dispute to arise regarding the appropriate classification of an employee in accordance with the duties outlined in the Schedule (which is invariably a dispute about the appropriate rate of pay), the employer will have recourse to ensure that employee is, in spite of the dispute, performing those duties which nevertheless correspond with the employee's designated classification under the Schedule; ad
- (d) It is inconceivable that an employee could be prosecuted for an award breach for refusing to perform a particular duty if the employee had an enforceable contractual right to refuse that duty.

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## 12. NTEU I - "Full time" or "Continuing" Employment (Both)

634. As set out in the Previous Submissions (specifically **Part 13** of **Exhibit 5**), and confirmed by the parties in opening submissions<sup>262</sup>, the issues surrounding the intersection between full time and part-time employment and fixed-term employment has been addressed to finality and a consent position has been reached in the technical exposure draft stage of the 4 Yearly Award Review. This consent position has subsequently been included in the exposure drafts of both the Academic Staff Award and the General Staff Award published since 6 June 2016.

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<sup>262</sup> PN176; PN469.

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### 13. NTEU - J - Claim for ICT Allowances (Both)

635. The NTEU has sought to include in both the Academic Staff Award and the General Staff Award an Information Technology Allowance that provides for reimbursement with respect to the *"actual costs incurred, up to the monthly subscription cost of the cheapest service package..."* for using ICT facilities when employees are required to use their own telephone, mobile, email and internet to perform work.
636. In the Academic Staff Award, the NTEU clause goes further to say that for the purposes of the allowance, *"an employee is required to use any of the services [specified] 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."* [our emphasis]
637. The Group of 8's position is that this claim is not necessary to meet the modern awards objective, for the reasons set out below.

#### 13.1 Preliminary comments

638. The NTEU case is that ICT is an expense for employees as part of their performance of work and industrial awards have long provided allowances for work expenses, and with increases in technology, more staff are using their own ICT equipment from home to perform work and this requires industrial regulation in the form of an allowance payable by the employer for awards to be a fair safety net.
639. Whilst certain allowances or reimbursement for certain costs, such as mandated work uniform or PPE, are a feature of some industrial awards, award allowances in relation to using ICT is limited to on-call and similar type situations where there is a direct and specific requirement by the employer that the employee have the equipment to respond to the on-call or similar arrangement.
640. Outside on-call and similar arrangements, use of personal ICT equipment, such as using a mobile phone, logging in using an existing home internet connection that you already have, or deciding to use one's own home desktop, rather than using an employer supplied laptop or work computer (or more recently to sit in in a café using a public hotspot) are not matters that have been determined to require provision of an allowance in industrial instruments.
641. There are several fundamental assumptions that underpin the NTEU claim that are not made out on the evidence and otherwise undermine the variations of the Higher Education Awards as being "necessary" to achieve the modern awards objective:
- (a) the NTEU case assumes the expenses of having a home internet connection are being incurred because of the employment (rather than because they already have such connection and use it for a variety of purposes, including personal purposes,

entertainment, Netflix, their children's assignments, banking, Facebook and social media, surfing the web, etc.);

- (b) the NTEU in various ways asserts that the employer requires the employee to work from home, rather than (particularly in the case of academic staff) this being a choice and part of their flexibility as to when and whether they attend at the University, and is otherwise more convenient than staying at the University and using facilities on campus or addressing it the following day by attending at work;
- (c) the types of issues raised by the NTEU warrant an allowance in the Higher Education Awards, over all other awards, despite the prevalence of ICT in all aspects of our lives across most industries and certainly those including professional, administrative, clerical and office based environments. Much of the NTEU evidence is a reflection of the work across the world and flexible access to information, not a merit based case for greater industrial regulation in the Higher Education Awards;
- (d) With internet prevalence, access and functionality increasingly integrated into technology, whether it be televisions, fridges, Wi-Fi functionality in cars, Wi-Fi in almost all urban public places, integration of smart technology into clothing, watches, spectacles, new satellite technologies etc., an allowance for the lowest cost internet connection has no place in a *modern* award. It is already technology limited and dated.

642. By their nature the issues concerning expenses regarding certain equipment or claiming a variety of other expenses in the course of employment, accommodation when travelling, reimbursement for certain equipment etc., are matters more appropriately dealt with by policies of organisations.

### **13.2 Prevalence of ICT allowances in existing awards**

643. The Group of 8 acknowledges that neither award currently provides for an ICT allowance, however such an allowance is not a necessary part of an award safety net of minimum terms and conditions.

644. Outside on-call and similar arrangements, use of personal ICT equipment to conduct work activities is not a feature of award regulation, including awards that apply to service-based industries that typically use a variety of ICT facilities to perform their work including at home or outside of work hours.

645. This key submission of the Group of 8 as set out in detail at paragraphs 210 (a) to (e) of Exhibit 5 have not been challenged by the evidence and in fact are acknowledged by the NTEU<sup>263</sup>, namely that:

- (a) of the 137 modern awards that exist, no other modern award includes a clause in the same or similar terms to the clause sought by the NTEU;
- (b) 19 out of the 137 modern awards provide for a telephone allowance, or reimbursement of expenses relating to the use of a telephone, or something similar. However, in most cases, the payment of the telephone allowance is connected to the requirement of such employees to be "on-call". No such requirement exists in the Higher Education Awards and this is reflected in Attachment 4 to Exhibit 5;<sup>264</sup>
- (c) of those 19 awards, the Commercial Sales Award 2010, the Contract Call Centre Award 2010 and the Telecommunications Service Award 2010 contain slightly different terms in that they only apply where the employee does not already have such equipment and are requested in writing by the employer to have such equipment. These awards contain a clause in the following terms (or similar):  
  

*"Where an employee does not have a telephone, modem or broadband connection and, at the written request of the employer, the employee is required to have such equipment, the employer must reimburse the cost of purchase, installation and rental."*
- (d) none of the 19 awards contain a "reverse onus" type provision such as is proposed for the Academic Staff Award whereby the allowance will be paid unless the employer directs the employee not to perform work that may require using such equipment away from the workplace. This is arguably the most problematic part of the NTEU clause; and
- (e) there are otherwise no other modern awards that require employers to pay for or reimburse employees for home internet use or email access.

### **13.3 Provision of ICT facilities at universities**

646. The weight of evidence shows that, as set out at paragraphs 212 and 213 of Exhibit 5, universities provide significant ICT facilities and equipment to all staff which are available throughout the University campuses.

647. Whilst these facilities may vary from university to university and within the various organisational units within those universities, such facilities and equipment generally include

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<sup>263</sup> Exhibit NTEU D, [124].

<sup>264</sup> Attachment 4 to Exhibit 5 provides extracts of Modern Awards that include ICT allowances or related provisions, though it should be noted that the rates set out in the attachment have since been increased in accordance with the annual wage review.

access to desktop computers, laptops, printers, network and internet access including Wi-Fi, e-mail accounts, access to computer laboratories and IT facilities in libraries (including out-of-hours and in some cases 24/7 access).

648. This evidence was primarily given by two university witnesses: Andrew Picouleau from Monash University<sup>265</sup>, and David Ward from UNSW<sup>266</sup>, and in neither case was their evidence disturbed on cross-examination. It was also supported by the evidence of a number of NTEU witnesses who each confirmed that these facilities were available to them at the universities at which they have been employed - including Dr Camille Nurka,<sup>267</sup> Dr Linda Kirkman,<sup>268</sup> Dr Caron Dann<sup>269</sup>, Dr Michael Dix<sup>270</sup>, Andrea Brown<sup>271</sup>, and Professor Phil Andrews<sup>272</sup>. Professor Andrews' evidence, taken as a whole, shows that use of his various personal ICT equipment is a choice rather than a necessity:

<p>Philip Andrews (Exhibit NTEU P)</p>	<p>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.</p> <p>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.</p> <p>70. I also maintain an internet connection at home and a mobile phone account which I regularly use for work purposes.</p> <p>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.</p>
<p>Philip Andrews</p>	<p>PN3288</p> <p>...your evidence is you're given the option between an desktop and a laptop?---Yes.</p> <p>PN3289</p> <p>And I take it from your evidence that you've elected to have a desktop?---Yes.</p> <p>PN3290</p> <p>And then you yourself have gone out and also you have a laptop, an iPad, a smartphone and a home desktop computer?---Yes, that's true.</p> <p>PN3291</p> <p>All right. Do you accept that you could've had the university laptop and it would've avoided the necessity for you to purchase your own laptop?---I used to have a university laptop....</p>

<sup>265</sup> Exhibit 12, [55]-[60].

<sup>266</sup> Exhibit 20, [24]-[28].

<sup>267</sup> PN8926-8928.

<sup>268</sup> PN8620-8622.

<sup>269</sup> PN8459-8469.

<sup>270</sup> PN9338-9342.

<sup>271</sup> PN3793

<sup>272</sup> PN3287-3289

649. Whilst there was also some evidence that the shared office spaces or computer laboratories or hot desks available to employees are not suitable for quiet contemplative work or within which to conduct student consultations (as was suggested by Drs Caron Dann<sup>273</sup> and Camille Nurka<sup>274</sup>), this was counterbalanced by evidence that there are separate areas available for these purposes - for example, quiet rooms in libraries and other University areas that can be used for this purpose<sup>275</sup>; and that Wi-Fi is almost universally available across the University campuses for use by both staff and students to support greater flexibility and to reflect the reality of current day technology.<sup>276</sup>
650. The NTEU suggests that it is not possible to perform some work within the confines of the university - for example whilst attending a conference or engaged in field research (as was put to Mr Ward on cross-examination<sup>277</sup> and to Sue Thomas<sup>278</sup>, and as led by NTEU witnesses such as Dr Caron Dann). This is accepted as one cannot attend an overseas conference or undertake field work on campus. However, the evidence shows that in addition to having onsite facilities and at least for continuing staff university provided laptop computers, universities have policies and procedures which enable staff to seek payment for ICT expenses incurred in the course of their duties, or a loan of ICT equipment for however long is necessary to perform their work.
651. For example, the Monash University IT Policy, which was tendered as evidence (Attachment AP-5 to Exhibit 12 and MF1-8), provides a mechanism by which staff can request necessary IT equipment and communications facilities to conduct necessary work away from their office or campus. This includes the provision of mobile phones and pagers, personal computers (including laptops), printers, fax machines, iPods, palm-pilots, and cameras. The policy also entitles employees to claim reimbursement for home telephone rental, calls, and internet access.
652. The existence of similar policies at other universities was also part of the evidence in the proceedings, including those of UNSW<sup>279</sup>; Charles Stuart University;<sup>280</sup> Swinburne University<sup>281</sup>; the University of Melbourne<sup>282</sup>; University of Sydney<sup>283</sup>; Western Sydney University<sup>284</sup> and La Trobe University<sup>285</sup>.

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<sup>273</sup> Exhibit NTEU AP, [3]-[6].

<sup>274</sup> Exhibit NTEU AR, [48]-[49].

<sup>275</sup> Exhibit 20, [26]; Exhibit 12, [55]; PN5408 (Professor Vann) ; PN6914 (Professor Herberstein); PN8621 (Dr Kirkman); PN1108 (Mr McAlpine).

<sup>276</sup> Exhibit 20, [24]; Exhibit 12, [55]; PN8620-8622 (Dr Kirkman).

<sup>277</sup> PN9170-9175.

<sup>278</sup> PN4248.

<sup>279</sup> PN9205 (Mr Ward).

<sup>280</sup> PN5439 (Professor Vann).

<sup>281</sup> PN6401-6403 (Professor Leach).

<sup>282</sup> PN8918 (Dr Nurka).

653. A number of witnesses also gave evidence of being provided with (or offered) university equipment where their role requires them to be contactable outside of work. This includes: Mr Andrew Vann<sup>286</sup>, Dr Michael Dix<sup>287</sup>, Mr David Ward<sup>288</sup>, and Michael Hamel-Green<sup>289</sup>.

654. Further, to the extent that it is suggested that staff are approved to work at home, including in approved flexible work arrangements (e.g. following parental leave), or on rare occasions that they are required or directed to perform work at home, then universities can and do accommodate this. For example, as stated by Mr Andrew Picouleau and Mr David Ward:

- (a) Academic staff are generally issued with laptops or desktops;
- (b) at least a number of universities, such as UNSW, allow staff to borrow laptop computers, i-pads and other ICT equipment if required;
- (c) Universities have policies and procedures which enable staff to seek reimbursement for things such as telephone rental, calls and home internet access;
- (d) Universities also generally provide staff with the option to salary package ICT equipment for work use,

655. This evidence was supported by a number of witnesses, including Mr Phil Andrews<sup>290</sup> and Mr Andrew Giles:

PN6564

In relation to IT equipment, you note that for senior staff a home office would be set up for the more senior staff? --- Yes, I wouldn't characterise it as a home office. There would be items of IT equipment that would be provided by the university, so a phone or an iPad or a laptop.

PN6565

Your paragraph 29 refers to it as a home office? ---Do I?

PN6566

Yes? ---Yes, there are some senior staff who would have a printer and kind of a work station they could plug their laptop into at home.

PN6567

Not all staff had that provided? ---No.

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<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> PN5439.

<sup>287</sup> PN9341.

<sup>288</sup> PN9180.

<sup>289</sup> PN62636264.

<sup>290</sup> PN3295-3297

PN6568

That's because, isn't it, you would expect the more senior staff to be doing more work from home than ordinary staff?--  
--Sure, sure.

656. Against this background, many of the NTEU witnesses who gave evidence about using their personal ICT equipment for work purposes conceded that they had either not sought to obtain university provided equipment, or had specifically decided against using it. See for example the evidence of Dr Michael Dix, Professor Michael Hamel-Green, and Dr Camille Nurka:

Dr Michael Dix	<p>PN9365</p> <p>You were asked whether you had borrowed a university laptop, for example, from the library - sorry, you were asked whether you were aware that was possible. Have you done so?--- I've not done so. I'm an impatient person and there's a bit of a rigmarole.</p>
Professor Michael Hamel-Green	<p>PN6263</p> <p>In relation to mobile telephone, you chose not to have a mobile telephone provided for by the university?---I did indeed, yes.</p> <p>PN6264</p> <p>But it would have been available to you had you wanted to?---It would have been available to me, yes, yes.</p>
Dr Camille Nurka	<p>PN8918</p> <p>Do you accept that at the universities that you've been employed at there's also been policies and procedures for employers to claim expenses? Are you aware of that?---Yes.</p> <p>PN8919</p> <p>Have you ever sought to claim any expenses in relation to your IT work or computer equipment?---From the university? No.</p>

Similar evidence was also provided by Philip Andrews<sup>291</sup> and Andrea Brown<sup>292</sup>. Also of note is the acknowledgement by Dr Caron Dann that she wasn't aware that she was entitled to ICT benefits under Monash University policy, but had not made any enquiries about that possibility.<sup>293</sup>

657. The NTEU suggests at paragraph J20 of its closing submissions that such equipment is "*usually only available for particular events or projects, and not for ongoing use*". This was not supported by the evidence, including the evidence relied upon by the NTEU. In particular, the Monash University "*Provision of University IT Equipment and Communication Facilities to Staff*" policy, which the NTEU appears to cite as evidence of this proposition, does not in fact restrict the provision of ICT equipment for a particular purpose or timeframe. Rather, the key

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<sup>291</sup> PN3310-3311.

<sup>292</sup> PN3885-3889.

<sup>293</sup> PN8472-8474.

issue is whether or not the requirements of the university necessitate the provision of such equipment. As stated in the preamble to the policy:

*"Some University staff members are required to be contactable outside business hours or whilst traveling on University business. In addition, some staff may have a need to work from home for short periods of time. In such cases, it is appropriate for staff to be provided with University IT equipment and communications facilities to enable them to conduct University business away from the office/campus."*

658. The conclusion that employees have access to ICT equipment on an ongoing basis was also supported by the evidence of Dr Dix:

PN9343

Are you aware that if you've got an *ongoing need* to do such work you can actually be given a laptop by the university?—I am aware of that possibility. I've not investigated it. (emphasis added)

659. Whilst there was some evidence that faculties themselves may not have roving ICT equipment available for long-term use (as was the case for Andrea Brown)<sup>294</sup>, there was very limited evidence suggesting that requests for such equipment were ever denied (or the reasons for that denial), or that it was not otherwise available when needed.

660. Staff (including academic staff) are therefore provided with all of the ICT facilities and equipment, and access to those facilities and equipment, that support the performance of their work.

### **Working from home is otherwise by choice**

661. Whilst it is accepted that many academic staff perform work from home and at locations other than the university, the evidence shows that this is generally by choice and is reflective of the self-directed nature of academic work and the flexibility and freedom enjoyed and valued so highly by academic staff about how, when and where they perform their work. The evidence of David Ward was that universities do not expect academics to work out of the office or late at night, but that they allow them to exercise their discretion when choosing to do so:

PN9177

...I'm not aware of particular situations where an email absolutely desperately needs to be responded to at 10 o'clock or else. I mean again that is where a judgment is being exercised that it is preferable to respond at that time rather than the following day....

PN9179

...We certainly rely on our academic staff to exercise their professional judgment. I'm not sure that that is the same thing as the university agreeing that a particular query could only have been answered at home and could not have been dealt with the following day at work.

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<sup>294</sup> PN3885-3886.

662. Similar evidence was provided by:

- (a) Dr Camille Nurka, who stated that it was more *"time-efficient"* for her to work from home instead of commute for two hours on public transport to get to the campus<sup>295</sup>;
- (b) Dr Linda Kirkman, who stated *"I am not obliged to be on campus unless I am teaching so at times it is more practical to be at home if I will be marking until, say, midnight"*,<sup>296</sup> and
- (c) Dr John Kenny who stated that *"it is best"* to reply to emails promptly as they are received, *"even if that means doing so in the evening or on a weekend"*,<sup>297</sup>

and in no case did any of those witnesses suggest that they did so at the direction or requirement of their employer.

663. If general staff use their personal devices and home internet connection to perform work, the evidence shows that this is not at the direction of universities and is more limited. This is supported by the limited evidence of general staff about their motives for working from home. For example, the evidence of Anthony Wilkes<sup>298</sup> was that:

It is not a requirement of my job to check emails after hours. I have my email account synchronised with my smart phone, so I am able to receive emails at any time. It is my decision whether I choose to respond to emails, so although I do sometimes check and respond to emails out of hours, I never write those hours down on the time sheet.

664. The NTEU suggests that general staff experienced pressures to answer emails or take calls outside hours. The evidence of such practice was limited and the evidence cited by the NTEU in their submission is primarily from Andrew Vann. When examined properly, this evidence does not support that contention. Mr Vann was responding to compound questions, to the effect you would agree that staff *"regularly or occasionally"* do XYZ and in any event his responses show he was referencing roles such as ICT roles or senior employees:

PN5432

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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<sup>295</sup> Exhibit NTEU AR, [41].

<sup>296</sup> Exhibit NTEU AQ, [34].

<sup>297</sup> Exhibit NTEU AB, [50].

<sup>298</sup> Exhibit NTEU F, [16].

PN5436

But leaving aside those sort of roles, it wouldn't be usual practice for the University to direct its professional staff or indeed its academic staff that they are required to use those mobile connections or facilities. It's just a practice that's developed.

PN5437

Yes, I think that's correct.

665. Further, Professors Hamel-Green (on behalf of the NTEU) and Andrew Vann (on behalf of AHEIA) gave evidence that it is not good practice to demand such work of general staff:

Professor Vann	PN5434 ...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.
Professor Hamel-Green (Exhibit AD)	34 ... 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.

### 13.4 No substantial change since award modernisation

666. It is acknowledged that the evidence relied upon by the NTEU in its Closing Submissions (at paragraphs J15 to J19) does indeed support the conclusion that both general and academic staff are making greater use of personal ICT equipment in the performance of their role when compared to the mid-1990s.

667. The fact that such an evolution occurred over the course of 20 years should not be regarded as probative, particularly since public use of the internet was only introduced to Australia less than 30 years ago (having been introduced in 1989), and the award modernisation process has occurred since that time.

668. Other than limited evidence from Michael Leach about an increasing tendency for general staff to email him about work matters "*particularly in the last year or two*"<sup>299</sup>, it is noted that there is no substantial evidence demonstrating that these changes were not already evident at the time the award modernisation process was being conducted.

### 13.5 Employees have telephone and internet connections regardless

669. Building upon the changes that have occurred in the last 20 years in relation to the commercialisation of public internet services and related technological advances, the expense that is being referred to in the clause (home internet connection), is an existing expense. The weight of the evidence (to the extent that the Bench needs any evidence of such a matter and

<sup>299</sup> NTEU AE, [29].

cannot take judicial notice) is that employees in the higher education sector already have telephone and internet connections for personal use and do so regardless of whether or not they are required to do so by their employer. See for example the evidence of Andrea Brown, Dr Camille Nurka and Mr Andrew Vann:

Andrea Brown	<p>PN3884</p> <p>You'd accept the proposition that whether you were working from home or not you'd now have the internet on at home?---Yes, absolutely.</p>
Dr Camille Nurka	<p>PN8913</p> <p>Do you accept that you would have had a computer anyway, and you indeed have a computer, anyway?---Yes.</p> <p>PN8914</p> <p>And internet?---Yes.</p>
Professor Vann	<p>PN5438</p> <p>...when I first arrived in Australia 20 years ago it was exceptional for anybody to have an Internet connection at all and obviously now so much of our lives is bound up in mobile technology on the internet, but it's more or less an expectation of a functioning adult that they are online.</p>

670. In cross-examination, Dr Nurka explained that she also uses her internet connection for her private business. When asked how her home internet expenses should be apportioned where employees use their internet connection for multiple employers, she conceded that it's a "*quandary*" for which she does not have the answer.<sup>300</sup>
671. There was one witness, Linda Kirkman, who appears to have put on the internet as a function of use for work. Such evidence was limited and exceptional.
672. There was also no evidence that the work use of existing home internet or mobile phone (in conjunction with the various personal uses) resulted in increased cost, relative to the existing ICT expenditure for employees. Without exception all witnesses were also using this ICT for their personal purposes. Any cost, if any, would depend on the employees' existing internet or phone plan or bundle etc. For example, many plans have unlimited data and calls or certain amounts of data and calls. Only if these were exceeded as a consequence of work activity does any expense arise for the employee in respect of their work activity. While some witnesses gave evidence of what their plan cost was, no probative evidence of additional cost is available to the Commission to support the imposition of the NTEU clause.

### 13.6 Tax deductibility

673. It is recognised in Australia that where employees work from home and use their own ICT facilities and equipment then this is a tax-deductible expense. Therefore, if the use of personal ICT equipment is acquiesced to by universities, this occurs against the background of

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<sup>300</sup> PN8915-8917.

employees being able to seek tax concessions for such expenses as part of their annual tax return in accordance with Commonwealth tax laws.

674. This was acknowledged by a number of NTEU witnesses who gave evidence in relation to this claim, including Professor Philip Andrews<sup>301</sup>, Dr Michael Dix<sup>302</sup>, Dr Caron Dann<sup>303</sup>, Professor Michael Hamel-Green<sup>304</sup>, Dr Linda Kirkman<sup>305</sup>, Mr Michael Leach<sup>306</sup>, Dr Camille Nurka<sup>307</sup> and Ms Andrew Brown<sup>308</sup>.

### **13.7 The "reverse onus" assumption**

675. A clause that provides for reimbursement of expenses that are required by the employer to be incurred, as a principle, is unexceptional. The issue here is whether it is necessary to include this particular provision in the award and for the reasons set out above it is not necessary. Moving beyond that issue the particularly problematic aspect of the proposed clause is the deeming or assumption provision which states as follows:

*"An employee is required to use any of the services specified for work purposes if that use is required by the nature of their work, including by custom and practice."*

676. Based upon the other submissions and evidence by the NTEU about academic staff performing various activities outside of the workplace, including preparation of lectures, answering of emails, posting material to University systems, and conducting research using the internet, it appears on the face of the clause that all such work would be said to be work that requires ICT services, including for example using their computer from home. Accordingly all such activities would fall within the scope of the clause as constituting "*custom and practice*" although the exact scope and intention is unclear.

677. The uncertainty in the clause is then further impacted by the exception:

*"Unless they are directed in writing not to perform any work requiring any of those services when away from the workplace."*

678. Given the self-determined nature of academic employment, the attempt to define the application of the clause by "*custom and practice*" is fraught and to equate that to an employer imposed work requirement should not be adopted.

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<sup>301</sup> PN3311.

<sup>302</sup> PN9345-9346.

<sup>303</sup> Exhibit NTEU AO, [14]-[16].

<sup>304</sup> Exhibit NTEU AD, [48].

<sup>305</sup> Exhibit NTEU AQ, [44].

<sup>306</sup> PN6400.

<sup>307</sup> PN8916.

<sup>308</sup> PN3796.

679. It is also counter to a basic premise of provision of allowances and/or reimbursement of expenses that they attach in circumstances where the employer has directed or required the particular qualifying activity to be undertaken and/or the particular expense to be incurred.

### **13.8 Modern Awards Objective**

680. For the reasons set out above the Commission cannot be satisfied that the NTEU has made a substantial merits case justifying a conclusion that the variation is necessary for the award to achieve the modern awards objective or that the variation is only to the extent necessary.

#### **s134(1)(b) - the need to encourage collective bargaining**

681. Given the nature and variability of the allowance sought, the NTEU's claim is a matter more appropriately pursued in bargaining (and otherwise a matter for basic expense/reimbursement policies). This is all the more so when based upon location, as the proposed clause would potentially result in a different allowance calculation .

682. As is the case with many of the other NTEU claims, the NTEU has previously pursued similar claims for payment of ICT expenses in bargaining, and has adopted various outcomes in enterprise agreements.

683. Take for example the Monash University enterprise agreement (Attachment AP-1 to Exhibit 12):

- (a) at clause 16.13 - "the University will provide Teaching Associate staff with the facilities and resources appropriate to enable the fulfilment of their duties"; and
- (b) at clause 16.15 - "the University will provide Teaching Associate staff (other than those staff employed on an occasional and ad hoc basis) with library cards, out-of-hours access, e-mail accounts, network and intranet access, and inclusion in the University's telephone book and web directory on an equivalent basis as for other academic staff (including during non-teaching periods over the calendar year).

684. Similar clauses are found in the following current enterprise agreements which were tendered as evidence in this proceeding:

- (a) the University of Melbourne (MFI 4) - see clause 32, and also clause 7 of Schedule 2;
- (b) Charles Sturt University (MFI 29) - see clause 21.17;
- (c) the University of Tasmania (MFI 34) - see clause 19.10; and
- (d) Deakin University (MFI 37) - see clause 16.2.

685. Michael Leach also gave evidence about a scheme at Swinburne University whereby staff can purchase ICT equipment at a special discounted rate.

686. Where such claims were pursued in other enterprise agreements but not agreed by the university, the uncontested evidence is that the claims were not vigorously pursued by the NTEU. See for example the evidence of Mr Ward:<sup>309</sup>

In relation to the ICT Allowance Claim, the NTEU sought in its logs of claims for the 2015 Academic EA (but not the 2015 Professional Staff EA) various things in relation to casual academic staff and the provision of facilities including ICT facilities, the use of email and an information technology allowance of \$40 per week or \$1,000 per year (whichever is the lesser). The UNSW did not agree to these claims and they were not vigorously pursued by the NTEU.

687. This is consistent with the notion that such matters are best decided at an enterprise level, particularly in circumstances where the needs of particular employees or workplaces, availability of support and equipment, other factors impact upon ICT usage and, and ICT costs may differ. Further, individual policies also differ between workplaces.

**s134(1)(d) - the need to promote flexible modern work practices and the efficient and productive performance of work**

688. As is evident from the above submissions, the existing framework already enables flexible and modern work practices. The NTEU's claim, properly construed, is actually a penalty on an employer who allow employees to work from home should they choose to do so, despite having facilities available on site.

689. It is also noted that, to the extent that the NTEU clause places a reverse onus on employers to ensure employees are not using their personal ICT devices for work, parallels can be drawn to the submissions noted above (in relation to the Academic Hours of Work claim), where such a direction would likely be viewed by employees as an unreasonable interference with academic freedom - e.g. by limiting where and when work they self-determine can be performed.

**s134(1)(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**

690. The method of calculating the NTEU's proposed allowance is variable depending on a number of factors outside of the control of employers, such as the location at which the employee resides, the telephone / internet services available at that location, and identification of what the lowest cost (bundled or unbundled) internet service would be. Presumably this means that employers who have staff who reside in multiple locations (e.g. Deakin has 4 campuses; in Melbourne, in Geelong and in rural Victoria) would presumably undertake market research in respect of each location, and identify various plans to identify the cheapest that has sufficient level of data and then do this on an ongoing basis.

691. Further, in the case of academic staff, there is a need to determine whether, by custom and practice, work is done from home. If an academic does their lecture preparation at home rather than sitting at the university, and has always as done so, do they get the allowance?

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<sup>309</sup> Exhibit 20, [16(e)].

692. Further, unlike the provision of a phone or laptop specifically for work purposes, payment of internet and telephone connection expenses are not calculable in circumstances where, as set out above:

- (a) the work usage is incidental to personal use; and
- (b) employees work for multiple employers across the higher industry sector or concurrently operate a business from home - as evidenced by a number of NTEU witnesses such as Michael Dix (who at one point undertook approximately 6 jobs at the same time)<sup>310</sup>, and Dr Camille Nurka (as set out above).

693. The difficulty of calculating such an allowance was recognised by Dr Camille Nurka under cross examination as follows:

PN8917

And where you have these concurrent employments with more than two employers, given the proceedings that we've got here, which of your employers do you say should be paying for your home internet?---Yes, I see your point. That's a quandary and I don't know how I would address that.

694. Therefore, contrary to the NTEU's submission that its claim is simple and easy to understand, the weight of evidence suggests that it is not practical and would potentially be difficult both to calculate and implement.

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<sup>310</sup> PN9317.

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#### **14. NTEU K - "Context" to "Content" (Academic Staff Award)**

695. The Group of 8 refers to and relies upon its Previous Submissions in relation to this claim, specifically, **Part 14 of Exhibit 5**, and also its oral submissions at PN473-PN474 and PN643 - PN648.

696. The NTEU says that the current wording of the clause is "ambiguous" (at paragraph K14 of its Closing Submissions). It is noted that the NTEU has not identified any ambiguity, based upon the prevailing tests applied by FWC in relation to ambiguity in awards or enterprise agreements.

697. The amendment can hardly be said to be a necessary change to meet the modern awards objective

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#### **15. NTEU L - Research Institutes (Both)**

698. The Group of 8 refers to and relies upon its Previous Submissions in relation to this claim, specifically, **Part 16 of Exhibit 5**.

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#### **16. NTEU M - Claim for Casual Conversion of Academic Staff (Academic Staff Award)**

699. The Group of 8 note that the NTEU are not presently pressing any application to provide for academic casual conversion and that any such application in the future is dependent on the outcome of the Casual Employment common claim<sup>311</sup>. This was confirmed by the NTEU in its opening submissions.<sup>312</sup>

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<sup>311</sup> 4 Yearly Review of Modern Awards – Casual Employment (AM2014/197).

<sup>312</sup> PN181, 582-593.

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## 17. Common Claims

700. The Full Bench has been referred two matters arising from AM2014/47 (Annual Leave)<sup>313</sup> and AM2014/300 (Award Flexibility)<sup>314</sup> regarding whether draft model terms determined in respect of applications concerning other awards, should be included in the Higher Education Awards. These matters have been the subject of previous submissions by all parties.
701. The Group of 8 notes that the no parties, including the NTEU, have filed further submissions in support of the variations. The Group of 8 relies upon its previous submissions in relation to these common claims, specifically, attachments 5 and 6 to Exhibit 5.
702. In relation to the model annual leave provision, it is noted that since making the submissions some further plain English redrafting has been published by the full Bench.<sup>315</sup> The submissions in Attachment 5 to Exhibit 5 otherwise continue to be relied upon.
703. In relation to TOIL this relates to the potential inclusion of the TOIL model provision in the Higher Education General Staff Award. For the reasons set out in the submission at Attachment 6 of Exhibit 5 we identified why the draft determination previously issued should not apply, including as, it was not consistent with the Full Bench decision<sup>316</sup> that determined the model TOIL clause, as it sought to apply the model TOIL clause not only to employees who were entitled to overtime payments under the Award, but is applied to more senior employees (HEW7 and above) for whom there is no entitlement to overtime pay.
704. Accordingly, in our submission at Attachment 6 of the Exhibit 5, inter alia, we included an amended draft that reflected the Full Bench decision and applies the model TOIL provision in respect of employees who are eligible to receive paid overtime, being employees under clause 26.1(a) of the General Staff Award.
705. This issue is not the subject of any application/proposal and has arisen solely out of the issue being dealt with in respect of the other awards and development of a TOIL model term. Consequently it has not been the focus of evidence in these proceedings. Nevertheless, there has been some evidence that reaffirms and reflects the employees at higher HEW classifications are not entitled to overtime pay. This reflects the historical award regulation and their seniority<sup>317</sup>, managerial responsibilities and autonomy and higher annual salaries<sup>318</sup>. This seniority is also reflected in the classification descriptors in Schedule B to the General Staff award for HEW 8, 9 and 10.

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<sup>313</sup> 4 Yearly Review of Modern Awards - Annual leave [2015] FWCFB 8030, [11].

<sup>314</sup> 4 Yearly Review of Modern Awards - Award flexibility [2015] FWCFB 8412, [7(ii)].

<sup>315</sup> [2016] FWCFB 3953.

<sup>316</sup> [2016] FWCFB 4258

<sup>317</sup> PN6286-6287 (Hamel-Green); PN6517-6519 (Giles); PN3745-3746 (Brown); PN4416-4417 (Strachan); PN9180 (Ward); PN4974-4975 (Hughes-Warrington).

<sup>318</sup> PN6288-6295 (Hamel-Green); PN6507-6510, 6572 (Giles); PN3737-37 (Brown); PN5345 (Vann).

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## **18. Conclusion**

706. The NTEU has not demonstrated that its proposed variations are necessary for the Higher Education Awards, in conjunction with the NES, to meet the meet the modern awards objective.
707. Nor has it shown that the variations vary the award only to the extent necessary.
708. The NTEU proposed variations should not be adopted.

**Clayton Utz**  
**Solicitors for the Group of Eight**  
**8 March 2017**

## Attachment 1 - Group of 8 analysis of academic performance expectations tendered by NTEU

Group of 8 Closing Submissions 8 March 2017

Exhibits analysed:

- Exhibit NTEU G, Attachment F (Witness statement of Ken McAlpine)
- Exhibit NTEU Q and attachments (Supplementary witness statement of Philip Andrews)
- Exhibit 9 and attachments (Witness statement of Stephen Garton)

University	Name of document	Description of Academic Performance Process	Description of Academic Performance Expectation	Are the expectations quantitative or qualitative?	Are the expectations a guideline or prescriptive minimum standards?
ACU	Research Performance Review and Plan Guidelines	Academic staff submit a 3 year research plan which is reviewed against relevant discipline based quantity/quality benchmarks by a ACU Panel and assigned a recommended research workload allocation. This is issued to the Deputy VC for approval. Once approved, it is reported on by the academic annually. Additionally, a performance review is conducted which includes an assessment of the academic's research outputs over the previous 5 years as against the University's benchmarks.	ACU has minimum benchmarks for grant income and weighted publications for each faculty as set out in its policy.	<b>Quantitative</b> - the document sets out benchmarks upon which an academic bases his/her own research plan.  <i>NOTE: other performance expectations (e.g. regarding service delivery and teaching) are not set out in the exhibited documents.</i>	<b>Guideline only</b> - the benchmarks are called "workload <i>recommendations</i> "
University of Adelaide (Go8)	Setting Objectives - Academic Staff	The document states the importance of setting and reviewing performance expectations but does not prescribe a process for doing so.	Other than stating a number of general "Key Result Areas" for academic staff, there are no prescribed performance expectations. E.g. for "Research", the result areas are "publications", "HDRs" and "Research income" - there is nothing to suggest what is expected under each category.	<b>Qualitative</b> - there are no measurable quantitative objectives, nor is there an articulated process to develop them.	<b>Guideline only</b> - the policy is necessarily a guideline only.
ANU (Go8)	Performance and Development Process - Academic Staff	Performance objectives are discussed between a supervisor and employee and a statement of expectations is developed, after which progress reviews are scheduled (on an interim basis and on completion of the term) as an opportunity	The Statement of Expectations should (but is not required to) include: <ul style="list-style-type: none"> <li>• a statement of an observable behaviour or outcome required of the staff member; and</li> </ul>	<b>Qualitative</b> - the expectations are negotiated individually between an academic and his/her supervisor and there is only general	<b>Guideline only</b> - the policy is necessarily a guideline only. The Statement of Expectations negotiated between supervisor and academic contemplates the possibility of not meeting

		to reflect on performance. The academic's performance is rated by agreement, however if agreement cannot be reached the staff member may seek a review of the performance objectives by the 1-up supervisor.	<ul style="list-style-type: none"> <li>a standard by which the expectation will be measured.</li> </ul>	guidance specified in policy documentation.	the achievements set out within it - e.g. allows for a "What was achieved" vs "what was expected" comparison.
<b>CQ University</b>	Academic Profiles Document	There is no description of the process for setting or reviewing research expectations other than to say that the relevant expectations are reviewed annually.	<p>Performance expectations appear to be set out in two parts - there are tables for 5 levels of academic employees which set out designated expectations. For research, there are specific publication and grant income metrics based on "Excellence in Research Australia" (ERA) data..</p> <p>The document also includes Appendix 1, which is a "research outcome metrics" tables setting out minimum publication and grant income requirements that "are to be achieved" within a 3 year period.</p> <p>For service- and teaching- related work, the requirements are less clear - e.g. the requirement is to demonstrate engagement with "a range" of service activities, or to "demonstrate competence" in teaching activities.</p>	<b>Mixed</b> - the expectations are a mix of quantitative and qualitative benchmarks	<b>Guideline only</b> - the document expressly states " <i>it is not expected that academics will engage in every activity or meet every benchmark.</i> "
<b>Charles Sturt University</b>	Review of Academic Promotions 2014	<i>This document is a report on a review relating to academic promotions</i>		<b>N/A</b>	<b>N/A</b>
<b>Curtin University</b>	Curtin Expectations for Academic Performance (CEAP)	This document does not provide a process for setting or reviewing performance expectations.	Includes a range of tables for different categories of academic staff, setting out high level qualitative performance indicators.	<b>Mixed</b> - the expectations are a mix of quantitative and qualitative benchmarks	<b>Guideline only</b> - the document expressly states that " <i>these measures guide the planning and assessing of academic work</i> " and that " <i>the expectations of volume will vary - according to role, sometimes by discipline, and relative to opportunity.</i> "
<b>ECU</b>	Academic Staff Performance Expectations and Outcomes Framework	Academic Staff will discuss performance outcomes and measures with their Line Supervisor during probation and/or performance planning and review meetings in accordance with the <i>Management for Performance Policy</i> .	Relevant performance areas are Learning and Teaching, Research and Creativity, and Academic Leadership. Sets out quantitative expectations for research outputs based on academic level, but is otherwise qualitative (e.g. requires obtainment of "competitive" research grants", but does not assign a dollar figure; requires "sound management" of	<b>Mixed</b> - the expectations are a mix of quantitative and qualitative benchmarks	<b>Guideline only</b> - the document expressly states that the measures " <i>should not be used as an absolute but an indication of performance that must be contextualised based on relative opportunity</i> ".

			sessional staff, etc)		
<b>Flinders University</b>	<p>(1) Academic Staff Performance Review - Guide to Form A</p> <p>(2) Academic Staff Performance Review - Guide to Form B</p>	Academic staff and the University jointly plan the work of staff to achieve desired goals. These plans are then reviewed on an annual basis.	The only university requirements referenced are in relation to mandatory reporting, OHS, student evaluation and orientation/induction. There are no research expectations set out in the document however reference is made to an Academic Profile which is developed between the staff member and the University, which sets out the staff member's activities and plans.	<b>Qualitative</b> - This document primarily focusses on the performance review process with only very scant guidance of what is expected of academics.	<b>Guideline only</b> - the document expressly states that " <i>...you are not expected to perform across all criteria under each area of academic activity nor at the same level for each of the criteria. However, you should provide evidence that a range of these criteria have been met. Please also note that there is no significance in the order of the dot points under each area of activity..</i> "
<b>JCU</b>	<ul style="list-style-type: none"> <li>Academic Position Classification Standards</li> <li>Performance and Development: Guide for Academic Staff</li> <li>JCU EA 2013-2016</li> <li>Academic Staff Performance Management Policy</li> <li>Employee Performance Management Program Report</li> </ul>	The second document sets out a process for jointly planning an academic's workload for the next 12 months and reviewing after 6 months and again at the 12 month period.	The first and third documents contains position descriptions which, for each classification, lists indicative duties in very general terms. The second document refers to the alignment of "priorities" with the direction of the University, and the fourth document refers to "KPIs" and "key competency areas", which appear to be individually negotiated between an academic and supervisor.	<b>Qualitative</b> - the expectations listed for each category of academic are qualitative only	<b>Guideline only</b> - there is no specificity in the document. It appears that performance is viewed as a whole, not in accordance with one or two individual criteria. Whilst the KPIs and key competency areas are considered, there is also scope to review third party materials such as feedback from students, clients, peers and indirect managers.
<b>La Trobe</b>	<ul style="list-style-type: none"> <li>Future Ready Academic Expectations</li> </ul>	Not stated	<p>There are three categories: Teaching, Research and Service. For research-related activities, academics are expected to meet national average performance expectations, as determined by national comparisons across relevant field of research codes.</p> <p>For teaching activities, there is a mix of quantitative expectations (meeting teaching hour allocations), and qualitative ("deliver high-quality education").</p> <p>For service-related activities, the expectation is that academics make "a significant contribution" across a range of areas. What constitutes a "significant contribution" is not stated.</p>	<b>Mixed</b> - the research expectations appear to be quantitative but cannot be discerned from this document. Service expectations are stated in very general terms.	<b>Guideline only</b> - the document expressly states that " <i>Future Ready academics are not expected to fulfil all of the performance expectations outlined in this document, all of the time ... The intention behind this document is provide[sic] guidelines as to what is considered strategically important academic productivity...</i> "

<b>Macquarie University</b>	<ul style="list-style-type: none"> <li>Writing a discipline report for academic promotion</li> </ul>	<i>This document is a guide to writing a report considered by Promotion Committees when considering a case for promotion. It does not comment on the University's minimum performance expectations other than by reference to MSALs</i>		<b>N/A</b>	<b>N/A</b>
<b>University of Melbourne (Go8)</b>	<ul style="list-style-type: none"> <li>Performance Development Framework - Part A (as at 2011)</li> <li>Minimum Performance Expectations for Academic Staff at the SCHOOL OF ENGINEERING - as at February 2014</li> </ul>	<p>The PD process runs on a 12 month cycle with a minimum of one feedback discussion and one review discussion. At the start of the cycle, the staff member and supervisor develop a Performance Development Plan which is aligned to the University's goals.</p>	<p>Objectives for academic staff are known as "Key Performance Areas" (e.g. Research, Leadership &amp; Service, Teaching and Learning, etc).</p> <p>Each KPA has measurable outputs (e.g. 5 publication minimum over 5 years, \$100k research income over 5 years, the performance of at least one task from a list of community engagement activities, etc).</p> <p>There are some limited exceptions: e.g. there is one component of "teaching and learning" KPAs requiring "contributions" to be made to curriculum development and to "engage" in activities to improve the overall standing of education within the faculty. There are not tied to specific activities.</p>	<b>Mixed</b> - the expectations are a mix of quantitative and qualitative benchmarks	<b>Mixed</b> - the document is based upon the primary principle of "performance against opportunity", and facilitative "positive acknowledgement of what has been achieved given the actual opportunities available."
<b>Monash University (Go8)</b>	<ul style="list-style-type: none"> <li>Academic Performance Standards</li> <li>Staff Development Procedure - Performance Development Process: Academic Staff</li> <li>Attachments PA1 - PA8 to Exhibit NTEU Q</li> </ul>	<p>The PD process runs on a 3 yearly cycle, aligned with a performance plan developed by academic staff and their supervisors (in line with University objectives).</p> <p>Each year, the University's expectations are communicated to supervisors after which annual performance review and planning meetings are held with academic staff. Performance over the last 12 months is reviewed and the three year plan is revised.</p>	<p>Objectives are split into the categories of: Research Performance, Education Performance and Service Performance. Each category is measured using criteria under "quantitative" and "qualitative" headings.</p> <p>For research performance standards, the quantitative criteria are set out in separate documents, an example of which was provided by Philip Andrews.</p>	<b>Mixed</b> - the expectations are a mix of quantitative and qualitative benchmarks	<b>Mixed</b> - some expectations are stated as minimum expectations. some performance expectations are expressly stated to be "aspirational standards aligned to external benchmarks".
<b>Murdoch University</b>	<ul style="list-style-type: none"> <li>Academic Performance Development and Review User Guide for Academic Staff and Academic Appraisers</li> </ul>	Operates on a 12 month cycle. Academics participate in a discussion with a designated "Academic Appraiser", the purpose of which is to review performance outcomes for the period under review, and plan for the future.	The document does not set out performance expectations. It does however list some example objectives that an academic may wish to suggest as part of their annual performance appraisal.	<b>Unknown</b> - the expectations are not stated however the examples used are a mix of both qualitative and quantitative activities	<b>Guideline only</b> - performance is gauged holistically having regard to past performance and "overall" achievements over the past 12 months. It is not aligned to any specific criteria.
<b>University of</b>	<ul style="list-style-type: none"> <li>Untitled document</li> </ul>	Operates on a 3 year cycle, though academics participate in annual PDR	The document sets out both quantitative ("core") and qualitative performance	<b>Mixed</b> - the expectations are a mix of quantitative	<b>Guideline only</b> - the document expressly states that

<b>Newcastle</b>		discussions with their supervisors	expectations for academic staff, split into the categories of research and innovation, teaching and learning, and service and engagement.	and qualitative benchmarks	it is not intended to be "exhaustive" and that expectations can be adjusted to suit individual circumstances.
<b>QUT</b>	<ul style="list-style-type: none"> <li>Activity Statement - Performance Planning and Review for Academic Staff</li> <li>Performance planning and review for academic staff</li> </ul>	Conducts an annual PD process involving a series of formal discussions between staff and their supervisor. Staff complete an Activity Statement for discussion at the meeting, setting out development goals in the next 2-5 years and the criteria for meeting those goals. The plan is subsequently agreed upon and forms the basis of subsequent PD reviews.	The Activity Statement has various categories of goals (e.g. teaching performance and leadership; research, scholarship and creative activity, etc), but does not otherwise set out what the expectations are.	<b>Unknown</b> - the expectations are not stated however the requirement is that they are "agreed".	<b>Guideline only</b> - goals listed in the Activity Statement are not prescribed, nor are they static (they can be reviewed and amended).
<b>RMIT</b>	<ul style="list-style-type: none"> <li>Academic promotion criteria instruction</li> <li>Academic Expectations and Development 2013</li> <li>Academic Expectations and Development 2012</li> <li>Transforming performance at RMIT University powerpoint</li> </ul>	Annual discussions are held with supervisors about career progress and development needs. A work plan is developed incorporating into it the academic performance expectations.	<p>There are quantitative targets for teaching and research - both "expected" and "aspirational" targets that are capable of being measured.</p> <p>With respect to research expectations, both the "quality and quantity" of the outputs are taken into account and balanced, suggesting that research activities will only count towards the target if they are of a certain standard. However, it is not clear how this is measured (e.g. by only counting publications in certain journals).</p> <p>With respect to teaching expectations, a quantitative output is generated from qualitative student evaluations (e.g. achievement of 65% positive responses).</p>	<b>Mixed</b> - the performance expectations are quantitative subject to the qualitative assessment of research and teaching quality.	<b>Minimum standards</b> - the document states that "achieving the required academic expectation will be seen as "acceptable" performance".
<b>Swinburne University</b>	<ul style="list-style-type: none"> <li>Performance, development and rewards - rationale for academic measures</li> </ul>	Reference is made to a PDR Performance Plan process during which performance objectives are discussed and planned.	<p>The document is a guideline for developing a performance plan. Categories of objectives include behavioural objectives, learning and teaching objectives, leadership and engagement objectives, and research activity objectives.</p> <p>Some objectives are mandatory (e.g. research activity targets) and others are individualised - e.g. 1 activity from a range of listed activities can be selected (essentially providing for individualised performance plans within set parameters).</p> <p>It appears that the objectives are assessed using a combination of quantitative (e.g. minimum number of publications) and</p>	<b>Mixed</b> - the performance expectations are highly variable and have the potential to involve a combination of both quantitative and qualitative objectives.	<b>Guideline only</b> - the document includes some behavioural expectations which are mandatory (e.g. integrity) however on the whole the expectations are a guideline only. The document expressly states that " <i>contextual and domain knowledge</i> " must be applied when assessing academic performance.

			qualitative (e.g. "active engagement in leadership") measurements.		
<b>University of Sydney</b> (Go8)	Performance Management and Development Procedures  Attachment SG-6 to Exhibit 9	Attachment SG-6 is an extract from the annual performance process which is set out in the enterprise agreement. It refers to an annual process for reviewing performance and the achievement of career goals.	The first document applies to general staff only however includes older performance criteria for academic staff (pre-2009).  Key Performance Areas for academic staff included: <ul style="list-style-type: none"> <li>• Teaching and learning</li> <li>• Research and Innovation</li> <li>• Leadership/management</li> <li>• Community, professional and industry engagement.</li> </ul> Each KPA is measured against a qualitative scale and then assigned a global rating negotiated between the staff member and reviewer.	<b>N/A</b> - though to the extent that the document may be of historical relevance the expectations are qualitative only.	<b>N/A</b> - though to the extent that the document may be of historical relevance it appears to be relatively prescriptive, subject to performance being assessed "holistically" rather than by looking at one discrete component.
<b>University of Canberra</b>	<ul style="list-style-type: none"> <li>• Performance expectations for academic staff policy</li> </ul>	Performance goals and the criteria for meeting those goals are set out in a "performance plan" developed during the annual PD process.	The policy contains a number of tables setting out a number of quantitative research goals for each level of academic. Separately there are a number of qualitative research objectives (e.g. "evidence of mentorship", "contribution to collaborative activities") which cannot be neatly quantified.  Other objectives (e.g. service and development; leadership) are purely qualitative.	<b>Mixed</b> - the expectations are a mix of quantitative and qualitative benchmarks	<b>Guideline only</b> - the document does not prescribe all activities and is necessarily a guideline only. In any event, it notes that quantitative expectations are supplemented by other factors to develop "an overall rating" - e.g. the impact of research and evidence of leadership.
<b>University of South Australia</b>	<ul style="list-style-type: none"> <li>• University of South Australia Academic Workload Guidelines</li> <li>• University of South Australia Business School - Academic Expectations and Workload Allocation Model 2014-2015</li> <li>• Division of Education Arts and Social Sciences Guidelines for Expectations of Academic Staff 2014</li> </ul>	There is a general reference to the quantity and quality of outcomes being assessed over a three year period but no specific reference to a review process.	The first document states that the quantity and quality of outcomes will be assessed and will inform future research allocations.  The second document (relating to the Business School) sets out a mix of high level qualitative (called "less tangible" contributions) and quantitative performance expectations of staff which are underpinned by guiding principles.  The third document (relating to the EASS division) also sets out very high level expectations but reads more like a position description rather than a description of performance metrics.	<b>Mixed</b> - the performance expectations are highly variable and have the potential to involve a combination of both quantitative and qualitative objectives.	<b>Guideline only</b> - the documents are expressed to be "a framework for constructive discussions between managers and academic staff members in setting and varying workloads."

UNSW (Go8)	<ul style="list-style-type: none"> <li>Academic Promotions - 2014 policies and procedures</li> </ul>	<i>Documents tendered relate to promotion criteria, not performance expectations</i>		N/A	N/A
UQ (Go8)	<ul style="list-style-type: none"> <li>Form B - Achievements and Objectives</li> <li>Form A - Academic Portfolio of Achievement for all academic staff</li> <li>Criteria for Academic Performance Policy</li> <li>Guidelines on Evidencing Academic Achievement</li> </ul>	<p>Performance appraisal is comprised of "regular discussions" between supervisors and staff, including by jointly completing an "Achievements and Objectives" form each year, setting out a research plan and proposed objectives for the next year. These are then evaluated against actual outputs.</p> <p>Further, an Academic Portfolio of Achievement is to be maintained by academic staff, setting out major activities in the last 12 months.</p>	<p>The guidelines set out a number of examples which may be used by academics to demonstrate academic achievement but do not otherwise set out measurable benchmarks upon which performance expectations should be based.</p>	Unknown - performance expectations are not set out in the documents	Guideline only - the document is necessarily a guideline only.
UTAS	<ul style="list-style-type: none"> <li>Community Engagement Performance Expectations for Academic Staff 2014</li> <li>Internal Service Performance Expectations for Academic Staff 2014</li> <li>Opening UTAS to Talent: the UTAS Academic 2014</li> <li>Research performance expectations for Academic Staff 2014</li> <li>Academic Levels for TPES: Overview</li> </ul>	The documents do not set out a performance appraisal framework	<p>There are 5 suggested categories of objectives that form part of the performance framework: research and scholarship, learning and teaching, contribution to discipline, contribution to community, contribution to University leadership.</p> <p>The research expectations are quantitative, providing for specific outputs and funding amounts in respect of each classification and discipline. The teaching expectations are a mix of quantitative and qualitative evaluations.</p> <p>The expectations set out in the other various documents are high level descriptors that read as position descriptions. There is no discernible quantitative component to the assessment.</p>	Mixed - the expectations are a mix of quantitative and qualitative benchmarks	<p><b>Minimum standards</b> - the standards identified appear to be minimum requirements however the document expressly states that performance "should be considered holistically" and that "a staff member may legitimately exceed expectations in two measures but have low or no outcomes in other measures."</p> <p>In other words, if expectations are not met in one area, then this can be compensated for by achievement in other areas.</p> <p>Other factors such as fraction and recent promotion are also taken into account.</p>
UWA (Go8)	<ul style="list-style-type: none"> <li>Appraising Collegiality: Working Draft of the Faculty of Education</li> <li>UWA Business School: Research, Education, service &amp; Collegiality Expectations June</li> </ul>	The appraisal process is set at a faculty level and broadly involves a collegiate discussion between the supervisor and academic on an annual basis.	Performance is assessed in categories of Teaching, Research and Research Training, and Service.	Mixed - the expectations are a mix of quantitative and qualitative benchmarks	Minimum standards - insofar as the faculty of science is concerned, the document aims to provide "clear and unambiguous guidance" on minimum performance standards.

	<p>2014</p> <ul style="list-style-type: none"><li>• FECM Research Performance Criteria - a discussion paper</li><li>• Teaching criteria framework</li><li>• Faculty of Engineering, Computing and Mathematics Policies</li></ul>				
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